

THE
CODE OF
CRIMINAL PROCEDURE

(ACT V OF 1898)

as amended up to date

EDITED BY V

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ACT, THE INDIAN SUCCESSION ACT, THE GUARDIANS AND WARDS
ACT, AND THE PROVINCIAL SMALL CAUSE COURTS ACT

FIFTH EDITION.

1926

EASTERN LAW HOUSE,
LAW BOOK-SELLERS AND PUBLISHERS,
15, College Square, Calcutta.

First Edition, August, 1920.

Second Edition, August, 1923

Third Edition, March, 1924

Fourth Edition, June, 1925

Fifth Edition, July, 1926

BY THE SAME AUTHOR.

TRANSFER OF PROPERTY ACT,

3rd Edn 1925 Rs 8

INDIAN LIMITATION ACT,

7th Edn 1924 Rs 7-8.

INDIAN SUCCESSION ACT,

(As amended in 1925) Rs 5

GUARDIANS AND WARDS ACT,

3rd Edn 1925 Rs 2-8

PROV SMALL CAUSE COURTS ACT,

2nd Edn 1924 Rs 2-8

PUBLISHED BY R. L. DE
OF
EASTERN LAW HOUSE
15, COLLEGE SQUARE,
CALCUTTA

PRINTED BY S K BANERJEE,
COTTON PRESS,
57, HARRISON ROAD,
CALCUTTA

PREFACE TO THE FIFTH EDITION.

Once more my heartiest
for the kind patronage they
which has seen the light of

In preparing this edition I have not merely contented myself with adding the new rulings but have made a searching scrutiny into the cases in the light of the amendments, and I can humbly assure the lawyers and Judges that if they carefully study this work they will not fall into the error, (which they frequently do, as is evident from numerous reported cases) of citing and following the old rulings which have been superseded by the Amendments of 1923 and later years

As time rolls on the effects of these amendments are being perceived and commented on by High Court Judges. But unfortunately those amendments have not been able to do away with the conflicts of rulings which still exist under almost every

of the law is judicial opinion so much divided. Some of those conflicts have been set at rest by the 1923 amendments, but still there is enough work left for the Legislature. To attempt to reconcile these conflicts is a hopeless task for the commentator, and I have merely pointed out the differences.

To make the book accessible to every lawyer, the price has been much reduced *but I have not on that account reduced the volume of the book*. On the other hand, 300 new rulings have been added. To reduce the bulk of the book and to make it handy, it has been printed on thinner paper and in slightly smaller types.

Lastly, the case law has been brought down to May 1926. Parallel references have been given, as far as possible, to the Criminal Law Journal and the All India Reporter.

7th July, 1926

B B MITRA

PREFACE TO THE FOURTH EDITION.

In bringing out the fourth edition of this book, the author begs to convey his heartfelt thanks to the legal profession for their kind appreciation of this humble work, which is passing through three successive editions within the space of bare two years.

In this edition the Notes have been numbered throughout and the references in the Index and Table of Cases are given to the numbers of Notes and not to the numbers of pages

1st June 1925

B B MITRA

PREFACE TO THE THIRD EDITION

The second edition of this work having been exhausted with in the short space of 5 months the present edition is issued after a careful revision of the whole book and addition of the recent rulings bringing the case law down to the end of 1923

20th February 1924

B B MITRA

PREFACE TO THE SECOND EDITION

Since the publication of the first edition of this work in 1920 the Criminal Procedure Code has undergone a salutary change by the passing of not less than seven amending Acts. The earliest of these is the Election Offences and Inquiries Act XXXIX of 1920 which however does nothing more than add two words to sec 196 of this Code and certain sections of the I P Code (171 E to 171 I) to Schedule II. The next is the Press Law of 1922 which adds a few sections. The amendments of 1923 do not require passing reference they are Act XX of 1923 which introduces the Indian Penal Code into Schedule II. The Criminal Law Amendment Act XXXV of 1923 which amends the definition of Pleader in section 4 and the Cr P C Second Amendment Act XXXVII of 1923 which amends secs 364 388 and 562.

But the most far reaching amendments have been wrought by the Criminal Law Amendment Act XII of 1923 (popularly known as the Racial Distinctions Act) and the Criminal Procedure Code Amendment Act XVIII of 1923. The first Act is the result of a compromise between the members of a Committee appointed in 1921 to amend certain provisions of this Code which differentiated between European and Indian British subjects in criminal trials and proceedings. The disabilities of second and third class Magistrates to try Europeans and British subjects to claim a jury

before a District Magistrate their exemption from security proceedings the lower scale of punishment, the more extensive rights of appeal—all these privileges have now been taken away though certain inequalities are still retained under the present Code. The amendments have been duly noticed in this book not only by reference to the Statement of Objects and Reasons of the Bill, but also to the Report of the Racial Distinctions Committee.

The Amendment Act XVIII of 1923 has got a long history behind it. The kernel of the Act was a Bill prepared in 1914, in which three-fourths of the present amendments were contained. This Bill was referred to a small Committee (known as the Lowndes Committee) in 1916, which submitted its Report at the end of the same year, but owing to the interposition of the war, further consideration on the Bill was postponed. Meanwhile, sugges-

and was referred to a Joint Committee which submitted its Report in 1922. This Bill, with various alterations, ultimately passed into law.

From this it is evident that neither the Bill of 1921 nor the Report of the Joint Committee of 1922 gives the whole history of the amendments, in order to understand the Objects and Reasons, one has also to consult the earlier Bill of 1914 and the Report of 1916. The editor has therefore spared no pains to trace each amendment to the original Bill and Report, in order to elucidate the lawyer as to the reasons of the particular amendment.

speeches have been cited where necessary. All the rulings modified or overruled by the amendments have been duly noticed. The amendments have been shown in *italics*, and where a section or subsection has been materially amended, it has been printed in *parallel columns*, the left hand column representing the old Act, and the right hand column giving the new.

The citations have been brought down to the present year, and, as in the previous edition, the notes have been supplemented by extracts from Police Codes and Manuals, and by Rules, Notifications, and Circulars.

20th August, 1923

B. B. MITRA.

ABBREVIATIONS

A I R	All India Reporter
All	Indian Law Reports Allahabad Series
A L J	Allahabad Law Journal
A W N	Allahabad Weekly Notes
B L R	Bengal Law Reports
Bom	Indian Law Reports Bombay Series
B H C R *	Bombay High Court Reports
Bom L R	Bombay Law Reporter
Bur I J	Burma Law Journal
Bur I R	Burma Law Reports
Bur L T	Burma Law Times
Bur S R	Burma Sessions Reports
Cal	Indian Law Reports Calcutta Series
C L J	Calcutta Law Journal
C I R	Calcutta Law Reports
C W N	Calcutta Weekly Notes
C P L R *	Central Provinces Law Reports
Cr L J	Criminal Law Journal of India
Ind Cas	Indian Cases
Ind Jur	Indian Jurist
L B R	Lower Burma Rulings
L W	Law Weekly (Madras)
Lah	Indian Law Reports Lahore Series
Lah L J	Lahore Law Journal
Mad	Indian Law Reports Madras Series
Mad Jur	Madras Jurist
M H C R	Madras High Court Reports
M I J	Madras Law Journal
M L T	Madras Law Times
M W N	Madras Weekly Notes
N I J	Nagpur Law Journal
N L R	Nagpur Law Reports
N W P H C R	North West Provinces High Court Reports
O C	Oudh Cases
O L J	Oudh Law Journal
O S C	Oudh Sessions Cases
O W N	Oudh Weekly Notes
Pat	Indian Law Reports Patna Series
P I J	Patna Law Journal
P L T	Patna Law Times
P J W	Patna Law Weekly
P I R	Punjab Law Reporter
† P R *	Punjab Record
† P W R *	Punjab Weekly Reporter
Ratanlal	Ratanlal's Unreported Criminal Cases (Bombay)
S I R	Sind Law Reporter
T B R	Upper Burma Rulings
Weir	Weir's Criminal Rulings (Madras)
W R *	Weekly Reporter (Calcutta)

* The Civil and Criminal portions of these Reports have different page numbers. The pages of these Reports referred to in this book should be read as pages of their Criminal portions.

† In the Punjab Record and Punjab Weekly Reporter the cases are known by their numbers and not by the pages on which they are printed.

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	1191	514	872 883 890
131	1365	16 Bom 159	545
172	586 1370	165	915
173	586	200	140
244	4	269	1274 1283
288	647 1402	274	1383
333	1383	307	1299
10 Bom 124	730 747	368	859
131	854 1183	37	225 293
174	251 271 275 791	414	73 735 90
176	1055 1167	580	3 695 829
181	8 1092	661	3 95 741
185	1 68		904 984
186	4 559 561 577	7 9	1 42
190	950 955 983	17 Bom 131	
196	1010	260	

		NOTE NO			NOTE NO
1 Bom	46	836	10 Bom	197	1342
	475	976		199	794 809
	610	983		258	4
	630	1347		274	36 1369 1383
	639	1060		319	705 956 1406
2 Bom	61	1147		340	652
	481	632 644		497	938
	575	935		512	1085
	534	597 1097	11 Bom	377	701 707
	564	1163 1203		375	344
	643	517		438	637
	653	803		584	464
3 Bom	12	506		657	501
	150	1116		659	22 499 627
4 Bom	15	1040	12 Bom	36	625
	101	1053 1162		63	1267
	740	1010		161	586 668
	287	1758		377	1174 1203
	357	643		561	18
	479	62	13 Bom	109	14 614
5 Bom	85	111		168	109 158
	26	90		376	1181
	338	558 1319		447	579
	405	1088		502	62 702 1001
6 Bom	14	968 1127		590	3 676 678
	285	1319		600	13 586 675 807
	288	519			826
	40	38	14 Bom	25	466 474
	49	1271		115	1210
	62	578		165	379
	670	334		227	4 580
7 Bom	42	316 317		331	1168 1210
	180	1186		381	21
	303	76		436	908
8 Bom	197	1099 1708		555	1299
	200	731 735 736 1166		572	791 1429
	216	499	15 Bom	66	882 982
	307	1090 1400		152	418
	312	549		349	1116 1704
	338	1365		369	915
	575	1353		452	930 938 939
9 Bom	40	24 42 1288		488	1126 1315
	100	50 1016 1171		491	725 743
		1191		514	872 883 890
	131	1365	16 Bom	159	545
	172	586 1376		165	915
	173	586		200	1402
	244	4		269	1274 1283
	288	647 1402		274	1383
	333	1383		307	1299
10 Bom	124	730 747		368	859
	131	854 1183		377	225 293
	174	251 271 275 291		414	737 735 902
	176	1055 1167		580	3 695 829
	181	8 1092		661	3 795 741
	185	1268			904 984
	186	4 559 561 577	17 Bom	779	124
	190	950 955 983		131	858
	196	1010		260	761

NOTE NO.

NOTE NO.

17 Bom. 369	734, 769	24 Bom. 527	438, 447
" 485	510	25 Bom. 48	241, 806
" 731	21	" 90	639
" 748	1342, 1363, 1365	" 151	652, 997
18 Bom. 97	869	" 168	517
" 364	401, 909	" 179	389, 410, 447
" 380	1271	" 422	1304
" 442	1431	" 543	518
" 468	15, 1292	" 636	553
" 581	719, 1237	" 675	961, 962
" 636	148, 149	" 680	1123
" 751	1148	" 694	883, 890
19 Bom. 51	585, 1140	" 702	1345
" 105	559	26 Bom. 50	1012
" 195	882	" 150	16, 485, 582, 805
" 612	7, 11	" 353	428
" 668	1368	" 418	843
" 714	1163	" 533	20, 1307
" 728	515	" 552	665, 687, 1365
" 732	1054, 1162	" 785	14, 1251
" 735	918, 928, 931	27 Bom. 84	701, 707, 1208
" 749	1124, 1319	" 130	615
20 Bom. 145	1111	" 135	756, 757
" 215	928, 930, 935, 938	" 626	1124
" 501	1429	" 644	913, 1124
" 540	1051	28 Bom. 129	150, 979
" 543	592	" 412	928, 930, 931, 934
21 Bom. 495	9, 484A, 509, 516, 1038	" 479	1203
" 536	13	" 533	1203
22 Bom. 112	635, 637, 1402	29 Bom. 226	25
" 235	509	" 449	778, 790
" 549	604, 1314, 1379	" 575	38
" 596	501	30 Bom. 49	727, 728, 756, 778
" 711	803, 1090	" 126	25
" 714	329	" 421	907, 908
" 717	1416	" 611	961, 962, 965
" 759	1112	31 Bom. 218	654, 734, 735
" 760	1148	" 438	32, 141
" 844	1342, 1345	" 611	35, 53, 1408
" 934	805	32 Bom. 10	35
" 936	22, 622	" 111	501, 503, 1167
" 949	13, 187, 193, 1053	" 162	1216
" 956	392	" 184	14, 1236
" 988	325, 357	33 Bom. 22	24, 25, 859
23 Bom. 32	237, 253, 529	" 33	227
" 50	986, 991	" 77	730, 751
" 213	1053, 1162	" 221	1100
" 221	904, 983	" 423	872, 874
" 316	516	34 Bom. 326	1083
" 439	515, 881, 913, 915	35 Bom. 137	1440
" 484	1148	" 163	702, 703
" 490	1290	" 225	576
" 493	1433	" 253	1220, 1350
" 494	718, 958, 962	" 271	308
" 606	1357, 1359	" 401	293, 1180
" 706	933	" 418	1113
24 Bom. 287	78A, 761	37 Bom. 146	958
	559, 581	" 152	4
		" 178	306

		NOTE NO				NOTE NO	
37 Bom	365		6	49 Bom	710	1 10	1 47
	369	89	8 6 851		860		62
	3 6		810 817		878	760 \ 98	131
38 Bom	114		14		89	754	12 1
	642		1238		906		1068
	719	1008	1010		916		78
39 Bom	58		501	50 Bom	34		975
40 Bom	97		757 1094		10		981
	186	1344	1350	Bombay Law Reporter			
	20		913 915	1 Bom L R	347		57
	598		9 0		357		517
41 Bom	4		11 1		5 0		80
	560		1 19		783		344
	667		580	2 Bom L R	57		73
4 Bom	17		647		536		95
	190		623		818	344 357A	2A
	20		1054		918		59
	54		990	3 Bom L R	69		2
	400		1334		584		371
	664		135	4 Bom L R	582		357
43 Bom	147		646 756		687		79
	300	1 46	1251		876		306
	554	1	111A	5 Bom L R	26	9	306
	607		1173		28		1393
	864		1173		873		4
	885	1290	1294		980	188 189	131
44 Bom	4		584	6 Bom L R	34		218
	385	30	304		663		231
	400		1020		862		231
	463		806		1098		306
	877		631	7 Bom L R	463		118
45 Bom	346		1000		5 7		58
	619		769		723		71
	672	372 975	977		833	54	58
	834		617	8 Bom L R	589		1
46 Bom	58		1103	9 Bom L R	5		09
	61		951		244		58
	97		898		1057		875
	120	951 961	1331		1385		86
	441		973	11 Bom L R	18	709	714
	592		1261		740		85
	641		557		743	218	43
	893		1420	12 Bom L R	6		1094
	973	1 61	1262		521		711
47 Bom	31		939	14 Bom L R	135		95
	89		344 347		141		15
	102		631		163	163	168
	270		631		236		10 3
	438		24		889	163 58	284
	907	578	581	15 Bom L R	5		357
48 Bom	358		1216		175	1 8	179
	360		676 680		998	695	710
	401		1257	16 Bom L R	138		80 30
	510		1219		684		3
	512	421 432	449	17 Bom L R	382		
49 Bom	440		818		389		
	450		1218		678		
	562		1274				
	608		6 8				

NOTE NO.

NOTE NO

19 Bom. L. R. 211 ..	243
20 Bom. L. R. 121 ..	283, 1308
" 1018 ..	614, 661
21 Bom. L. R. 1065 ..	511
22 Bom. L. R. 157 ..	381
" 368 ..	1261
" 833 ..	1020
23 Bom. L. R. 842 ..	587
" 844 ..	340
" 846 ..	1054
24 Bom. L. R. 885 ..	78A
" 928 ..	1261
" 1153 ..	616, 621
25 Bom. L. R. 228 ..	174
" 282 ..	1254
26 Bom. L. R. 186 ..	1278
" 440 ..	1093
" 719 ..	1433A
" 965 ..	502
" 1232 ..	1032
" 1235 ..	611
" 1236 ..	869
" 1240 ..	960
27 Bom. L. R. 105 ..	977
" 113 ..	898, 899
" 352 ..	681
" 1019 ..	1438
" 1039 ..	628
" 1058 ..	466, 473
" 1351 ..	84
" 1353 ..	419
28 Bom. L. R. 89 ..	811
" 288 ..	853

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1 Bur. L. J. 32 ..	1143
" 82 ..	1289
" 122 ..	1044
" 123 ..	1277
" 183 ..	592
" 250 ..	716
" 257 ..	277
" 258 ..	620
2 Bur. L. J. 61 ..	1287
" 191 ..	1047
" 285 ..	1180
" 287 ..	1303
" 289 ..	611
" 295 ..	387, 398
3 Bur. L. J. 18 ..	1137, 1139
" 26 ..	814
" 32 ..	1080
" 121 ..	593
" 141 ..	623
" 182 ..	154
" 256 ..	397
" 323 ..	1219
Bur. L. J. 2 ..	209, 210

4 Bur. L. J. 11 ..	957, 1274
" 65 ..	1429
" 172 ..	280, 302
" 211 ..	589
" 213 ..	586, 757, 1029
" 258 ..	1273
" 269 ..	1298, 1299

I. L. R. Calcutta Series.

1 Cal. 207 ..	510
" 219 ..	1386
" 281 ..	1121
" 282 ..	1097
" 450 ..	1241
2 Cal. 23 ..	48, 1428
" 110 ..	225, 251, 293,
	294, 1203
" 117 ..	856
" 273 ..	1119
" 290 ..	1369
" 356 ..	1232
" 384 ..	225, 293, 306
" 405 ..	1097, 1429
3 Cal. 189 ..	773
" 320 ..	404
" 366 ..	858
" 379 ..	1345, 1352
" 389 ..	823
" 495 ..	850, 1004
" 540 ..	751
" 573 ..	720, 1205
" 623 ..	936
" 742 ..	22, 546
" 754 ..	19
" 757 ..	1338
" 758 ..	612
" 765 ..	874, 1123
4 Cal. 16 ..	1097
" 18 ..	89, 857, 1001, 1400
" 20 ..	1023, 1222
" 339 ..	426
" 378 ..	404
" 417 ..	419
" 483 ..	882
" 603 ..	101
" 623 ..	100
" 650 ..	394, 407
" 865 ..	299, 1335
" 869 ..	620
5 Cal. 7 ..	381, 382
" 132 ..	364
" 194 ..	464, 474
" 536 ..	15, 1180
" 558 ..	1275
" 614 ..	894, 1413
" 768 ..	915, 945
" 826 ..	516, 831, 832, 878,
	1026

NOTE No				NOTE No			
Cal	8 1		9 6 328	Cal	371		755
	8 5	3 5 339	349 351		377		884
	254		510		455	501	13 5
	958		519 1041		513		1099
Cal	14		1 75		637		331
	30		1363		847		1197
	83		1398		861		174
	96	90 00	4 883		875		941
			974		878		110
	91		334	10 Cal	18		158
	307		558 561		67	826	851
	308	124	125	10 Cal	8		390
	411		1380		85		66 70
	496		1 47		109		8 31 1261
	579		869		140	904 907 930	974
	581		809		194		1429 1431
Cal	58		719		207		1177
	584		717		56		497
	640		623		68	1097	1223
	714	720	845		405		499
	718		761		551		996
6 Cal	6		1029		643		553
	835	393	438		775	506 507	517
7 Cal	8		838		931		843
	4	887	917		937		1030
	46	398	410		970	904 9 2	908
	8		1347		1024		13 9
	36	831 83	880		1026		1122
	208		1247		10 9		1431
	63		1124		1030		1210
	322		1429		1047		893
	385		394		1070	791 8 3	1151
	447		1117		1079		1331
	662		1033		1097		357
8 Cal	63		1386	11 Cal	8		54 80
	121	697 791 8 3	893		13		473
	154		538		5	493 1311	1339
	167		1423		77		1000
	211	505	1325		79		350 354
	393	604	1393		84		918 938
	450	733	745		85	86 797	820
	481		759		91		723
	580	380	381		106		1001
	616	516	1037		36	857	761
	618 (Note		1037		349		418
	634		745		365	404	880
	644	306	1200		410		406
	724		280		413		1065
	736	1272 1 75			527		237
	739	538 886 914	930		530		1000
	851		1390		566	6	1000
	875		1198		619		237
	883		332		737		71
	895		1204		762	409 436	37
	896		13 1	1 Cal	133		1016
	985	4	1401		473	50	61
9 Cal	53	930	938		495		418
	96		1103		5 1		
	103	372	382		535	1 79 1	

NOTE NO.

NOTE NO.

19 Bom. L. R. 211 ..	243
20 Bom. L. R. 121 ..	283, 1308
" 1018 ..	614, 661
21 Bom. L. R. 1065 ..	511
22 Bom. L. R. 157 ..	381
" 368 ..	1261
" 833 ..	1020
23 Bom. L. R. 842 ..	587
" 844 ..	340
" 846 ..	1054
24 Bom. L. R. 885 ..	78A
" 928 ..	1261
" 1153 ..	616, 621
25 Bom. L. R. 228 ..	174
" 282 ..	1254
26 Bom. L. R. 186 ..	1278
" 440 ..	1093
" 719 ..	1433A
" 965 ..	502
" 1232 ..	1032
" 1235 ..	611
" 1236 ..	869
" 1240 ..	960
27 Bom. L. R. 105 ..	977
" 113 ..	898, 899
" 352 ..	681
" 1019 ..	1438
" 1039 ..	628
" 1058 ..	466, 473
" 1351 ..	84
" 1353 ..	419
28 Bom. L. R. 89 ..	811
" 288 ..	853

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1 Bur. L. J. 32 ..	1143
" 82 ..	1289
" 122 ..	1044
" 113 ..	1277
" 183 ..	592
" 250 ..	716
" 257 ..	277
" 258 ..	620
2 Bur. L. J. 01 ..	1287
" 191 ..	1047
" 285 ..	1180
" 287 ..	1303
" 289 ..	611
" 295 ..	387, 398
3 Bur. L. J. 18 ..	1137, 1139
" 26 ..	814
" 32 ..	1080
" 121 ..	593
" 141 ..	623
" 182 ..	154
" 256 ..	397
" 323 ..	1219
4 Bur. L. J. 2 ..	209, 210

4 Bur. L. J. 11 ..	957, 1274
" 65 ..	1429
" 172 ..	280, 302
" 211 ..	589
" 213 ..	586, 757, 1029
" 258 ..	1273
" 269 ..	1298, 1299

I L R. Calcutta Series.

1 Cal. 207 ..	510
" 219 ..	1386
" 281 ..	1121
" 282 ..	1097
" 450 ..	1241
2 Cal. 23 ..	48, 1428
" 110 ..	225, 251, 293,
	294, 1203
" 117 ..	856
" 273 ..	1119
" 290 ..	1369
" 356 ..	1232
" 384 ..	225, 203, 306
" 405 ..	1097, 1429
3 Cal. 189 ..	773
" 320 ..	404
" 366 ..	858
" 379 ..	1345, 1352
" 389 ..	823
" 493 ..	850, 1004
" 540 ..	751
" 573 ..	720, 1205
" 623 ..	936
" 742 ..	22, 546
" 754 ..	19
" 757 ..	1338
" 758 ..	612
" 765 ..	874, 1123
4 Cal. 16 ..	1097
" 18 ..	89, 857, 1001, 1400
" 20 ..	1023, 1222
" 339 ..	426
" 378 ..	404
" 417 ..	419
" 483 ..	882
" 603 ..	101
" 623 ..	100
" 650 ..	394, 407
" 865 ..	299, 1335
" 869 ..	620
5 Cal. 7 ..	381, 382
" 132 ..	364
" 194 ..	164, 474
" 536 ..	15, 1180
" 558 ..	1275
" 614 ..	894, 1413
" 768 ..	915, 945
" 826 ..	516, 831, 832, 878,
	1026

NOTE NO			NOTE NO		
5 Cal	871	926, 928	9 Cal	371	755
"	875	323, 339, 349, 351	"	397	884
"	954	510	"	455	501, 1325
"	958	510, 1041	"	513	1090
6 Cal	14	225, 271, 275	"	637	331
"	30	1361	"	847	1197
"	83	1398	"	861	174
"	96	290, 700, 774, 883, 974	"	875	941
"	291	334	"	878	1102
"	307	558, 561	10 Cal.	18	158
"	308	1242, 1252	"	67	826, 851
"	411	1380	10 Cal.	78	390
"	406	1247	"	83	66, 702
"	570	860	"	109	8, 31, 1261
"	581	809	"	140	904, 907, 930, 974
6 Cal.	582	719	"	194	1420, 1431
"	584	717	"	207	1177
"	640	623	"	256	497
"	714	720, 845	"	268	1097, 1223
"	718	761	"	405	499
6 Cal	762	1029	"	551	996
"	835	393, 438	"	643	553
7 Cal	28	838	"	775	506, 507, 517
"	42	887, 917	"	931	843
"	46	398, 410	"	937	1030
"	87	1247	"	970	904, 922
"	06	831, 832, 880	"	1024	908
"	208	1247	"	1026	1329
"	203	1124	"	1029	1122
"	322	1429	"	1030	1431
"	385	394	"	1047	1210
"	447	1117	"	1070	791, 823, 893
"	662	1033	"	1079	1151
8 Cal.	63	1386	"	1097	1331
"	121	607, 791, 823, 893	11 Cal	8	357
"	154	538	"	13	254, 280
"	166	1423	"	52	473
"	211	505, 1325	"	77	493, 1311, 1339
"	393	604, 1393	"	79	1000
"	450	733, 745	"	84	350, 354
"	481	759	"	85	918, 938
"	580	380, 381	"	91	786, 797, 820
"	616	516, 1037	"	106	723
"	618 (Note)	1037	"	236	857, 1001
"	634	745	"	349	761
"	644	306, 1200	"	365	404, 418
"	724	280	"	410	880
"	736	1272, 1275	"	413	406
"	739	538, 886, 914, 930	"	527	1065
"	851	1390	"	530	237
"	875	1198	"	566	622, 1037
"	883	332	"	619	100
"	895	1204	"	737	237
"	896	1321	"	762	409, 436, 712
"	985	4, 1401	12 Cal.	133	237
9 Cal	53	930, 938	"	473	50, 1016
"	96	1103	"	495	761
"	103	372, 382	"	521	418
			"	535	1279, 1295

NOTE NO			NOTE NO		
1 Cal	536	3 6 116	17 Cal	86	516 1038
	53	406 418		87	6
	558	1019		930	908
13 Cal	110	1021	18 Cal	75	119
	1 5	398 433		1 9	13 6
	1)	406		186	1171 1198
		1057		47	1371 13
	5	354		549	516 1038 1042
	304	805	19 Cal	5	189 190 1173
	305	1010		113	1319 1324
	334	556 659		1 7	369 3 0 382
14 Cal	4	1022 1 07		345	1 45
	60	346		380	1165
	128	746	20 Cal	316	100
	141	663 668 671 675		349	1 45
	164	914 1151		351	859 1024
	169	410 430 449		353	1047 1051
	174	1057		469	836 844
	45	8 3 893 894 908		474	1 45
	2 6	1290		4 8	1069 1072
	358	7 4		481	13
14 Cal	361	41 449 453 1 10		483	654
	395	48 779		513	590 391
	539	516 519 1037		5 0	390 592 398 407
	556	7		537	779
	653	1409		633	705 1179
	707	591 6 0		642	497 540
	834	1342 1345		676	24 75
	887	1168		687	1115 1421
15 Cal	31	4		719	
	109	189 190 191 193		7 4	22
		199		729	13 5 445 1180
	69	939		857	1373 14 8
	455	1308 1371		867	444
	100	334	1 Cal	870	1011 101 1019
	511	746		9	394 399 409 430
	5 7	404 406		97	1051 113
	5 4	357 358		103	884
	595	509 516		1 1	802 993 995
	608	19 827 854		401	1043
	775	1320		404	846 905
16 Cal	7	331 337		588	435
	80	3 9 382		609	689
	1 1	1 12 0		622	478 1
	38	1324		64	24 1009
	81	404		72	698 836 896 1038
	41	78A		78	4 0
	48	1425		8 7	4
	513	406 413		915	1408
	610	497		916 (Note)	399
	667	4 565 568		920	399
	15	857		955	1391 1429
	30	1208 1 41		99	62 930
	46	12 1		50	805 816
	81	15 99 1276	Cal	131	609 96
	99	1111		131	1 15
1 Cal	485	1121		161	805 1066
	5 2	358		1 6	1116 1204
	61	1167			1406

NOTE NO				NOTE NO			
Cal	41		1051	1 Cal	344		237
	6		3 730		391		380 390
	11		1280		395	3 3 330	331 344
	1	41 4	441 455		423	61 694	695 8 9
3 7		1 6 3 9	1151		449		134
384		4 8	478A		49		964
387			4 8		551		1320
391		3	1408		638		1 88
487			63		691		1 525
573			1176		757		478A
586		816	817	5 Cal	20		4 160
761		1365	1367A		230	11 4	1151
805		941	944		233		1215
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	194	1012	1019		711		914 915
	48		805		727		1371 1372
	49	307	1198		736	914 915	919 920
	50		1171		798	232 234	255 292
	25	903	913		852		372 382
	300		7		858	42	565 566
	328	670 1406	1428		863	19	1015
	347		1138	26 Cal	49		700 974
	350		1144		181		817
	361		896		188	395	406 447
	420		1051		336		652
	442		1406		560		726 754
	493	41 286	308		576		221A
			966		625	387 392	438 439
	495		1371		740		682
	499	343	357		748		157 158
	502		1045		786	586 620	1215
	532		1241		852	644 648	649
	557	394 462	466 469		863		767
	604		1085		869	339 349	357 359
	621	272	307		874		4
	731		433	27 Cal	126	68 707	1175A
	896	149 157	158		131	25	859
	975	1031 1145	1219		137		964
	983		681 1406		144		12
1 Cal	53		809		174	30	1356
	55		401		259		406 447
	155		308		295	496 508	519
	167	670	1411			538 872	898
	193		716		320	1 9	1208
	286		681		366	113	135
	288		1413		368		972
	316		1148		370	836 837	844
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	320	153 421	495		450	863	1

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	455	514		393	2 1A
	457	155		409	857 1001 1400
	461	1057		410	687
	501	1161		41	1090 1400
	565	75		415	654 734
	654	4		417	169
	656	41 308 291		455	301 31
	658	1178 1180		457	675 1184
	660	1146		481	788 829
	66	13 5 41 795		483	46 510 5 0
	781	51 461 73 390		4	1150 136
	785	377 378 453		6	854 1043
	798	662 664		9	59 89
	820	585 6 2		782	956
	839	735 748		885	396
	89	391 399 406		887	628
		447 448	30 Cal	36	622
	918	410		93	21A
	921	660 663 669 680		101	2 2 227
	979	603 1394		107	1333
	981	397		110	406 455
	983	21A 857 1001		112	387 390 408
	985	691			424 444
	993	758		121	79
	1041	564		1 3	810 817
8 Cal	7	748		155	387 399 400 401
	10	745 780			407 4 2 424
	63	742		85	13
	10	854 1176		288	742
	104	781		366	26
	11	681 87 1166		394	2 1 21A
	17	622		40	631
	251	816		415	725
	297	13 1 137 1377		443	13
	302	4 8		449	39 407
	339	956		485	603 1394
	348	501		508	926
	397	1188		593	409 413 436 448
	399	149		690	399 406
	416	310 398 447		905	13 134
	446	400		910	646 739
	540	172		916	654
	594	846		918	631
	652	68 854 1043		973	477
	689	146 974 979		9 7	490 660 675 676
	709	19 41 1370		1	644
9 Cal	704	499	31 Cal	48	545 716
	1 8	939		142	390
	187	428		350	900
	08	38 393 434		419	9 23 37
		438 439		557	258
	11	1371 1387		664	9 26 245
	286	939 1064		685	14 1251
	379	914		691	413
	38	456		10	1356
	385	779		715	1143
	387	745 816 1413		83	1387
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	21	589		360		614
	36	836 838		367		913
	50	613 1241		376	1051	1138
	285	423		444	671	1252
	87	5 1171		477		1254
	331	458		631		85
	340	1410 1432		693		926
	412	585 1315		702		48
	446	302		846		745
	467	510 513 638 639		854	541 662	678
		757 778		873		517
	578	406 466		982		405
	604	745	41 Cal	17	113	135
	618	617		66	745	747
	642	1 1239		88		1282
	680	1087		173		1261
	81	1012		265	190 195 197	521
	845	961 962		299	894	988
38 Cal	24	436		305		570
	68	199 606 1215		350	111 11 215	943
	156	252		406		1136
	202	1161		425		1117
	214	1109		466		1207
	302	811		537		767
	304	190 201 521		621		934
	307	1140		662	766 770 115	939
	387	406 466 469		694		744
	453	776 778		719	41	1370
	488	27 968		722	726	754
	551	1086 1092		743	730 867	973
	786	1204		754	939	1087
	789	182		764		301
	828	825 1055		806		286
	876	366 372		1013	13 586	589
	880	671 966		1072	880 883 940	949
	881	405				1093
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	150	234		25		1315
	157	808 1150		158	357	358
	160	1298		240		1246
	238	1178		365		796
	403	205		374		1138
	450	246 47 48 250		381		1025
	463	628		422	893	1300
	469	34		608		699
	476	1374 1432		612		1204
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	81	7 9 845 1018		702		345
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"	153	755	"	522	447, 449
"	173	258	"	534	335, 1168
"	426	1244	"	874	1102
"	542	908	"	1086	1244
"	591	1243	"	1105	1303
"	671	244	49 Cal.	167	511, 512, 915
"	1024	271A, 228	"	177	418, 419
"	1029	301, 302	"	182	987, 988
"	1128	1222	"	187	398, 425
"	1143	271, 275, 1330	"	277	893
"	1152	993, 1211	"	358	893
44 Cal	61	620	"	544	457
"	76	324, 338, 344	"	551	616
"	358	114, 119, 1298	"	555	734, 735, 754, 762
"	477	730, 768, 769	"	573	514, 610, 778, 915
"	595	893, 917	"	682	358
"	650	570, 571	"	871	404
"	703	620	"	924	1093
"	723	1107	"	1075	977
"	737	925, 926	50 Cal.	41	939
"	876	301, 302	"	94	745, 750
"	912	538, 1058, 1100	"	135	590, 637, 1428
"	1002	555, 557	"	159	778, 779, 1204
15 Cal.	486	628	"	223	608, 823, 975, 977
"	557	565	"	229	309, 609
"	585	912, 919	"	308	977
"	720	622	"	318	318, 319, 893, 915
"	727	983	"	367	834, 945
"	816	762	"	423	1168
"	905	994	"	432	1168
46 Cal	52	205, 1427	"	461	640
"	60	1298	"	482	585
"	207	1055	"	518	975, 977, 980
"	212	925	"	564	762, 766
"	215	1143	"	585	1315
"	411	251, 253, 258, 263,	"	594	746, 1092
"	544	284	"	632	751, 1094
"	635	1033	"	658	929, 930, 935
"	700	1117	"	664	44, 1011, 1044
"	712	1151	"	867	1282
"	741	1302	"	872	889, 940
"	807	778	"	939	977
"	854	780	"	969	308, 1316
"	867	582, 660, 666	"	972	1138
"	1056	603, 666, 1429	"	985	241, 973
47 Cal.	46	796	"	1004	756, 778
"	147	413	51 Cal	1	182
"	154	914, 915	"	79	78A, 1051
"	164	56, 796	"	160	915, 938
"	438	751, 1304	"	271	938, 939
"	597	191, 198, 200	"	347	936, 937, 938
"	647	447, 1202, 1217	"	402	137, 529, 582, 587
"	758	193	"	418	889, 893, 936
"	795	191	"	442	698, 1003
"	974	906	"	460	1171
48 Cal.	78	1050	"	488	725
"		478, 1054	"	584	
"		1091	"	650	6

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"	827	1229	"	348	142
"	849	701, 702, 703	"	883	234
"	924	975	"	926	13
"	933	977	7	32	232
"	980	38, 885, 1396, 1398	"	117	357
"	1044	844, 845	"	301	2A
52 Cal.	67	509, 919	"	457	67
"	148	1410	"	522	191
"	159	1029	"	853	75
"	223	915	"	883	2A
"	253	723, 759, 783	8	143	358
"	319	116, 118, 1298	"	180	230, 290
"	347	1226A, 1398	"	517	222
"	403	1037, 1038	"	543	254, 259
"	431	642, 1029	9	438	213
"	437	1028	"	618	239
"	446	1037	"	816	24
"	463	1105, 1115, 1439	"	898	223
"	470	1028	10	287	127
"	478	1248, 1257	"	845	354
"	499	480, 1029	"	847	67
"	522	974, 975	"	1027	301
"	590	949	"	1095	43
"	595	915	11	100	25
"	632	1028	"	121	367
"	636	1227A	"	129	263
"	666	1248, 1249	"	176	226
"	668	1028	"	512	405
"	721	1028	"	789	263, 289
"	959	466	"	836	205
"	962	1171	"	840	226
"	987	938	"	1128	226
53 Cal.	129	1029	12	438	13
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"	394	301	"	973	187
"	650	151	"	1016	190
2 C. W. N.	70	372	13	420	19
"	422	367	"	580	237
"	572	370, 374, 382	"	1091	150
3 C. W. N.	345	354, 358	14 C. W. N.	709	301
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"	761	78A	"	1051	13
4 C. W. N.	57	394	16 C. W. N.	1078	188, 197
"	121	296	"	1105	13, 637
"	253	25	17 C. W. N.	72	85
"	426	405	"	238	252, 276
"	797	308	"	448	14
5 C. W. N.	28	248	"	451	1175, 1176
"	106	14	"	980	13
"	108	2A	18 C. W. N.	394	49
"	249	263	"	700	410, 418
"	250	219	"	1148	339
"	329	364	19 C. W. N.	62	399
6	163	13	"	248	373
			"	959	406
			20 C. W. N.	518	405

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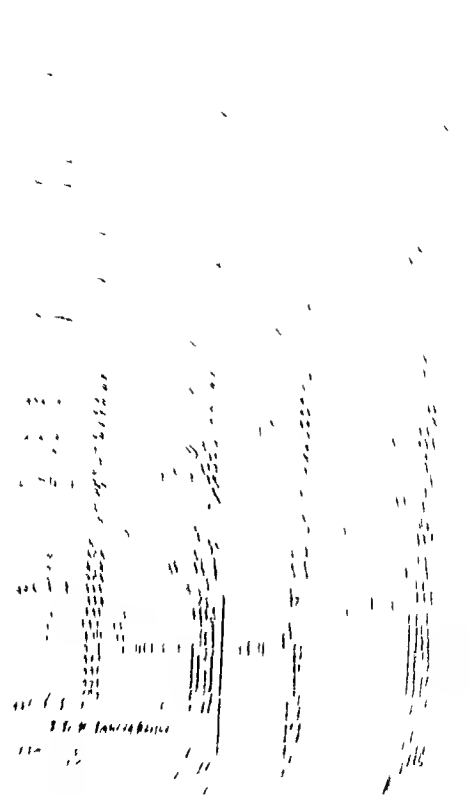


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	183	517 973	3 Mad	48	1054
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5 L L J	531	771		381	794 809 813
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6 L L J	471	563		63	696 823 987 991
	606	16 582		69	137 991
	618	977		146	615
7 L L J	39	517		203	364 365
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	250	519 1403		316	802
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8 Mad	18	50 1016 1171		364	326
	70	1281		379	652 992 997
	140	62		398	1279
	296	1093 1177		399	50 1389
9 Mad	336	1177	15 Mad	36	1197
	36	1103		39	702 703 718
	61	831 878		83	789 861 863 870
	83	897			1431
	102	805		94	1394
	201	343		131	10
	224	516 974 977 979		132	93
		1042		137	1127
	282	664 1014		224	628 1259
	356	1369	16 Mad	352	608 895 896 962
	374	805		234	25 685
	377	1006 1010		235	499
	439	644		410	1020
10 Mad	448	1345		421	514
	13	1297		423	1113 1421
	25	1343		461	1250
	121	978		468	646
	165	77	17 Mad	260	1283
	166	77		402	93 719 1402
	232	21 620	18 Mad	41	418
11 Mad	95	700 974 1036		51	399 433
	98	137 527 529		255	681
	142	807		394	1012
	199	15 1278		402	369 38
	323	466	19 Mad	3	165 166
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	375	622		18	21 378 386
	441	748 779		263	593 1410 1432
12 Mad	443	14 660		269	1024
	480	134 135		349	215
	35	1089 1304		354	1127
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	54	62		31	143
	88	406		87	1127
	92	101		88	171 173 1071
	94	1084		189	489 537
	123	898		735	161 859
	196	915 919		383	21
	273	748		387	668
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13 Mad	451	981 1412		444	1081
	475	340 341		445	893
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	18	193	21 Mad	470	30 1284
	24	1269		74	1419
	144	14 1253		83	208 210 515 915
	343	965		114	1127
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"	246 ..	1276	"	478 ..	1118
"	247 (Note)	1276	"	592 ..	714, 719, 744, 774
"	459 ..	855	"	596 ..	51
"	491 ..	882	"	598 ..	875, 942
23 Mad.	151 ..	881, 882	"	607 ..	23
"	205 ..	1253	"	640 ..	13, 549, 693
"	210 ..	21	"	656 ..	631
"	223 ..	22, 646	27 Mad.	13 ..	1272, 1289
"	225 ..	705, 1190	"	54 ..	22, 646, 716
"	540 ..	641, 1196	"	59 ..	817, 1248
"	544 ..	499, 500	"	61 ..	654
"	626 ..	802	"	124 ..	631
"	632 ..	873, 874, 1405	"	127 ..	484
"	636 ..	700	"	223 ..	623
24 Mad.	13 ..	72	"	237 ..	1045
"	45 ..	369, 381	"	238 ..	901, 974, 979
"	121 ..	622	"	510 ..	19, 241, 1052
"	136 ..	705, 1190	"	525 ..	306
"	161 ..	1315	28 Mad.	308 ..	1021
"	238 ..	1430	"	310 ..	854, 1051
"	262 ..	371, 1269	"	565 ..	486
"	305 ..	1417, 1421	29 Mad.	89 ..	21, 574
"	317 ..	393	"	91 ..	931
"	321 ..	951, 962	"	97 ..	466, 469
"	414 ..	898	"	100 ..	22, 1254
"	523 ..	872, 892, 941, 942	"	126 ..	681, 827, 854, 1043
"	641 ..	1095	"		1086
"	660 ..	24	"	187 ..	816
"	675 ..	62, 702, 1001	"	188 ..	1113, 1146
25 Mad.	15 ..	644	"	190 ..	221, 221
"	61 ..	714, 744, 748, 750,	"	236 ..	1130
"		950, 955	"	237 ..	466
"	534 ..	1051	"	331 ..	1236
"	546 ..	663	"	372 ..	810, 833
"	659 ..	1244	"	373 ..	478
"	667 ..	805	"	375 ..	1344, 1362
"	671 ..	629	"	517 ..	805, 1103
26 Mad.	1 ..	1151, 1407	"	518 ..	727, 728
"	38 ..	506, 507, 915	"	561 ..	392, 413, 422, 446
"	43 ..	652	"	567 ..	1150, 1431
"	49 ..	1356	"	569 ..	734, 754
"	98 ..	14, 1253	30 Mad.	44 ..	914, 915
"	116 ..	613	"	48 ..	227, 1147
"	124 ..	245, 551	"	94 ..	549
"	125 ..	745, 748	"	103 ..	1146
"	127 ..	815, 816	"	136 ..	37, 1106
"	130 ..	1389	"	182 ..	227
"	188 ..	389, 1370	"	224 ..	717
"	243 ..	926, 1123	"	228 ..	587, 1143
"	394 ..	1394A	"	233 ..	1373
"	410 ..	457	"	282 ..	255, 281
"	419 ..	212	"	328 ..	728, 751, 753
"	421 ..	1148	"	332 ..	1285
"	454 ..	745, 758	"	400 ..	1289
"	465 ..	1074	"	548 ..	398, 407
"	467 ..	924	31 Mad.	40 ..	895, 1012

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	140	1281		398	652 992 997
	296	62		399	1279
	336	1093 1177	15 Mad	36	50 1389
9 Mad	36	1177		39	1197
	61	1103		83	702 703 718
	83	831 878			789 861 863 870
	102	897			1431
	201	805			1394
	224	343		94	10
		516 974 977 979		131	93
	282	1042		132	1127
	356	664 1014		137	628 1259
	374	1369		224	895 896 962
	377	805	16 Mad	352	25 685
	439	1006 1010		234	499
	448	644		410	1020
10 Mad	13	1345		421	514
	25	1297		423	1113 1421
	121	1343		461	1250
	165	978		468	646
	166	77	17 Mad	260	1283
	232	77		402	693 719 1402
	295	21 620	18 Mad	41	418
11 Mad	98	700 974 1036		51	399 433
	142	137 527 529		255	681
	199	807		394	1012
	323	15 1278		402	369 382
	339	466	19 Mad	3	165 166
	375	908		14	535
	441	622		18	21 378 386
	443	748 779		263	593 1410 1432
	480	14 660		269	1024
12 Mad	35	134 135		349	215
	36	1089 1304		354	1127
	39	761		375	720 888 988
	45	4	20 Mad	461	127 1276
	54	1138		3	1281
	88	62		31	143
	92	406		87	1127
	94	101		88	171 173 1071
	123	1084		189	489 532
	196	898		235	161 859
	273	915 919		383	21
	35	748		387	668
	451	1419		388	791
13 Mad	475	981 1412		444	1081
	17	340 341		445	893
	18	1273		457	161
	24	193	21 Mad	470	30 1284
	144	1269		74	1419
	343	14 1253		83	208 210 515 915
	353	965		114	1127
	423	4		124	1253
14 Mad	36	581		237	810 817 1248
	121	936 1124		246	1020
		7	22 Mad	15	519 875 1041

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23 Mad.	47 ..	44. 94. 1012	26 Mad	469	221, 221A
"	148 ..	595	"	471 ..	234, 292
"	153 ..	1113, 1150	"	477 ..	1175
"	246 ..	1276	"	478 ..	1118
"	247 (Note)	1276	"	592 ..	714, 719, 744, 774
"	459 ..	855	"	596 ..	51
"	491 ..	882	"	598 ..	875, 942
23 Mad.	151 ..	881, 882	"	607 ..	23
"	205 ..	1253	"	640 ..	13, 549, 693
"	210 ..	21	"	656 ..	631
"	223 ..	22, 646	27 Mad	13 ..	1272, 1289
"	225 ..	705, 1190	"	54 ..	22, 646, 716
"	540 ..	641, 1196	"	59 ..	817, 1248
"	544 ..	499, 500	"	61 ..	654
"	626 ..	802	"	124 ..	631
"	632 ..	873, 874, 1405	"	127 ..	484
"	636 ..	700	"	223 ..	623
24 Mad	13 ..	72	"	237 ..	1045
"	45 ..	369, 381	"	238 ..	901, 974, 979
"	121 ..	622	"	510 ..	19, 241, 1052
"	136 ..	705, 1190	"	525 ..	306
"	161 ..	1315	28 Mad	308 ..	1029
"	238 ..	1430	"	310 ..	854, 1053
"	262 ..	371, 1269	"	565 ..	480
"	305 ..	1417, 1421	29 Mad.	89 ..	21, 514
"	317 ..	393	"	91 ..	937
"	321 ..	954, 962	"	97 ..	466, 469
"	414 ..	898	"	100 ..	22, 1254
"	523 ..	872, 892, 941, 942	"	126 ..	681, 827, 854, 1043,
"	641 ..	1095	"		1088
"	660 ..	24	"	187 ..	818
"	675 ..	62, 702, 1001	"	188 ..	1113, 1148
25 Mad.	15 ..	644	"	190 ..	221, 227
"	61 ..	714, 744, 748, 750,	"	236 ..	1130
"		950, 955	"	237 ..	466
"	534 ..	1051	"	331 ..	1239
"	546 ..	663	"	372 ..	820, 833
"	659 ..	1244	"	373 ..	478
"	667 ..	805	"	375 ..	1344, 1363
"	671 ..	629	"	517 ..	805, 1103
26 Mad.	1 ..	1151, 1407	"	558 ..	727, 728
"	38 ..	506, 507, 915	"	561 ..	392, 413, 422, 448
"	43 ..	652	"	567 ..	1150, 1435
"	49 ..	1356	"	569 ..	734, 754
"	98 ..	14, 1253	30 Mad	44 ..	914, 915
"	116 ..	613	"	48 ..	227, 1147
"	124 ..	245, 551	"	94 ..	549
"	125 ..	745, 748	"	103 ..	1148
"	127 ..	815, 816	"	136 ..	37, 1106
"	130 ..	1389	"	182 ..	227
"	188 ..	389, 1370	"	224 ..	717
"	243 ..	926, 1123	"	228 ..	587, 1143
"	394 ..	1394A	"	233 ..	1373
"	410 ..	457	"	282 ..	255, 281
"	419 ..	212	"	328 ..	728, 751, 753
"	421 ..	1148	"	332 ..	1285
"	454 ..	745, 758	"	400 ..	1289
"	465 ..	1074	"	548 ..	398, 407
"	467 ..	924	31 Mad	40 ..	895, 1012

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31 Mad	43		760	36 Mad	470		1010
	80	319	638		474	240	1308
	82		414		585	872 911 926	929
	84		1077	37 Mad			930
	131		843		112		190
	133		1181		119	1216	1219
	140	1236	1252		125	311	313
	185		1285		153		227
	272		962		156		1333
	276		290	38 Mad	317		1248
	277		1104		565		1276
	280	342	360		304		1019
	315	90	239		489	366 381	38
	416	404	439		498		1044
	506		499		51		678
	515	306	1083		552		1005
	543	8 7	1043		555		254
	548		1443		556 (Note)		754
32 Mad	3	13 16	582 637		585	19 830	1014
			639 730		639		555 557
	47		964		779	555	557 575
	49		14 1236		807		1299
	173	961	963 965		1028	796	1054
	179		1151		1088	182 186	1318
	218	19 1 1	018		1091		878
	220	19	827 1176	39 Mad	449		915
	255		101 644		503	786 820	837
	258		104 106		505		1219
	303	35 40	53 63		527		748
	384		730		537		323
33 Mad	48		1 53		539		241
	85	241	295 1179		561		1 05
	89		818 1137		576		557
	264	771	1146		604		998
	288		1299		677	612	628
	502		756		770	974	979
	514		965		928		526
	94		1345		942		856
	138		410		946	993 995 998	999
	139		287		957		1277
34 Mad	253	798	1089	40 Mad	977		515
	343		91		1006		805
	346		583		1085		1207
	349		712		100		1237
	545		1145		108	1011	1044
	243		1145		591		1115
	247		501		789		1441
	701		1387		835	571	1383
	739		1384		976		1088
	72	622 1238	1254		977	798	1088
35 Mad	96		258	41 Mad	1028	113	115
	138		631		246	230 237	585 599
	159		896		323		1000
	275	398 447	1202		533	1435	1438
	308		1000		644		1343
	315	234 437 803	1088		685	994 995	999
	321	699 713	1003		727	786 797 820	853
	387	549 625	628		787		631
	457		974 1143		982		1191

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	96	631	11 M L J	122		375	
	109	1219	14 M L J	207		327	
	180	637		491		233	
	42	1252	15 M L J	489		22	
	446	26 525	16 M L J	53		439	
	540	1237		148		399	
	561	714 1029 1189	17 M L J	158		389	
	91	549 1401		438		285	
	885	637 638 1156	19 M L J	18		407	
43 Mad	316	355	21 M L J	283		844	
	330	849 1089		486		466	
	361	717 718		795		670	
	411	756 757 837	22 M L J	419		623	
	450	271 72 279 280	23 M L J	445		210	
		289		670		37	4 35
	511	19 241 1012	25 M L J	1		680	
		1015		593		623	
	709	589	26 M L J	208		447	
	744	930		120		619	
44 Mad	51	811 814		223		466	322
	913	133	27 M L J	160		453	405
45 Mad	29	807		586		615	
	230	511		587		466	
	359	690 1023		593		719	
	820	977		613		478A	
	846	1002		628		381	367
	913	1045 1219 131		746		652	
	928	628 631	28 M L J	381		725	
46 Mad	162	1150 1352 1353		486		631	
	253	869 1057 1225	32 M L J	54		613	
	382	1055 1129		402		21	
	440	846 975 976 977	33 M L J	78		477	476
	605	131	35 M L J	127		541	521
	719	1015		59		744	
	721	1290		559		719	
	758	973		665		1197	
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47 Mad	384	611	37 M L J	361		4	
	428	1055 1218		588		143	
	442	122		589		414	
	713	420 424	38 M L J	27		214	213
	716	47		73		410	
	722	1203 1215	41 M L J	172		818	
	746	766	42 M L J	49		701	
	914	1148 1150		72		1235	
48 Mad	262	478 1150		108		822	637
	385	1133 1134		139		641	634
	388	1291		147		438	418
	395	631 1248		179		385	
	503	1277 1295		352		382	381
	620	611	43 M L J	87		1054	
	640	502 503		564		1181	654
	774	771 1219		624		447	
	874	701 1193		710		660	
				716		413	
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"	485 ..	220	"	97 ..	598, 600, 1390
"	648 ..	556, 565	"	101 ..	101
"	774 ..	613	"	109 ..	1138
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"	279 ..	1432	"	20 ..	1083
"	305 ..	845	"	57 ..	632
"	543 ..	654	"	65 ..	824, 839, 841
"	800 ..	1398	"	84 ..	1051
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47 M. L. J.	439 ..	382	"	65 ..	587
"	689 ..	280, 290	"	68 ..	778
"	925 ..	1011	"	81 ..	1203, 1428
48 M. L. J.	308 ..	755A, 756	"	88 ..	724, 1440
"	490 ..	1096	"	184 ..	1241
"	494 ..	1280	10 N. L. R.	8 ..	811
"	504 ..	1051	"	15 ..	1371
"	518 ..	466	"	19 ..	505
49 M. L. J.	44 ..	993	"	177 ..	21, 613, 1208
"	93 ..	734, 745	11 N. L. R.	59 ..	954, 961, 962, 965
"	269 ..	1290	"	98 ..	313
"	276 ..	611	"	162 ..	991
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"	423 ..	1011	13 N. L. R.	13 ..	13
"	593 ..	421, 1433A	"	35 ..	756, 775, 778
"	784 ..	424	"	169 ..	1031
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"	137 ..	1440	"	23 ..	1171, 1254
"	139 ..	1435	"	30 ..	897
"	187 ..	1018	17 N. L. R.	92 ..	1286
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"	149 ..	1171, 1198	"	154 ..	227
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"	50 ..	631	20 N. L. R.	72 ..	555
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"	67 ..	1010, 1148	"	166 ..	1337
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"	59 ..	1345	"	376 ..	554
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8 O C	91	99		21	234 437
	245	312 315		57	1219
	313	627		142	1184
	395	519		167	405 420
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	69	89 290		249	1288
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	112	316 1038		261	814
	132	272		267	344
	161	272		293	869
	165	1371		304	1129
	87	227		317	252
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	148	652		367	1237 1254
	261	1178	25 O C	37	1168
	267	292		111	154
	360	1103		148	413 461
12 O C	308	981		151	745
	400	396		182	1020
13 O C	7	501		242	458
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	161	1211		242	271 275
	295	926		282	1090 1204
	309	1135		283	801
	337	890		284	302
13 O C	263	290 301		358	631
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	309	1244		69	915 931
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	239	698 835		230	1226A
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	136	514 517 878 881		407	517
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	536	1129	3 Pat	288	416 431
	659	325		417	549
	693	1140		503	746 753 1092
	743	404 433		591	845 1321
	757	399		638	1148
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	341	257		870	219
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	281	1313		259	1333
	302	1186		288	1157
	359	13		323	620
	402	703		327	512
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	705	849		484	1246
	773	308		488	974 977 1029
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	878	1210		783	358
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	50	1204		63	510A 1029
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	534	926			
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	54	737 977		97	1190
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	621	257 598		165	1205
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	3 9	6 116 670		208	1237 1243
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	54	737 977		592	14 660
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	621	257 598		67	339 357 359
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	257	622 630 1208		487	149
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"	138 ..	85, 1108	"	531 ..	13
"	141 ..	490	"	594 ..	405
"	147 ..	421	"	632 ..	43, 272, 285
"	192 ..	1107	"	681 ..	234
"	224 ..	752	"	716 ..	869
"	243 ..	376, 377	2 P. L. T.	6 ..	353
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"	287 ..	380	"	392 ..	380
"	291 ..	510	"	186 ..	389, 402
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"	316 ..	406, 428	"	596 ..	71
"	346 ..	14	"	650 ..	380, 394
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"	653 ..	941	"	433 ..	436
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"	154 ..	406	"	434 ..	452
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"	456 ..	1184	"	248 ..	439
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"	609 ..	631	"	372 ..	431
"	656 ..	1385	"	402 ..	325
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"	47 ..	1183	"	723 ..	407, 413
"	61 ..	671, 1406	5 P. L. T.	15 ..	1089
"	91 ..	837	"	63 ..	1371
"	104 ..	438	"	69 ..	438
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"	246 ..	406, 412	"	129 ..	271, 272
"	321 ..	1345	"	166 ..	272
"	430 ..	975	"	252 ..	391
6 P. L. J.	146 ..	1246	"	300 ..	1243
"	147 ..	942, 975	"	419 ..	469
"	174 ..	973	"	457 ..	473
"	178 ..	1244	"	458 ..	403
"	241 ..	501, 982	"	505 ..	102, 614
"	264 ..	937, 939	"	535 ..	438
"	644 ..	911	"	589 ..	452
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"	72 ..	377	"	146 ..	701
"	73 ..	882	"	215 ..	848
"	153 ..	701, 1194	"	253 ..	382
"	200 ..	555	"	258 ..	409, 443
"	241 ..	973	"	431 ..	1156
"	351 ..	586	"	454 ..	405
"	369 ..	377, 392	"	477 ..	985, 987
			"	193 ..	975
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"	626 ..	844
"	710 ..	424
"	746 ..	377
"	365 ..	618
"	727 ..	677
"	570 ..	1190
"	766 ..	234
"	708 ..	290
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"	810 ..	272, 290
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"	17 ..	67
"	26 ..	74
"	28 ..	21
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"	13 ..	1208
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"	6 ..	1203
"	10 ..	68
"	15 ..	1203
1876 P. R.	6 ..	1047
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THE CODE OF CRIMINAL PROCEDURE

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THE CODE OF
CRIMINAL PROCEDURE, 1898
ACT NO. V OF 1898.

[As amended up to date]

RECEIVED THE G G'S ASSENT ON THE 2ND MARCH, 1898.

*An Act to consolidate and amend the Law relating to
Criminal Procedure*

WHEREAS it is expedient to consolidate and amend the law relating to criminal procedure It is hereby enacted as follows —

1 Recent Amendments and their history —The Criminal Procedure Code 1898 has undergone drastic amendments at the hands of the Legislature in 1923 by two Acts viz the Criminal Law Amendment Act XII of 1923 (popularly known as the Racial Distinctions Act) and the Criminal Procedure Code Amendment Act XVIII of 1923 Of these the latter Act is the more important and is the outcome of a general revision of the whole Code whereas the former Act is limited to the amendment of certain sections relating to the trial of European British Subjects These Amendment Acts have come into force from 1st September 1923

The genesis of Act XVIII of 1923 dates as far back as 1914 In that year a Bill (no 3 of 1914) was introduced in the Imperial Legislative Council on the 21st March and was thereafter referred to the Local Governments and Administrations Their opinions were received and partially examined but further progress with the Bill was suspended until the conclusion of the war Meanwhile the Government by a resolution dated the 18th September 1916 referred this Bill and the opinions received to a small Committee (known as the Lowndes Committee) This Committee sat for 21 days and its work was finished on the 23rd December

1916 The Bill as revised by this Committee was again introduced in the Imperial Legislative Council on the 26th September 1917 but further consideration of the Bill was postponed until after the war. Meanwhile some further suggestions for the amendment of the Code were considered by the Government and after the termination of the war a new Bill was prepared in 1921 which was substantially the Bill as revised by the above Committee supplemented by the amendments regarded as advisable as a result of the consideration above referred to.

This Bill (no 3 of 1921) was introduced in the Council of State on the 21st February 1921 by Sir William Vincent and in September 1921 it was referred to a Joint Committee composed of representative members of the Legislative Assembly and the Council of State. This Committee sat for 14 days and submitted its report after a year (in September 1922) and the Bill as revised by this Committee with certain alterations made during the discussions in the Council of State in September 1922 and in the Legislative Assembly in January and February 1923 ultimately passed into law and has been enacted as Act XVIII of 1923.

(For Bill 3 of 1914 see Gazette of India Part V 28th March 1914 for the Report of the Select Committee of 1916 see Gazette of India Part V September 1917 reprinted in the Gazette of India February 26 1921 at p 39 for Bill 3 of 1921 see Gazette of India Part V February 26 1921 for the Report of the Joint Committee see Gazette of India Part V September 9 1922)

The changes made from time to time by other minor Amendment Acts up to June 1926 have been noticed in this book in their proper places.

2 Pending cases are not affected by changes in the law.—The general rule as to new laws of procedure is that they take effect from their coming into operation so that the procedure from that date would be governed by such laws. It is also a general rule that such laws are not to affect vested rights. Therefore where a person was being tried under an old Act and before the conclusion of the trial the new Act came into force the trial ought to be continued in accordance with the procedure laid down in the earlier Act which was in force at the commencement of the trial.—*Srinivasachari v Queen* 6 Mad 336 *Mudund v Ladu* 3 Bom L R 584

2A Construction.—A penal statute must be construed strictly that is nothing is to be regarded as within the meaning of the statute which is not within the letter—which is not clearly and intelligibly described in the very words of the statute itself.—*Emp v Kola* 8 Cal 214 *Lakshmi Chaud v Emp* 1901 P R 24 *Bhimbur v Q* E 5 C W N 108 Penal provisions have to be strictly construed nor can the liability to punishment for the neglect of a statutory obligation be extended by inferential reasoning.—*Kazi v Q* E 28 Cal 304 In interpreting statutes

of a penal character, it is important to see that the powers conferred upon the Magistrates are duly exercised with reference to the rendering unlawful acts which would otherwise be lawful—*Q E v Shrodon*, 10 All 115 A penal statute must be construed strictly, and Magistrates ought to be very careful before they proceed to inflict imprisonment in a summary manner. They must avoid all appearance of oppression—*In re Ganesh Narayan*, 13 Bom 600 Words importing a doubtful or ambiguous meaning must be construed strictly, and in favour of the subject that is to say, unless the meaning of the Legislature is perfectly clear no penalties are to be imposed upon the subjects of the Crown nor are their liberties to be restricted—*Q E v Imam*, 10 All 150 (F B) See also 17 Bom 573 2 A L J 26 1 Bom 308

The same rules of interpretation apply to notifications issued under penal statutes—1901 P R 24

The marginal notes to a section do not form part of an enactment, and cannot be referred to for the purpose of construing the section. They should not be allowed to vary the clear grammatical meaning of the rule embodied in the section—*Punardeo v Ram Sarup* 25 Cal 838, *Bhoyendra v Emp.* 7 C W N 883 2 Bom L R 918, 23 Cal 55, 1 M L J 37 6 C P L R 31 In construing a section, it is not competent to refer to the proceedings in the Legislative Council as legitimate aids to the construction of a law—*Q E. v Srichurn* 22 Cal 1017 F B , *Q E v Tslak* 21 Bom 112 nor is it proper to refer to the previous history of the law—*Sarat v Emp.* 7 C W N 301

It is not regular [for a Magistrate to allow his decision to be guided by anything that appears in some proposed Bill that has not become law—3 All 283

PART I

PRELIMINARY

CHAPTER I

1. (1) This Act may be called the Code of Criminal Procedure
Short title Com 1898 and it shall come into force on the
mencement first day of July, 1898

(2) It extends to the whole of British India but in the
Extent absence of any specific provision to the
contrary nothing herein contained shall
affect any special or local law now in force or any special juris-
diction or power conferred or any special form of procedure
prescribed by any other law for the time being in force or shall
apply to—

(a) the Commissioners of Police in the towns of Calcutta
Madras and Bombay or the Police in the towns of
Calcutta and Bombay

(b) heads of villages in the Presidency of Fort St George or

(c) village Police Officers in the Presidency of Bombay

Provided that the Local Government may if it think fit
* * * by notification in the official Gazette extend any of
the provisions of this Code with any necessary modifications
to such excepted persons

The words with the sanction of the Governor General in Council
which occurred in the proviso have been omitted by the Devolution Act
XXVIII of 1920

XII—The Amendments made by Acts VII and XVIII of 1923 have
come into force from 1st September 1923

3 Object of the Code —The object of the Criminal Procedure Code is
to provide a machinery for the punishment of offences against the sub-
stantive law—*In re Ganesh A. Saha* 13 Bom 590 Q. J. v. Abdul Raha nan

16 Bom. 580; *Dulir v. Nijabat*, 12 Cal 536. *Q E v. Rasna chandra*, Ratanlal 776 (778) *Q E v. Mona Puna* 16 Bom 661 (669), *Q E v. Abdul Ratanlal* 577 (579)

4 **Extent—British India**—The term "British India" shall mean all territories and places within Her Majesty's dominions which are for the time being governed by Her (His) Majesty through the Governor General of India or through any Governor or other officer subordinate to the Governor General of India (Sec 3 General Clauses Act, X of 1897)

The following are within British India—Aden, Laccadive Islands, (*Q E v. Cheria Koya*, 13 Mad 353) Andaman and Nicobar Islands (*Triccam v B B & C. I Ry Co*, 9 Bom 244), Ajmer and Merwara (9 Bom 244), Island of Perim (*Q E v. Mangal Tekchand*, 10 Bom 258)

Native States:—The Native States and Tributary Mahals are not within British India, therefore this Code does not apply to Rajkot (*Q E v. Abdul Latif*, 10 Bom 186), Civil Station of Wadhwan (*Emp v. Chiman Lal*, 37 Bom 152, but see 9 Bom 244); Moyurbhanj (*Emp v. Keshub*, 8 Cal 935), Keonjhar (*Bichitranand v. Bhugbut* 16 Cal 667), the lands occupied by the Hyderabad State Railway (*Muhammad Yusuf-uddin v. Q E*, 25 Cal 20 P C), Railway Station in a Native State (*Emp v. Raghunathrao*, 5 Bom L R 873)

But although the Code as such does not apply to the Native States, many of those States have in fact adopted it, e.g. the Civil and Military Station of Bangalore (*In re Hayes*, 12 Mad 39), Mysore, Kashmir, the Native States in the Rajputana Agency, etc

Transfer of territory from British India to Native State—The British Court has jurisdiction to proceed with the trial of an offence committed in a territory which formed part of British India at the date of the offence and at the date of commitment to the Sessions, but was transferred to a Native State before the case came on for trial—*King Emp v. Ravi Naresh*, 34 All 118 Similarly, the British Appellate Court has jurisdiction to hear an appeal if the transfer took place after a conviction but before the appeal therefrom was heard—*Mahabir v. King Emp*, 33 All 578

Other places where the Code does not apply:—The Code does not apply to the North Cachar Hills (*Soonderjee v. Maylow*, 26 Cal 374) or to the Chittagong Hill Tracts (*Q E v. Sonai Mugh*, 27 Cal 654) It also does not apply to the Garo Hills, the Khasia and Jaintia Hills, the Naga Hills, the North Cachar Subdivision of the Cachar District, the Mihar Hill Tracts in the Nowgong District, the Dibrugarh Frontier Tracts in the Lakhimpur District, and the Lushai Hills, see Assam Gazette, 1898, Part II, page 788.

Places to which the Code has been extended.—The Code has been extended to the following places:—(1) The District of Angul (with

from 1st August 1898) see *Calcutta Gazette* 1898 Part 1 p 779 (2) *Upper Burma* (excluding the Shan States) see *Burma Laws Act* (XIII of 1898) (3) the *Shan States* (by the *Shan States Laws and Criminal Justice Order* 1895 as amended by Notification no 29 dated 19 12 1898 *Burma Code*) (4) the *Scheduled Districts in Ganjam and Vizagapatam* see *Fort St George Gazette* 1898 Part 1 page 306 see also *Public Prosecutor v Sadananda* 23 M L J 670 (5) *Sonthal Parganas* see *Calcutta Gazette* 1898 Part 1 page 665 (6) *Districts of Hazaribagh Lohardaga Manbhum Palamau Pargana Dhalbhum and the Kothen in the Singhbhum District* see *Calcutta Gazette* 1898 Part 1 page 714 and *Gazette of India* 1899 Part 1 page 779 (7) *Pargana of Manipur* see *Gazette of India* 1899 Part 1 page 419 (8) *British Baluchistan* see *Gazette of India* 1898 Part 1 page 221 (9) *Chittagong Hill Tracts* see section 4 of the *Chittagong Hill Tracts Regulation I of 1900* but see *Q E v Sonai Mugh* 27 Cal 654

The Code has also been extended to the *British Protectorates* on the East Coast of Africa (*Order of Council* 1897) *Somaliland* (*Order* 1899) the *Persian Coast and Islands* (*Order* 1897) and *Zanzibar* (*Order* 1884 under which Zanzibar is to be treated as a District in the Bombay Presidency)

As regards *Muscat* it has been held that the Bombay High Court is invested with original criminal jurisdiction over it but not appellate or revisional jurisdiction—*In re Rattansee* 24 Bom 471

High Seas —The trial of a British seaman for an offence committed on the high seas on a British ship must be conducted under the Code of Criminal Procedure though the offence charged was an offence under the English Law—*Q E v Gunning* 21 Cal 782 *Q E v Barton* 16 Cal 233 *Q v Thompson* 1 B L R O Cr 1 *Reg v Lloistone* 7 B H C R 89

5 *Special law* —The expression special law in this section has reference to statutory enactments and not to local family law (e g *Maru makkattayan law*)—*Thilhu Amma v, Sankunni* 37 M L J 361 20 Cr L J 733 The *Coroner's Act* is an instance of special law

6 *Local law* —This Code will not affect any local law as for instance *Act XXXVII of 1885* which is still in force in *Sonthal Perganas*. So an order under that Act sentencing an accused to imprisonment is not open to revision under this Code—*Dular v Niyabat* 12 Cal 536 So also the *Criminal Procedure Code* will not apply to proceedings held under the *Sind Frontier Regulations (V of 1872 and III of 1892)*—*Emp v Ghulam Kadir* 5 S L R 105=12 Cr L J 568

7 *Special jurisdiction* —The following are instances of special jurisdiction —The jurisdiction conferred by *Sec 3 of Madras Act XXIV of*

1839 (Vizagapatam Agency Act) regarding the administration of criminal justice in the Vizagapatam Agency Tract—*Q E v Budara Jani* 14 Mad 121 the jurisdiction conferred by secs 20 23 Cattle Trespass Act—*Shama v Lachu* 23 Cal 300 *Budhan v Issur* 34 Cal 926 the jurisdiction conferred by Bombay Village Police Act VIII of 1867—*Q E v Ragho Mahadu* 19 Bom 612

8 Special powers —Instances —Powers conferred on second class Magistrates by Secs 3 (5) and 56 of the Bombay Abkari Act V of 1878—*Q E v Gustadji* 10 Bom 181 powers possessed by the High Courts to punish for contempts—*Surendra Nath Banerjee v Chief Justice* 10 Cal 109 (P C) powers possessed by the High Courts under Sec 29 of the Letters Patent to transfer criminal cases before itself—*Sitapathi v Queen* 6 Mad 32 power of superintendence under Sec 15 of the Charter Act—*Lakhraj v Deb Pershad* 12 C W N 678

9 Police of Calcutta Bombay —This Code does not apply to the Police in the city of Calcutta unless expressly made applicable to them—*Emp v Madho Dhobi* 31 Cal 557 Section 155 however applies to the Police of Calcutta and Bombay—*Q E v Nilmadhub* 15 Cal 595 *Q v Issram Babaji* 21 Bom 495 Also Secs 42 44 54 55 56 68 83 84 85 86 127 164 202 and Col 3 of Schedule II have been specially extended to the Police in the town of Calcutta Sections 386 and 387 have been by notification under the proviso extended to the Commissioner of Police for the town of Calcutta (see *Calcutta Gazette* 23rd March 1904) Secs 42 44 68 84 85 86 127 164 202 and Col 3 of Sch II apply to the Police of Bombay But Secs 54 55 56 and 83 are no longer applicable to the Police of Bombay under Sec 2 (1) of the City of Bombay Police Act IV of 1902

This Code applies to the Police but not to the Commissioner of Police Madras See Madras Act III of 1888

10 Madras Village Headmen —No part of this Code applies to Village Headmen who are empowered by Madras Regs XI of 1816 and IV of 1821 to try petty cases—*In re Vinramutha Pillai* 2 Weir 1 But sec 528 now applies to Madras Village Headmen Sections 480 and 482 do not apply to Village Munsiffs—*Q E v Venkatasami* 15 Mad 131

This section should not be read to mean that village Magistrates cannot complain or be tried under this Code but it only means that in his official capacity as a village Magistrate that is in the proceedings he takes as a village Magistrate he is not governed by the Cr P Code—*Pub Pros v Mari Mudali* 19 L W 30 25 Cr L J 221 A I R (1924) Mad 730

11 Bombay Village Police officers —The ancient village system of Police regulated formerly by Reg IV of 1818 and Reg XII of 1827 and now by Bombay Village Police Act VIII of 1867 remains unaffected, Criminal Procedure Code—*Q L v Ragho Mahadu* 19 Bom 612

2. [Repealed by the Repealing and Amending Act X of 1914]

3. (1) In every enactment passed before this Code comes into force, in which reference is made to, or to any chapter or section of, the Code of Criminal Procedure, Act XXV of 1861, or Act X of 1872, or Act X of 1882, or to any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code, or to its corresponding chapter or section

(2) In every enactment passed before this Code comes into force, the expressions "Officer exercising Acts. (or 'having') the powers (or 'the full powers') of a Magistrate," "Subordinate Magistrate, first class," and "Subordinate Magistrate, second class," shall respectively be deemed to mean "Magistrate of the first class," "Magistrate of the second class" and "Magistrate of the third class"; the expression "Magistrate of a division of a district" shall be deemed to mean "Sub divisional Magistrate", the expression "Magistrate of the district" shall be deemed to mean "District Magistrate", the expression "Magistrate of Police" shall be deemed to mean "Presidency Magistrate", and the expression "Joint Sessions Judge" shall mean "Additional Sessions Judge"

4. (1) In this Code the following words and expressions have the following meanings unless a different intention appears from the subject or context :

Definitions.

(a) "Advocate-General" includes also a Government Advocate, or, where there is no Advocate General or Government Advocate, such officer as the Local Government may, from time to time, appoint in this behalf :

(b) "bailable offence" means an offence shown as bailable in the second schedule, or which is made bailable by any other law for the time being in force ; and "non bailable offence" means any other offence .

(c) "charge" includes any head of charge when the charge contains more heads than one.

(d) * * * * *

(e) "Clerk of the Crown" includes any officer specially appointed by the Chief Justice to discharge the functions given by this Code to the Clerk of the Crown :

(f) "cognizable offence" means an offence for, and "cognizable case" means a case in, which a police-officer, within or without the Presidency-towns, may, in accordance with the second schedule, or under any law for the time being in force, arrest without warrant :

12 Cognizable offence.—The words "a Police officer" in this clause do not mean "any and every Police officer." That is, an offence is regarded as a cognizable offence, if the offender can be arrested without warrant by *certain* Police-officers, though not by *any and every* Police officer. If the power of arrest without warrant is limited to any *particular* class of Police officers, that does not prevent the offence being regarded as a cognizable one—*Q F v Deodhar* 27 Cal 144. Thus, under the Gambling Act it is not every Police officer who can arrest without a warrant. It is only the District Superintendent of Police who can so arrest, but still the offence under that Act will be treated as a cognizable offence—*Ibid*.

But the power of arrest referred to in this clause must be an unqualified power, and not a conditional power like the one conferred upon the Police by sec 24, Opium Act I of 1878 which authorises a Police officer to arrest without warrant if the accused does not furnish the security required by that section. An offence under sec 9 Opium Act is not therefore a cognizable offence—*Bahabai v Tarak Nath*, 24 Cal 691.

(g) "Commissioner of Police" includes a Deputy Commissioner of Police :

(h) "complaint" means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police-officer :

13 Complaint.—Who can make a complaint.—A complaint need not necessarily be made by the person injured but may be made by any person aware of the offence. The rule is that if a general law is

any person has a right to complain whether he himself has suffered any particular injury or not—*In re Ganesh Narayan* 13 Bom 600 *Imp v Keshav Lal* 21 Bom 536 *Bharat Chunder v Javed Ali* 20 Cal 481 *Dedar Bux v Shyamapada* 41 Cal 1013=18 C. W. N 921 *Farsand Ali v Hanuman* 18 All 465

It is not necessary under this clause or under section 190(a) that the person lodging the complaint must have personal knowledge of the facts constituting the offence—*Sukumar v Mofisuddin* 25 C. W. N 357 *Suresh Chandra v Emp* 1 P. L. T 531 21 Cr. L. J 346 *Imp v Shewah Ram*, 7 S. L. R 77 15 Cr. L. J 369

Essentials of a complaint—The complaint must allege that an offence has been committed the use of a house as brothel is not an offence and a statement to a Magistrate that a certain person has so used his house is not therefore a complaint—*Imp v Khairi* 6 S. L. R 254 14 Cr. L. J 320 An application under sec 107 (25 Cr. L. J 89 1 O. W. N 359 5 Cr. L. J 1149) is not a complaint So also a petition to institute proceedings under sec 110 (*Q. F. v Imam Mandal* 27 Cal 662 *Imam Mandal v Emp* 6 C. W. N 163 *Queen v Ahmad Khan* 1900 A. W. N 206 *Muhammad Khan v K. E.*, 1905 P. R 42) or under sec 145 (*Chathu v Niranjana* 20 Cal 729) is not a complaint because the allegations in support of proceedings under those sections do not amount to an offence As to what are and what are not offences see notes under Clause (o) *infra*

The complaint must be made to a Magistrate A Police officer is not a Magistrate therefore a petition or information sent to such officer is not a complaint—*Isiri v Bakshi* 6 All 96 *Queen v Palanvarapa* 7 Mad 563 *Kailash v Emp* 30 Cal 85 *Surendra v Rai Mohan* 30 Cal 690 (F. B.) *In re Harilal* 22 Bom 949 *Emp v Mathura Singh* 1904 A. W. N 266 So also an Agent of the Court of Wards is not a Magistrate—*Jagobundhu v Emp* 30 Cal 415 a Mamlatdar in his executive capacity is not a Magistrate—*Queen v Shivram Ratanlal* 554 But a Deputy Commissioner is an *ex officio* District Magistrate and a petition to him would amount to a complaint—*Shanker v Manni* 13 N. L. R 13 18 Cr. L. J 459

The complaint must be made to a Magistrate with a view to his taking action under this Code A petition alleging that an offence has been committed but that the petitioner does not desire to prosecute the wrong doer is not a complaint—*Bhawan Singh v Haliman* 6 C. W. N 926 a mere statement to a Magistrate by way of information without any intention of asking him to take action is not a complaint—*Harder Raja v. King Emp* 36 All 222 *Ahmed Husain v Emp* 17 C. W. N 980 *Bansi Lal v Emp* 12 C. W. N 438 *Rayan Kuti v Emp* 26 Mad 640 so also a petition sent by a husband to a Magistrate not with a view to his taking action thereon but to recover the jewels alleged to have been

stolen by his wife is not a complaint—*In re Rukmani* 16 Cr L J 466 (Mad) a petition making charges against a person and asking for an order of the Police to warn that person in the first instance is not a complaint—*Purno v Hurish* 15 C W N 1051=12 Cr L J 535 a letter written by the Assistant Collector to the District Magistrate in which the former did not ask that any action should be taken by the Magistrate nor intended that the Magistrate should proceed according to law against the person complained against but merely solicited for orders (i.e. asked for directions as to how he should proceed) did not amount to a complaint—*Sheo ampat v Emp* 40 All 641=19 Cr L J 963 a statement made to a Magistrate with the object of inducing him to take action not under this Code but under Sec. 6 of the Bombay Gambling Act IV of 1887 is not a complaint within the meaning of this section—*Hotu v Crown* 8 S L R 66 15 Cr L J 657

A complaint need not set out the details of the offence—32 Mad 3 but it must contain a statement of the facts relied on as constituting the offence in ordinary and concise language with as much certainty as the nature of the case will admit a complaint in which no facts are set out but only the words of the section of the Statute are literally copied is a colourable compliance with the requirements of the law—*Pulin Behari Das v Lmp* 16 C W N 1103 *Sukumar v Mofisuddin* 5 C W N 357

14 Instances of complaint.—The following have been held to be complaints

(1) The petition of a complainant who has withdrawn his case and again asks to be allowed to proceed with the same—*Sarat Chandra v Aghore Nath* 4 C W N ccxxi

(2) the presentation of a petition by the complainant that his complaint should be inquired into—*Lalji Gope v Giridhari* 5 C W N 106

(3) a petition impugning the correctness of a police report and praying for a trial of the accused—*Jogendra Nath v Lmp* 33 Cal 1=10 C W N 158 *Lalji Singh v Parsip Singh* 18 Cr L J 754 (Pat)

(4) a letter to the Magistrate conveying the information of an offence and asking the Magistrate to take action—*Khetra Molau v Emp* 17 C W N 448=14 Cr L J 76 *Chholey v Emp* 10 C W N 108 25 Cr L J 1147

(5) the submission of a record by an Assistant Magistrate trying a rent suit to the Collector who was also the District Magistrate for starting a case under sec. 193 I P C against the plaintiff in the rent suit—*Emp v Sundar Sarup* 26 All 514

(6) a *Yadast* sent by a Revenue Officer to a Magistrate charging a certain person with having disobeyed a summons issued by him—*Queen v Mori* 11 Mad 443.

(7) an application by a complainant to have his witness summoned, coupled with his oral allegations though not on oath nor reduced to writing—*Apurba Krishna v Lmp* 35 Cal 141

(8) proceedings of a Court under sec 476 sending a person to the nearest first class Magistrate—*Q E v Rachappa* 13 Bom 109 *Q E v Narakha* 13 Mad 144 *Ishri Prosad v Sham Lal* 7 All 871 *Emp v Arjan* 31 Cal 664 *Eranpote Athan v King Emp* 26 Mad 98 *In re Lakshmidas* 32 Bom 184 (contra—*Atiyakannu v Emp*, 32 Mad 49 *Mata Ratan v Mohabir* 4 A I J 803 *In re Bal Gangadhar Tilak* 26 Bom 785 *In re Alauddin Husain* 23 All 249)

(9) a communication by a Revenue Court to the District Magistrate that certain documents tendered in evidence before it were forgeries and that such action might be taken as the Magistrate might deem fit—*Inder Bhan v King Emp* 1905 P R 30

(10) a committal sheet signed by a Superintendent of the Salt Department and sent to the Magistrate (in accordance with the procedure laid down by para 12 of the Instructions issued by the Commissioner of Salt Revenue for the guidance of the Salt Revenue Department) and containing *inter alia* a definite request to the Magistrate to summon certain witnesses and to try the accused for the offences set out in the sheet is a complaint—*Phag on Sihru v King Emp* 11 L J 592=18 Cr L J 366

(11) where A charged B with house breaking and B lodged an information against A for theft of his gun but the Police reported B's case to be false whereupon B filed a petition of objection asking the Magistrate to make an investigation and to summon the accused *held* that the petition of objection filed by B was a complaint—*Sadhu Charan v Balat Swain* 3 P L J 346=19 Cr L J 874

(12) where in the course of an insolvency proceeding the District Judge found that certain transfers made by the insolvent were fraudulent and the Judge made a report to the District Magistrate asking him to prosecute the transfers *held* that the report was a complaint—*Mahadeo v Emp* 18 A L J 50=21 Cr L J 56

(13) where a Magistrate sent a report to the District Magistrate that a certain person had made an alteration in a document filed in his Court and had committed an offence under sec 477 I P C *held* that the report amounted to a complaint—*Suraj Prasad v Emp* 21 A I J 825

15 What are not complaints —

(1) statements made in a deposition—*Emp v Imankhau* 14 Bom L R 141=13 Cr L J 287

(2) a letter merely conveying a sanction of the Local Government under sec 196 authorising the prosecution—*Shamal Khan v Emp* 1890 P R 16

(3) an application for issue of process—*Emp v Lalit Mohan* 3^d Cal 557=15 C W N 29

(4) a petition for maintenance under sec 488 of this Code—*Sardaran v Amir Khan* 1005 P R 20 *Hildephonsus v Malone* 1885 P R 13 *Toker Bibi v Abdul Khan* 5 Cal 536 *Yus Mahomed v Bismulla* 16 Cal 781 *Penkata v Paramma* 11 Mad 109 *Rozario v Ingles* 13 Bom 459

16 Report of a Police Officer.—In *King Emp v Sada* 26 Bom 150 (15th 11 has been held that although the word 'report' is not defined in the Code still the Legislature has studiously attached to the expression 'Police report' a peculiar meaning whenever that expression occurs that the words 'report of a Police officer' in section (4) (h) and the 'Police report' in sections 157, 173 and 190 (f) are confined to reports in cognizable cases only and that if the Police officer goes beyond his duties and makes of his own motion a report of an information of a non cognizable case (e.g. if he lays an information of a non cognizable offence under sec 51 of the Bombay District Police Act) it is not a report but an information or rather a 'complaint' within the meaning of section 4 (h). This view has also been taken in *Chithambaram v Emp* 32 Mad 3 *Harshar v Emp* 23 C W N 481 and *Imp v Khushaldas* 6 S L R 82. The Select Committee of 1916 after considering the above Bombay case changed the words 'Police report' in section 190 (b) into the words 'report in writing made by a Police Officer' remarking that the term 'police report' in section 190 was not intended to be a technical expression but was used to cover any report made by a police officer. In the light of this amendment and the reason given for the same the words 'report of a police officer' in clause 4 (h) should be interpreted to mean not only the report of the Police officer in a cognizable case but any information of a non cognizable offence which a Police officer may report to a Magistrate. But the Lahore High Court takes a contrary view in *Emp v Ghulam* A I R (1925) Lah 237.

If however a report is made by a Police officer investigating a non cognizable case under the orders of a Magistrate having power to try the case the report falls within the duty of the Police officer and it is a report not a complaint—*Sarfaraz v King Emp* 11 A L J 332. This question presents no difficulty.

(1) 'European British subject' means—

(i) any subject of His Majesty of European descent in the male line born, naturalized or domiciled in the British Islands or any colony, or

(ii) any subject of His Majesty who is the child or grand child of any such person by legitimate descent;

17 Change —This clause has been amended by sec 2 of the Criminal Law Amendment Act VII of 1923 (popularly known as the Racial Distinctions Act) Prior to the present amendment the definition stood as follows — European British subject means (i) any subject of Her Majesty born naturalised or domiciled in the United Kingdom of Great Britain and Ireland or in any of the European American or Australian Colonies or possessions of Her Majesty or in the Colony of New Zealand or in the Colony of the Cape of Good Hope or Natal (ii) any child or grandchild of such person by legitimate descent

The present amendment has narrowed the definition so that the number of persons who will be entitled to the privileges conferred by this Code on European British subjects will now be reduced by reason of the fact that they will only be claimable by persons of *European descent in the male line*—*Statement of Objects and Reasons* para 9 of the Criminal Law Amendment Bill

In order to sustain the plea of a British born subject under clauses (i) and (ii) not only the legitimate descent of the accused but also the nationality of his father or grandfather as the case may be must be proved to the satisfaction of the Court—*Thomas Nash Turnbull* 6 M H C R 7

(j) High Court means in reference to proceedings against European British subjects or persons jointly charged with European British subjects the High Courts of Judicature at Fort William Madras Bombay Allahabad Patna Lahore and Rangoon and the Courts of the Judicial Commissioners of the Central Provinces Oudh and Sindh in other cases 'High Court' means the highest Court of criminal appeal or revision for any local area or where no such Court is established under any law for the time being in force such officer as the Governor General in Council may appoint in this behalf

18 The italicised words in this clause have been added by the Criminal Law Amendment Act (VII of 1923) Before this Amendment the Court of the Judicial Commissioner of Sind could exercise its revisional powers over an European British subject only when the latter waived his privileges under Chapter XXXIII of the Code (*Queen v Grant* 12 Bom 561) otherwise he was under the revisional jurisdiction of the Bombay High Court Under the present law the Judicial Commissioner's Court will

exercise its revisional jurisdiction over an European British subject under all circumstances in the same way as it will over an Indian accused

High Court, Original side—A single Judge sitting on the original side of the High Court is not a High Court within the meaning of this Code—*Kalichinkar v Dinabandhu*, 32 Cal 379

(k) inquiry includes every inquiry other than a trial conducted under this Code by a Magistrate or Court

19 Clause (k)—Inquiry—The word 'inquiry' is meant to include every thing done in a case by a Magistrate, whether the case has been *challanned* or not—*Bhallun Singh v Queen Emp*, 1897 P R 3 A proceeding under Chapter XII is an inquiry—*Lalit Mohun v Suryakanta*, 28 Cal 709=5 C W N 749, *Satish v Rajendra* 22 Cal 898, *Ali Mohamed v Tarak Chandra* 13 C W N 420 An inquiry under the Workman's Breach of Contract Act is an inquiry contemplated by the Code—*Bansi v Lakshmi Dasi*, 45 All 700=21 A L J 619 A "register case" or a preliminary inquiry into an accusation of an offence triable exclusively by the Court of Session is an inquiry and not a trial—*Palaniandy v Emp*, 32 Mad 218

Trial—The word 'trial' is not defined in the Code It means according to Wharton's Law Lexicon, "the examination of a case, civil or criminal before a Judge who has jurisdiction over it, according to the laws of the land"—*In re Ramaswami*, 27 Mad 510 It means the proceeding which commences when the case is called on with the Magistrate on the Bench and the accused on the dock, and the representatives for the prosecution and the accused are present in Court for the hearing of the case—*Gomer Sirda v Q E* 25 Cal 863 It refers only to trials for offences, and not to miscellaneous matters such as those coming within sec 145 of this Code—*Sufferuddin v Ibrahim*, 3 Cal 754 The word 'trial' as used in sec 497 includes appeal—*Madhub Chunder v Novodeep*, 16 Cal 121 A proceeding under section 107 is a trial—*In re Ramaswami*, 27 Mad 510, *Venkata chinnaya v King Emp*, 43 Mad 511 (F B)=21 Cr L J 402

Trial, when begins.—In a case triable exclusively by a Court of Session, the trial begins only after the charge is framed—*Palaniandy v Emp*, 32 Mad 218 So also, in a warrant case, the trial commences when the accused is called upon to plead to a charge, and till a charge has been framed there is no trial but only an inquiry—*Manna v Emp*, 9 N L R 42, *Sreeramulu v Veerasalingam* 38 Mad 585=15 Cr L J 673, *Narayana-swami v Emp*, 32 Mad 220 F. B (at pp 224 and 234), *Haridass v Sarit-ulla* 15 Cal 608 (F B) In a summons case however, as it is not necessary to frame a formal charge, the trial may be said to commence when the accused is brought or appears before the Magistrate,

(4) An order of Government authorising or sanctioning a prosecution under Sec 196 or 197 of this Code—*In re Kalagana Bapiiah*, 27 Mad. 54-

(5) An inquiry by a Magistrate with a view to ascertain whether a sanction to prosecute (now abolished) should be given or not—*Q. E. v. Venkataranianna*, 23 Mad 223

(6) A departmental inquiry under Sec 197 of the Bombay Land Revenue Code (Act V of 1879)—*In re Chotalal* 22 Bom 936

(7) An inquiry by a Deputy Magistrate in pursuance of an order of the District Magistrate calling for inquiry on the report by the Police stating that a complaint lodged with them was false—*Masbat Khan v. Emp.*, 33 Cal 30

(8) Examination by a Police officer under Sec 161 of the Code—*Q E v Ismail*, 11 Bom 659

(9) Proceedings of a District Magistrate under Sec 125 for cancelling a bond for keeping the peace or for good behaviour—*Daya Nath v. Emp.*, 37 Cal 72

(10) An inquiry by a Magistrate on the strength of an information from the secretariat that a seditious pamphlet was published—*Fateh Ali v. Emp.*, 1894 P R 15

(11) A Divisional Magistrate's inquiry under Sec 176 into the cause of death of a person under suspicious circumstances—*In re Trailokha Nath*, 3 Cal 742

(12) Calling for records under Sec 435 of this Code—*In re Sudraya*, 15 M. L. J 489

(13) An inquiry held by a Magistrate not in his magisterial, but in his executive, capacity—*In re Ahadju*, 1886 P R 21

(14) Proceedings conducted by a person not legally authorised or having no jurisdiction—*Radhika Mohan v Lal Mohan*, 20 Cal 719, *Abdul Majid v. Krishna Lal*, 20 Cal 724, *eg.*, an inquiry into the unprofessional conduct of a second grade pleader, conducted not by the presiding officer of the Court in which the pleader practises but by the District Judge—*Nallasivam v. Ramalingam*, 32 M L J 402 * 28 Cr L J. 785.

(15) Where on the death of an employee in the Telegraph Department his heir sent a letter to the Telegraph Authorities demanding payment of money due to the deceased in the hands of the Telegraph Authorities, and they sent the letter to the District Judge for verification and orders, whereupon the District Judge inquired into the claim, held that the reference to the Judge for verification and the subsequent action in regard thereto did not constitute a judicial proceeding—*Emp v. Chaitram*, 6 All, 103.

(n) non cognizable offence means an offence for, and non cognizable case means a case in which a police officer, within or without a presidency town, may not arrest without a warrant

(o) 'offence' means any act or omission made punishable by any law for the time being in force it also includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act, 1871

23 Clause (o)—Offence —This definition is the same as that given in Sec 3 (37) of the General Clauses Act The definition in Sec 40 I P Code is wider and includes acts committed outside British India In the Extradition Act the word has a still wider meaning and is not restricted to offences as defined in Sec 40 I P C or in this Code—*Adams v Emp* 26 Mad 607

Civil wrong —Where an act may be a criminal offence or a mere civil wrong according to the intention of the person doing the Act the aggrieved party should not be encouraged to go into a Criminal Court unless he is fully prepared to prove that the act is criminal and not a mere civil wrong—*Gulzar v Emp*, 1887 P R 50

24 Offences, what are —(1) Breach of a husband's duty (to maintain his wife) declared by the Magistrate's order or a disobedience of such order—*In re Sheikh Fakruddin* 9 Bom 40

(2) Failure to prepare and retain counterfoils of rent receipts as specified in Sec 58 of the Bengal Tenancy Act—*Emp v Mohant Ramdas* C W N 816

(3) Omission to stamp a share warrant under Sec 35 of the India Companies Act—*Q E v Moore* 20 Cal 676

(4) Illegal seizure of cattle mentioned in Sec 20 of the Cattle Trespass Act—*Budhan Mahlo v Issur Singh* 34 Cal 926

(5) Omission by a workman to comply with an order made under clause (1) of Sec 2 of the Workmen's Breach of Contract Act—*King Emp v Takasi Nukayya* 24 Mad 660 *Emp v Dhondy* 33 Bom 22 (24)

25 Offences, what are not —(1) Neglect to maintain wife or children—*Q v Golam Hossain* 7 W R 10 *In re Ponnammal* 16 Mad 234 *Hildephonsus v Malone* 1885 P R 13

(2) A mere breach of the contract under clause (1) of Sec 2 of the Workmen's Breach of Contract Act—*King Emp v Takasi Nukayya* 24 Mad 660 *In re Ram Sarup* 4 C W N 253 *Averam Das v Abdu Rahim* 27 Cal 131 *Pollard v Mothulal* 4 Mad 234 *Emp v Dhondy* 33 Bom 22 (24) The breach of the contract does not of itself constitute

any offence but upon such breach the Magistrate passes an order for payment of the advance or for performance of the contract, and it is only when the order is disobeyed that there is an 'offence' within the meaning of the Cr P Code—33 Bom 22 (24)

(3) Inability to give a satisfactory account of oneself or want of ostensible means of livelihood (sec 109)—*Emp v Buddhu* 3 N L R 51

(4) The mere travelling in a train without pass or ticket is not an offence under the Railways Act unless there is a dishonest intention to defraud the Railway Company—*Q E v Rampal* 20 All 95 *Kuloda v Emp* 11 C W N 100

(5) The mere use of a house as a brothel—*Emp v Khairi* 6 S L R 254 14 Cr L J 320

(6) Keeping a disorderly house is not an offence under the Eastern Bengal Disorderly Houses Act—*Rajani Akemlawah v Pramatha*, 37 Cal 287

(7) An application to take proceedings under sec 107 is not an accusation for an offence—*Hazarimal v Memanmal* 1893 P R 16, *Q E v Imam Mandal* 27 Cal 662 *Chathu v Niranyan* 20 Cal 729 See notes under sec 107

(8) Gambling in a boat hired by the accused or in a compartment in a train is not an offence under Bombay Act IV of 1887—*Emp v Waha* 29 Bom 226, *Emp v Budhoobai*, 30 Bom 126

(p) "officer in charge of a police station" includes when the officer in charge of the police-station is absent from the station house or unable from illness or other cause to perform his duties the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the Local Government so directs, any other police officer so present

26 Clause (p) —This clause is not applicable to the Police of Calcutta—*Emp v Madho Dhobi* 31 Cal 557

The words present at the station house do not mean physically present at the station house therefore if a person is deputed to be in charge of a police station in the absence of the permanent incumbent the fact that he was doing duty within the limits of the jurisdiction of the Police Station but outside the station house does not deprive him of his capacity as Station House officer—*Assan Alliar v Maslamani* 42 Mad 446 36 M L J 252 20 Cr L J 42

If the Sub Inspector in charge of the thana is ill the writer Head Constable who is the officer next in seniority to him can act in his place

Thus where the Magistrate sent a cognizable case to the Police for investigation and report and the Sub Inspector was ill that day it was the duty of the writer Head Constable who was in charge of the Police station on that day to investigate the case although he was not generally empowered to make investigation into cognizable cases—*K E v Bhole Bhagat* 2 Pat 379 (354) 4 P 1 T 521 24 Cr L J 375

Constable —By a judicial notification no 3 dated 31 1 1883 the senior constable present at any police station shall be deemed to be the officer in charge for the time being during the absence of the officer in charge—*Pub Pros v Kuppa Lalundan* 9 M L T 414 12 Cr L J 190

(g) 'place' includes also a house building tent and vessel

(r) 'pleader' used with reference to any proceeding in any Court, means a pleader or a *mukhtar* authorized under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil, and an attorney of a High Court so authorized and (2) any other person appointed with the permission of the Court to act in such proceeding

27 Clause (r) —Charge in the law —The definition of pleader has been amended by the Criminal Procedure Code Further Amendment Act (XXXV of 1923) The old definition ran as follows — pleader used with reference to any proceeding in any Court means a pleader authorized under any law for the time being in force to practise in such Court and includes (1) an advocate a vakil and an attorney of a High Court so authorised and (2) any mukhtar or other person appointed with the permission of the Court to act in such proceeding Thus under the old law a *mukhtar* fell under the second item of the definition of the word pleader, that is a mukhtar was not entitled *as of right* to practise in Criminal Courts but it was necessary for him to obtain *permission of the Court* in each case before he was authorised to practise before Magistrates and Sessions Judges (*In re Arant Ram* 30 All 66 *Ishan Chandra v Erip* 38 Cal 488) through such permission was usually and naturally granted The mukhtars were placed in the same category as other persons i.e. ordinary persons without any training or license For this reason the mukhtars had a sentimental grievance and it was desirable that it should be removed (see the Report of the Select Committee on Bill 6 of 192) In the *Gazette of India* 1923, Part V pages 129—131) Accordingly the definition has been amended by the Amendment Act (XXXV of 1923) This amendment has done away with the necessity of obtaining the permission of the Court and gives a legal status to mukhtars

'Practise' —The word practise does not connote the doing of acts

habitually or often but signifies the performance of even a single act by a person as a professional man which as a private individual he could not do—*Emp v Beni Bahadur* 26 All 380

A petition writer who attends Court all day cannot be said to practise—*Shib Churn v Ishan Chunder* 18 W R 27 Only persons entitled to appear plead or act in Court can be said to practise—*Tassaduq v Girhar* 14 Cal 556 (565)

Mukhtar—The word refers to such Mukhtars as have obtained a certificate of qualification from the High Court—*In re Anant Ram* 30 All 66

License for one district—A pleader who holds a license to practise in a particular district is not entitled as a matter of right to practise in a Criminal Court of another district unless he is permitted to practise in the latter Court—*Amratra v Crown* 4 S L R 207 It is the duty of a pleader who appears in a Criminal Court of a district to which his *saad* does not apply to inform the Magistrate that he cannot appear as of right and to apply for a permission under this clause—*Re Clement* 7 S L R 98

Other person—The words other person embrace pure outsiders as well as duly qualified and enrolled mukhtars who have failed to take out their certificates—*Tassaduq v Girhar* 14 Cal 556

(s) police station means any post or place declared generally or specially by the Local Government to be a police-station and includes any local area specified by the Local Government in this behalf

(t) Public Prosecutor means any person appointed under section 492 and includes any person acting under the directions of a Public Prosecutor and any person conducting a prosecution on behalf of His Majesty in any High Court in the exercise of its original criminal jurisdiction

28 Clause (t)—*Public Prosecutor*—The appointment of a Magistrate who had in the first instance tried the accused as a Public Prosecutor to conduct an inquiry subsequently directed in the case is a most improper proceeding—*Reg v Hashinath* 8 B H C R 126

The complainant may appoint a pleader and the Public Prosecutor may avail himself of his services and the prosecutor does not thereby deprive himself of the management of the case—*In re Narayan* 11 B H C R 102

As to who may be appointed a Public Prosecutor see sections 492 and 495

- (u) sub-division means a sub division of a district
 () summons case means a case relating to an offence, and not being a warrant case and
 (r) warrant case means a case relating to an offence punishable with death transportation or imprisonment for a term exceeding six months

29 Clause (w) —The term Sessions Case has not been defined here This term does not necessarily mean cases triable exclusively by the Court of Session but includes all cases which a Magistrate has committed to a Court of Session although he might have tried them himself—*Reg v Gulabdas* 11 B H C R 98

Words referring to acts (2) Words which refer to acts done extend also to illegal omissions and

all words and expressions used herein and defined in the Indian Penal Code and not hereinbefore defined shall be deemed to have the meanings respectively attributed to them by that Code

30 Thus the words force and criminal force used in sec 522 must be interpreted according to the definition given in sections 349 and 350 of the Indian Penal Code—*Dalram v Chamru* 2 P L T 120 *Churaian v Ramlal* 25 All 341 *Hari Chand v Emp* 1919 P R 16 *Ishan Chandra v Dena Nath* 27 Cal 174

But the principle of this clause does not always hold good for instance the term adultery in section 488 of this Code should not be construed with reference to the definition given in the Indian Penal Code Adultery on the part of the husband may not justify a conviction under section 497 I P C but it may be sufficient for the purpose of sec 488 of this Code to entitle the wife to claim separate maintenance—*Gandapalli v Gandapalli* 20 Mad 470 (F B)

5 (1) All offences under the Indian Penal Code shall be investigated inquired into tried and other wise dealt with according to the provisions hereinafter contained

(2) All offences under any other law shall be investigated inquired into tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating

the manner or place of investigating inquiring into trying or otherwise dealing with such offences

31 Power of High Court to punish for contempt —The power to punish for contempt vested in the High Court by the Common Law of England is not affected by the provisions of this Code. A contempt of the High Court by a libel published out of Court when the Court is not sitting is not included in the words offences under the Indian Penal Code or offences under any other law in Sec 5 of the Cr P Code though the contempt may include defamation. It is something more than mere defamation and is of a different character which the High Court can deal with by virtue of its superior powers—*Surendra Nath Banerjee v Chief Justice* 10 Cal 109 (P C)

32 Clause (2) —Where a special law (e.g. the Bombay Prevention of Gambling Act IV of 1887) has provided a special procedure for the manner or place of investigating or inquiring into any offence under it its provisions must prevail and no provisions of the Criminal Procedure Code can apply. Where however the special Act is silent the Cr P C would be applicable—*Emp v Haitan* 31 Bom 438

Thus the Gambling Act III of 1867 sec 5 prescribes a special procedure for searches under that Act and the provisions of Chapter VII of this Code shall not apply thereto—*Khulinda Ram v Emp* 3 Lah 359 23 Cr L J 621. So also under the Madras Abkari Act (I of 1886) an accused person has the right to a special procedure regulating the course of investigation and providing for a much more elaborate inquiry than is provided for in the Cr P Code and if a Magistrate takes cognizance of an offence under the Madras Abkari Act under the provisions of this Code the proceedings are not properly instituted—*In re Kuppusamy*, 44 M L J 231 24 Cr L J 335

Where the special law prescribes no special procedure the procedure of the Cr P Code must be followed. So an offence under sec 20 of the Calcutta Rent Act must be summarily inquired into under the provisions of Ch XXII of this Code—*Ishan Chandra v Mammatha* 37 C L J 298 A I R (1923) Cal 339. The Cr P Code is applicable to trials before a Magistrate of offences under the Bengal Excise Act—*Upendra v Emp* 41 Cal 691 (702) 18 C W N 486

A simultaneous conviction under the Indian Penal Code as well as under a special law for the same offence is illegal—*Queen v Hussain Ali* 5 N. W P H C R 49

33 Enactment —A rule framed under any Act (e.g. Calcutta Rent Act) is not an enactment within the meaning of clause (2) of this section—*Gobardhan Das v Doolie Chand* 25 C W N 661 22 Cr L J 354.

PART II.

CONSTITUTION AND POWERS OF CRIMINAL COURTS AND OFFICES.



CHAPTER II.

OF THE CONSTITUTION OF CRIMINAL COURTS AND OFFICES

A --Classes of Criminal Courts.

6. Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in British India, namely—

I—Courts of Session :

II—Presidency Magistrates :

III.—Magistrates of the first class :

IV.—Magistrates of the second class .

V.—Magistrates of the third class.

34 Magistrate—Court —A Magistrate as such is not a Court unless he is acting in a judicial capacity—*Clarke v Brojendra Kishore*, 36 Cal 433

The Court of a Police Patel is not a Criminal Court within the enumeration contained in this section—*Q E v Ramia Ratanlal* 317

35 Presidency Magistrate —The term "Presidency Magistrate" could not be ordinarily included in the words "District Magistrate" or "Magistrate of the first class" because secs 10 and 12 of the Code show that the District Magistrates and Magistrates of the first class are appointed only in districts outside the Presidency towns—*Emp v Chota Singh*, 32 Mad 303 But the term "Magistrate of the first class" used in sec 111 of the Immigration Act (XX of 1883) means a Magistrate appointed to exercise the highest magisterial powers and includes a Presidency Magistrate—*Emp v Jeevanji*, 31 Bom 611 *Emp v Haji Shaik Mahomed*, 32 Bom 10

District Magistrate —The Code does not recognise any Court other than the 5 classes mentioned in this section. A District Magistrate's Court is for the purposes of an ordinary criminal trial the Court of a Magistrate of the first class—*Esp v Syed Sajjad* 3 A L J 85 4 Cr L J 140

The terms Deputy Magistrate General Deputy Magistrate are unknown to this Code and should not be used—*P P v Sadananda* 23 M L J 670 13 Cr L J 850

B—Territorial Division

7 (1) Every province (excluding the presidency town) shall be a sessions division or shall consist of sessions divisions and every sessions division shall for the purposes of this Code be a district or consist of districts

(2) The Local Government may alter the limits or * * * the number of such divisions and districts

(3) The sessions divisions and districts existing when this Code comes into force shall be sessions divisions and districts respectively unless and until they are so altered

(4) Every presidency town shall for the purposes of this Code be deemed to be a district

The words with the previous sanction of the Governor General in Council which occurred in sub section (2) have been omitted by the Devolution Act XXXVIII of 1920

36 Local Government may alter etc —This section assumes the existence of Sessions Divisions in every part of British India but it does not contemplate the *creation* of such divisions by the Local Governments which can only alter the limits or number of such divisions under sub section (2) of this section—*Q E v Mangal Tehchand* 10 Bom 274

37 Sessions Division —*Instances* —*Cachar* is a Sessions Division of Assam (see Assam Gazette 1874, page 3) *Darjeeling* is included with in the Purnea Division. The District and Town of Rangoon are two Sessions Divisions for the purposes of this Code (see Gazette of India

1874, p. 62) The Ganjam Collectorate consists of two Sessions Divisions, one consisting of the Agency District and the other of the Non agency Tracts—3 M L J 670=13 Cr L J 850 The Districts of North and South Malabar are two Sessions Divisions in the Malabar District—*Valia Amalu v Emp* 30 Mad 136

8 (1) The Local Government may divide any district outside the presidency towns into sub divisions or districts into sub divisions make any portion of any such district a sub-division and may alter the limits of any sub division

(2) All existing sub divisions which are now usually put under the charge of a Magistrate shall be deemed to have been made under this Code

(Courts and Offices outside the presidency towns)

9 (1) The Local Government shall establish a Court of Session for every sessions division and appoint a Judge of such Court

() The Local Government may by general or special order in the Official Gazette direct at what place or places the Court of Session shall hold its sitting but until such order be made the Courts of Session shall hold their sittings as heretofore

() The Local Government may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts

(4) A Sessions Judge of one sessions division may be appointed by the Local Government to be also an Additional Sessions Judge of another division and in such case he may sit for the disposal of cases at such place or places in either division as the Local Government may direct

(5) All Courts of Session existing when this Code comes into force shall be deemed to have been established under this Act

38 The High Court exercising original criminal jurisdiction is not a Court of Session within the meaning of this Code A Court of Session is established in the mofussil in every Sessions Division and belongs to a class of Courts different from the High Courts—*Eril v Havendra* 31 Cal 980 (1902) 29 C W N 384

District Magistrate —The Code does not recognise any Court other than the 5 classes mentioned in this section. A District Magistrate's Court is for the purposes of an ordinary criminal trial the Court of a Magistrate of the first class—*Emp v Syed Sajjad* 3 A L J 825 4 Cr L J 140

The terms Deputy Magistrate General Deputy Magistrate are unknown to this Code and should not be used—*P P v Sadananda* 13 M L J 670 13 Cr L J 850

B—Territorial Divisions

7 (1) Every province (excluding the presidency town) shall be a sessions division or shall consist of sessions divisions and every sessions division shall for the purposes of this Code be a district or consist of districts

(2) The Local Government may alter the limits or * * * the number of such divisions and districts

(3) The sessions divisions and districts existing when this Code comes into force shall be sessions divisions and districts respectively unless and until they are so altered

(4) Every presidency town shall for the purposes of this Code be deemed to be a district

The words with the previous sanction of the Governor General in Council which occurred in sub section (2) have been omitted by the Devolution Act XXXIII of 1920

36 Local Government may alter etc —This section assumes the existence of Sessions Divisions in every part of British India but it does not contemplate the creation of such divisions by the Local Governments which can only alter the limits or number of such divisions under sub section (2) of this section—*Q E v Mangal Tekchand* 10 Bom 274

37 Sessions Division —Instances —*Cachar* is a Sessions Division of Assam (see Assam Gazette 1874, page 3) *Darjeeling* is included within the Purnea Division The District and Town of Rangoon are two Sessions Divisions for the purposes of this Code (see Gazette of India

1874, p. 62) The Ganjam Collectorate consists of two Sessions Divisions, one consisting of the Agency District and the other of the Non agency Tracts—3 M. L. J. 670=13 Cr. L. J. 850 The Districts of North and South Malabar are two Sessions Divisions in the Malabar District—*Valia Amalu v. Emp* 30 Mad. 136

8. (1) The Local Government may divide any district outside the presidency towns into sub divisions, or make any portion of any such district a sub-division and may alter the limits of any sub-division

Power to divide districts into sub-divisions

(2) All existing sub-divisions which are now usually put under the charge of a Magistrate shall be deemed to have been made under this Code.

Existing sub-divisions maintained

C—Courts and Offices outside the presidency towns

9. (1) The Local Government shall establish a Court of Session for every sessions division and appoint a Judge of such Court

(2) The Local Government may by general or special order in the Official Gazette direct at what place or places the Court of Session shall hold its sitting but until such order be made the Courts of Session shall hold their sittings as heretofore

(3) The Local Government may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts.

(4) A Sessions Judge of one sessions division may be appointed by the Local Government to be also an Additional Sessions Judge of another division and in such case he may sit for the disposal of cases at such place or places in either division as the Local Government may direct

(5) All Courts of Session existing when this Code comes into force shall be deemed to have been established under this Act

38 The High Court exercising original criminal jurisdiction is not a Court of Session within the meaning of this Code. A Court of Session is established in the mofussil in every Sessions Division and belongs to a class of Courts different from the High Courts—*Emp v. Havendra* 51 Cal. 980 (1982) 29 C. W. N. 384

The Additional Sessions Judge will try such cases as would be made over to him by the Sessions Judge. But that does not oust the jurisdiction of the Sessions Judge over those cases, therefore if a Sessions Judge makes over a particular appeal to the Additional Sessions Judge to be tried by the latter, he can afterwards withdraw the case from the latter, and take it on his own file and decide it—*Birju Marwari v Emp*, 44 All 157 19 A L J 952 23 Cr L J 107

Under Sec 20 of the Aden Courts Act (Bom Act II of 1864), the *Resident of Aden* is not a Court of Session, but is a *persona designata* invested with the powers of a Court of Session except as in that Act otherwise provided. The powers of the Court of Session conferred on the Resident are not wholly such as are defined in the Cr P Code but only such as are specially provided in Act II of 1864—*Emp v Robert Comley*, 29 Bom 575

10. (1) In every district outside the presidency towns, the Local Government shall appoint a *District Magistrate*. Magistrate of the first class who shall be called the District Magistrate

(2) The Local Government may appoint any Magistrate of the first class to be an Additional District Magistrate * * * and such Additional District Magistrate shall have all or any of the powers of a District Magistrate under this Code or under any other law for the time being in force as the Local Government may direct

(3) For the purposes of sections 192 sub-section (1), 407 sub-section (2), and 528 sub-sections (2) and (3), such Additional District Magistrate shall be deemed to be subordinate to the District Magistrate

39. Change.—In sub-section (2), the italicised words have been added, and the words "for a period not exceeding six months" occurring after the words "an Additional District Magistrate" have been omitted, by the Criminal Procedure Code Amendment Act (XVIII of 1923)

Sub-section (3) has also been newly added by the same Amendment Act. Prior to this amendment the Code did not define the relation between a District Magistrate and an Additional District Magistrate. Section 12 also did not make an Additional District Magistrate subordinate to a District Magistrate and therefore the latter had no power under

section 525 to transfer a case from a Sub-divisional Magistrate to the Additional District Magistrate—*Prakas Chunder v Erip* 34 Cal 918 This case is no longer good law because under sub section (3) really enacted the District Magistrate has been expressly empowered to transfer cases under sec 525 to the Additional District Magistrate

40 District Magistrate —A District Magistrate is appointed in a district outside the Presidency towns Therefore a Presidency Magistrate is not included in the term District Magistrate—*Emp v Chola Singh* 32 Mad 303

The term Zillah Magistrate used in the Bombay Regulations means a District Magistrate 3 B H C R 11 7 B H C R 59 A Deputy Commissioner in a Regulation Province is a District Magistrate—16 W R 1

A District Magistrate is subordinate to the Sessions Judge and cannot disregard the order of the latter—5 L B R 49

District Magistrate and 1st class Magistrate —Where a trial was commenced by an officiating District Magistrate and before its close the officer reverted to his original position as First class Magistrate of the district in which capacity also he had jurisdiction over the offence it was held that he had jurisdiction to continue the trial This Code does not recognise any particular Court as that of the District Magistrate but only Courts of First Second and Third Class Magistrates—*Emp v Syed Sajjad Husain* 3 A L J 825

11. Whenever in consequence of the office of District Magistrate becoming vacant, any officer temporarily succeeding to vacancies in office of District Magistrate succeeds temporarily to the chief executive administration of the district, such officer shall, pending the order of the Local Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate

40A An officer absent on casual leave is not treated as absent from duty While such officer is on casual leave the next senior officer remains in charge of the current duties There is no vacancy and no temporary succession within the meaning of this section when a Sub divisional Magistrate is temporarily looking after the current duties of a District Magistrate absent on casual leave on account of illness and when there is no order appointing him to officiate as District Magistrate—*A E v Achhaibar*, 24 O C 255 22 Cr L J 713

12 (1) The Local Government may appoint as many persons as it thinks fit, besides the District Magistrate to be Magistrates of the first, second or third class in any district outside the presidency towns and the Local Government or the District Magistrate subject to the control of the Local Government may from time to time define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under this Code

(2) Except as otherwise provided by such definition, the jurisdiction and powers of such persons shall extend throughout such district

41 Magistrate —A cantonment Magistrate is a Magistrate appointed under this section—*Q E v Maula Baksh* 1897 P R 1

42 Local area —Although the expression local area includes a sessions division district or subdivision (*Funardeo v Ram Sarup* 25 Cal 858) still it appears sufficiently clear that the Legislature did not contemplate the exercise of jurisdiction by any Magistrate outside the limits of an area called a District in which he might be appointed by the Local Government—*In re Shakh Fakruddin* 9 Bom 40 A Sub divisional Magistrate who has had his jurisdiction defined within a sub-division or local area in the district by order of the District Magistrate cannot take cognizance of a matter outside such local area—*Kunj Belari v Lanna* 19 A L J 77=72 Cr L J 122 But where a notification appointing a Magistrate did not specify any local area within which he was to exercise jurisdiction but conferred on him power to try all such cases as might be instituted in his Court it was held that the notification by necessary implication conferred jurisdiction throughout the province—*Lakshmi Chand v Emp* 1901 P R 24

But a Magistrate having jurisdiction within a district cannot record a confession in a place outside British India (e g in a Native State) although the offence in respect of which the confession is made has been committed within that district—*Nahar Singh v Emp* 19 A L J 355=77 Cr L J 567

43 Jurisdiction throughout district —Unless the powers of a Magistrate have been restricted to a certain local area he has jurisdiction over the entire district—*Sarat Chandra v Bipin* 29 Cal 389 *Hiranand v King Emp*, 10 C W N 1095 at page 1098 *Emp v Achhatbar Singh*,

24 O C 255 therefore a Magistrate appointed for a whole district but put in charge of a particular taluk or subdivision only is not without jurisdiction if he enquires into or tries a case in another taluk or subdivision of the same district—*Q E v Jamshedji Ratanlal* 177 *Rameshwar v Emp* 1 P L T 632 21 Cr L J 321 *Q E v Laban*, U B R. (1892—96) 16

A Magistrate in the division whose powers have not been formally limited to any particular portion of the division has jurisdiction to try an offence committed within the division although beyond the local limits of what was regarded as his jurisdiction—2 Weir 13

44 Effect of transfer —Since the jurisdiction of a Magistrate extends throughout the district it follows that the transfer of a Magistrate from one local area to another local area in the same district does not oust his jurisdiction over the former area—*Karuppana v Akobalamalai* 22 Mad 47 Cases on the file of one Magistrate in a district do not automatically pass to his successor in the local area merely because the former has been transferred to another local area in the same district The former Magistrate can retain the case on his file ever after he is transferred to another local area in the district and can pass order in the case—*Mitham v King Emp* 34 All 203

But when a Magistrate is transferred to another district his jurisdiction over the district in which he was originally appointed ceases as soon as he is relieved by his successor and therefore a judgment passed after though on the same day as he was relieved by his successor was held to be without jurisdiction—*Emp v Anand Sarup*, 3 All 563 *Baluant v Krishen* 19 All 114, *Emp v Dhondu* 15 C P L R 15 *Baishnab Charan v Amin Ali* 50 Cal 664=38 C L J 202=24 Cr L J 489

13. (1) The Local Government may place any Magistrate of the first or second class in charge of a sub division and relieve him of the charge as occasion requires.

Power to put Magistrate in charge of sub division

(2) Such Magistrates shall be called Sub divisional Magistrates

(3) The Local Government may delegate its powers under this section to the District Magistrate.

Delegation of powers to District Magistrate

14. (1) The Local Government may confer upon any person all or any of the powers conferred or conferrable by or under this Code on a Magis

Special Magistrate

12 (1) The Local Government may appoint as many persons as it thinks fit, besides the District Magistrate, to be Magistrates of the first, second or third class in any district outside the presidency towns, and the Local Government, or the District Magistrate subject to the control of the Local Government may, from time to time, define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under this Code

(2) Except as otherwise provided by such definition, the jurisdiction and powers of such persons shall extend throughout such district

41. Magistrate —A cantonment Magistrate is a Magistrate appointed under this section—*Q E v Maula Baksh*, 1897 P R. 1.

42. Local area —Although the expression "local area" includes a sessions division, district or subdivision (*Punardeo v Ram Sarup*, 25 Cal 858), still it appears sufficiently clear that the Legislature did not contemplate the exercise of jurisdiction by any Magistrate outside the limits of an area called a 'District' in which he might be appointed by the Local Government—*In re Shah Fakruddin*, 9 Bom 40. A Sub divisional Magistrate who has had his jurisdiction defined within a sub division or local area in the district by order of the District Magistrate cannot take cognizance of a matter outside such local area—*Kunj Behari v Lanna*, 19 A. L. J. 77=22 Cr L J. 122 But where a notification, appointing a Magistrate, did not specify any local area within which he was to exercise jurisdiction, but conferred on him power to try 'all such cases as might be instituted in his Court,' it was held that the notification by necessary implication conferred jurisdiction throughout the province—*Lakshmi Chand v. Emp*, 1901 P R. 24

But a Magistrate having jurisdiction within a district cannot record a confession in a place outside British India (e.g. in a Native State) although the offence in respect of which the confession is made has been committed within that district—*Nahar Singh v Emp*, 19 A. L. J. 355=22 Cr L J. 567.

43. Jurisdiction throughout district.—Unless the powers of a Magistrate have been restricted to a certain local area, he has jurisdiction over the entire district—*Sarat Chandra v. Bipin*, 29 Cal 389, *Hiranand v. King Emp*, 10 C. W. N. 1095 at page 1098; *Emp. v. Achharbar Singh*,

40 O C 155 therefore a Magistrate appointed for a whole district but put in charge of a particular taluk or subdivision only is not without jurisdiction if he enquires into or tries a case in another taluk or subdivision of the same district—*Q E v Jamshedji Ratindji* 177 *Rameshwar v Emp* 11 L T 63 1 Cr I J 311 *Q E v Laban U B R.* (189—96) 16

A Magistrate in the division whose powers have not been formally limited to any particular portion of the division has jurisdiction to try an offence committed within the division although beyond the local limits of what was regarded as his jurisdiction—2 Weir 13

44 Effect of transfer.—Since the jurisdiction of a Magistrate extends throughout the district it follows that the transfer of a Magistrate from one local area to another local area in the same district does not oust his jurisdiction over the former area—*Karuppana v Ahobalamatam* 22 Mad 47 Cases on the file of one Magistrate in a district do not automatically pass to his successor in the local area merely because the former has been transferred to another local area in the same district The former Magistrate can retain the case on his file ever after he is transferred to another local area in the district and can pass order in the case—*Mithani v King Emp* 34 All 203

But when a Magistrate is transferred to another district his jurisdiction over the district in which he was originally appointed ceases as soon as he is relieved by his successor and therefore a judgment passed after though on the same day as he was relieved by his successor was held to be without jurisdiction—*Emp v Anand Sarup* 3 All 563 *Balwant v Kristen* 19 All 114 *Emp v Dhondu* 15 C P L R 15 *Baisnab Charan v Amin Ali* 50 Cal 664=38 C L J 202=24 Cr L J 489

13 (1) The Local Government may place any Magistrate of the first or second class in charge of a sub-division and relieve him of the charge as occasion requires

Power to put Magistrate in charge of sub-division

(2) Such Magistrates shall be called Sub-divisional Magistrates

(3) The Local Government may delegate its powers under this section to the District Magistrate

Delegation of powers to District Magistrate

14 (1) The Local Government may confer upon any person all or any of the powers conferred or conferrable by or under this Code on a Magistrate

Special Magistrate

trate of the first, second, or third class in respect to particular cases or to a particular class or particular classes of cases, or in regard to cases generally, in any local area outside the presidency towns

(2) Such Magistrates shall be called Special Magistrates, and shall be appointed for such term as the Local Government may by general or special order direct

(3) * * * The Local Government may delegate, with such limitations as it thinks fit, to any officer under its control, the power conferred by sub-section (1)

(4) No powers shall be conferred under this section on any police officer below the grade of Assistant District Superintendent, and no powers shall be conferred on a police officer except so far as may be necessary for preserving the peace, preventing crime, and detecting, apprehending, and detaining offenders in order to their being brought before a Magistrate, and for the performance by the officer of any other duties imposed upon him by any law for the time being in force

The words 'with the previous sanction of the Governor-General in Council' which occurred at the beginning of sub-section (3) have been omitted by the Devolution Act XXXVIII of 1920

45. "Any local area" —The words 'any local area' can be extended to cover, if necessary, a whole province, therefore, where the Local Government, by a Notification, appointed a special Magistrate under this section with all the powers of a first class Magistrate in regard to cases generally 'throughout the Panjab,' it was held that the appointment was not *ultra vires*—*Hiralal v. Crown*, 1918 P. R. 7 19 Cr. L. J. 310, 1901 P. R. 24

It is essential that a Special Magistrate should be appointed for a local area. The connotation of a Special Magistrate under this Code is that he should have (1) specified powers conferrable on a Magistrate by the Local Government; (2) a local area within which to exercise those powers; and (3) jurisdiction to try particular cases or classes of cases generally. Each of the above ingredient enters into the conception of a Special Magistrate as defined in this section, but the last is a variable element and does not necessarily require specific mention. If nothing is said about the cases to be tried, it will be understood that all cases triable by law by a Magistrate invested with the powers of a Special Magistrate may

be tried by him. But the powers and the local area must be defined—*Lakshmi Chind v. Emp*, 1901 P. R. 24

Appeal—Appeals from the orders of a Special Magistrate would lie to the Sessions Judge within the local limits of whose jurisdiction the Magistrate was in any particular case holding his Court—1918 P. R. 7
10 Cr. L. J. 310

15. (1) The Local Government may direct any two or more Magistrates in any place outside the presidency-towns to sit together as a Bench and may by order invest such Bench with any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second, or third class, and direct it to exercise such powers in such cases or such classes of cases only, and within such local limits, as the Local Government thinks fit

(2) Except as otherwise provided by any order under this section, every such Bench shall have the powers conferred by this Code on a Magistrate of the highest class to which any one of its members, who is present taking part in the proceedings as a member of the Bench, belongs, and, as far as practicable, shall, for the purposes of this Code, be deemed to be a Magistrate of such class

Powers exercisable
by Bench in absence
of special direction

See notes under sec. 350A

46 Powers of a Bench—Where a case triable by a first class Magistrate was at first tried by a Bench of Magistrates which could exercise first class powers when sitting together but neither of whom was individually invested with first class powers and at the adjourned hearing only one member of the Bench was present it was held that he was not competent to try the case alone—*In re Baroda Prosunna*, 2 C. L. R. 348. An Honorary Magistrate who is a member of a Bench which exercises powers of third class collectively cannot act independently (that is, when not sitting on the Bench), unless he is authorised to act independently—*Emp v. Nuri Sheik*, 29 Cal. 483

Where there was a rule framed under this section that only such cases as could be tried summarily should be transferred to the Bench and in spite of this rule a case not triable summarily but within the competency of the Bench was transferred to it, and the Bench tried the case

in the regular way, it was held that this contravention of the rule in transferring a case which the Bench could not try summarily came within sec 526 (f) and the trial by the Bench was valid—(1910) U, B, R, (Cr, P, C) 70

16. The Local Government may, or subject to the control of the Local Government, the District Magistrate may, from time to time, make rules for guidance of Benches. rules consistent with this Code, for the guidance of Magistrates' Benches in any district respecting the following subjects —

- (a) the classes of cases to be tried ,
- (b) the times and places of sitting ,
- (c) the constitution of the Bench for conducting trials ,
- (d) the mode of settling differences of opinion which may arise between the Magistrates in session

47. "Consistent with this Code —The rules framed under this section must be consistent with this Code The Judges have recently had occasion to call for and examine the rules made in each district and they noticed that in several districts District Magistrates have exceeded the powers conferred upon them by sec 16 either by making rules inconsistent with the Code itself, or by adding rules on the subject not mentioned in the section in question and so not within the powers conferred by it Care should, therefore be taken to limit action under the section to the powers conferred by it"—*Punj Cir, No. 13 2612 G, of 1890*

48 Classes of cases to be tried —Magistrates should ordinarily not make over cases to Benches which are likely to be of a protracted character—*Q. v Bholanath 2 Cal 23* So also cases involving difficult questions of fact or law should not be directed to be tried by a Bench of Honorary Magistrates—*Public Prosecutor v Varadarajulu, 47 Mad 716 (722) 47 M L J 470 25 Cr I J 1070*

49 Differences of opinion —According to the new rule (vide *Cal Gaz 1906, Part I, p 980*) framed in Bengal, in case of difference of opinion as to the finding between an even number of Magistrates the case shall be referred back to the District Magistrate or the Sub divisional Officer , and the provisions of section 350 shall then apply—*Chand v Shamsher, 19 Cr L. J 312 (Cal)*. But in Eastern Bengal and Assam, the old Notification under which the difference of opinion between two Honorary Magistrates forming a Bench is to be settled by the casting vote of one of them, viz, the Chairman, is still in force See *Uifal v K E, 18 C W. N. 394 14 Cr L J. 684*

According to the U P. rules If there is an irreconcilable difference of opinion among the members of a Bench as to the guilt of the accused, he

should be given the benefit of doubt. The Bench cannot refer the case to a District Magistrate such a reference is irregular and is not justified by any provisions of the Code—*Kashinath v Shanker* 16 Cr L J 113 (All) *Abdul Aziz v Emp* 15 A L J 237

17 (1) All Magistrates appointed under sections 12, 13 and 14 and all Benches constituted under section 15 shall be subordinate to the District Magistrate and he may, from time to time make rules or give special orders consistent with this Code as to the distribution of business among such Magistrates and Benches, and

(2) Every Magistrate (other than a Sub-divisional Magistrate) and every Bench exercising powers in a sub-division shall also be subordinate to the Sub-divisional Magistrate, subject, however, to the general control of the District Magistrate

(3) All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction, and he may from time to time, make rules consistent with this Code as to the distribution of business among such Assistant Sessions Judges

(4) The Sessions Judge may also, when he himself is unavoidably absent or incapable of acting, make provision for the disposal of any urgent application by an Additional or Assistant Sessions Judge or, if there be no Additional or Assistant Judge by the District Magistrate, and such Judge or Magistrate shall have jurisdiction to deal with any such application

(5) Neither the District Magistrate nor the Magistrates or Benches appointed or constituted under sections 12, 13 14 and 15 shall be subordinate to the Sessions Judge except to the extent and in the manner hereinafter expressly provided.

50 Subordinate —'Subordinate' means inferior in rank within the meaning of sec 435—*Q E. v Pirya Gopal*, 9 Bom 100 *In re Padmanabha* 8 Mad 18 *Opendra v. Dukhni* 12 Cal 473 All

and Courts made subordinate to the District Magistrate are inferior Criminal Courts in respect of him within the meaning of sec 435—*Shamsuddin v Pir Ala* 1885 P R 38 A Cantonment Magistrate is subordinate to the District Magistrate—See sec 7 Cantonments Act XIII of 1889 A Magistrate who is subordinate to a Sub divisional Magistrate is also subordinate to the District Magistrate—*Thaman Chetti v Alagiri* 14 Mad 399 A covenanted Magistrate of the third class to whom a case is made over by the Sub divisional Magistrate is subordinate to the Sub divisional Magistrate—*Emp v Kallu* 4 All 366

The Court of a subordinate Magistrate in the district is subordinate to that of the District Magistrate both in its judicial as well as executive capacity—*In re Gur Dayal* 2 A I 205 (F B) and the District Magistrate has power to call for and examine the record of a proceeding before a Sub divisional Magistrate of the first class—*Q E v Laskari* 7 All 853 (F B)

51 Clause (g)—Magistrates not subordinate to the Sessions Judge — Neither the District Magistrate nor the other Magistrates are subordinate to the Sessions Judge except in so far as is expressly provided in the Code (see secs 123 103 105 408 431 436 437) therefore an order of the District and Sessions Judge declaring certain persons to be toutis and prohibiting them to appear within the precincts of the Courts is limited only to his own Court and the Civil Courts subordinate to him but does not extend to the Courts of Magistrates—6 Mad 596 So also, where a Sub-divisional Magistrate (acting as an executive officer and not as a Court) revoked a sanction granted by a Sub-Magistrate the Sessions Judge had no jurisdiction to interfere with that order—2 Weir 19, *Sankaram v Santharappa* 2 Weir 155

52 Delegation of power by District Magistrate — Clause (2) of sec 17 empowers only a District Magistrate to make rules or pass orders as to the distribution of work Such power cannot be delegated by a District Magistrate to a Sub-divisional Magistrate or to a senior Honorary Magistrate—*Balkisen v Sipahsai* 36 All 468 15 Cr L J 584 12 A L J 503

D—Courts of Presidency Magistrates

18. (1) The Local Government shall, from time to time appoint a sufficient number of persons (hereinafter called Presidency Magistrates) to be Magistrates for each of the presidency towns, and shall appoint one of such persons to be Chief Presidency Magistrate for each such town

(2) The powers of a Presidency Magistrate under this Code shall be exercised by the Chief Presidency Magistrate, or by a salaried Presidency Magistrate, or by any other Presidency Magistrate empowered by the Local Government to sit singly, or by any Bench of Presidency Magistrates.

(3) *A Presidency Magistrate may be appointed under this section for such term as the Local Government may, by general or special order, direct.*

(4) *The Local Government may appoint any person to be an Additional Chief Presidency Magistrate, and such Additional Chief Presidency Magistrate shall have all or any of the powers of a Chief Presidency Magistrate under this Code or under any other law for the time being in force, as the Local Government may direct*

Change —Subsections (3) and (4) have been added by the Criminal Procedure Code Amendment Act (XVIII of 1923) 'The Local Government is given power to define the term for which a Presidency Magistrate may be appointed and provision is made for the appointment of an Additional Chief Presidency Magistrate to meet the contingency of such an officer being needed, which has been actually experienced in Calcutta'—*Statement of Objects and Reasons* (Bill 3 of 1914)

53 Powers of Presidency Magistrate —For the purposes of the Emigration Act, a Presidency Magistrate is included in the term "Magistrate of the First Class" in Sec 111 of that Act—31 Bom 611 But a Presidency Magistrate is not a District Magistrate or a Magistrate of the First Class within the meaning of Sec 52 of the Prisons Act, and has no jurisdiction to try offences under that section—*Emp v Chola Singh*, 32 Mad. 303

A Presidency Magistrate has jurisdiction to charge, convict and punish under the Indian Penal Code a person who has committed an offence on the High Seas on board a British ship—*King Emp v Chief Officer*, 25 Bom 636

54 Bench of Magistrates —This section confers the full powers of a Presidency Magistrate on a Bench of Honorary Presidency Magistrates, and the Bench can therefore take action under sec 106 of this Code—*J Hassan v Yas Kubar*, 7 Bom L R. 833.

55 Sub-section (4)—"Any person" —In the Bills of 1914 and 1921 the words were any Presidency Magistrate" but on the recommendation of the Joint Committee in 1922, the words Presidency Magistrate"

have been changed into the word "person" The reason is thus stated—
 'We think there is force in the suggestion of the Calcutta Bar Library Club that it is not necessary to restrict the appointment of an Additional Chief Presidency Magistrate to persons who are already Presidency Magistrates and we have therefore substituted the words 'any person' for the words any Presidency Magistrate'—*Report of the Joint Committee* (1922)

19 Any two or more of such persons may (subject to the rules made by the Chief Presidency Magistrate under the powers hereinafter conferred) sit together as a Bench

20. Every Presidency Magistrate shall exercise jurisdiction in all places within the presidency-town for which he is appointed, and within the limits of the port of such town and of any navigable river or channel leading thereto, as such limits are defined under the law for the time being in force for the regulation of ports and port-dues

56 Within the limits of Port—A Presidency Magistrate of Calcutta has jurisdiction to try an offence committed under sec 84 of the Calcutta Port Act (III of 1890) outside the limits of Calcutta but within the limits of the port of Calcutta—*Ganpat Rai v. Good*, 47 Cal 147 24 C W N 79

21. (1) Every Chief Presidency Magistrate shall exercise within the local limits of his jurisdiction all the powers conferred on him by this Code or which by any law or rule in force immediately before this Code comes into force are required to be exercised by any Senior or Chief Presidency Magistrate, and may from time to time, with the previous sanction of the Local Government, make rules consistent with this Code to regulate—

- (a) the conduct and distribution of business and the practice in the Courts of the Magistrates of the town;
- (b) the times and places at which Benches of Magistrates shall sit;
- (c) the constitution of such Benches.

(d) the mode of settling differences of opinion which may arise between Magistrates in session ; and

(e) any other matter which could be dealt with by a District Magistrate under his general powers of control over the Magistrates subordinate to him.

(2) The Local Government may, for the purposes of this Code, declare what Presidency Magistrates *including Additional Chief Presidency Magistrates* are subordinate to the Chief Presidency Magistrate, and may define the extent of their subordination

The italicised words have been added by the Criminal Procedure Code Amendment Act (XVIII of 1923) This is consequential to the amendment made in section 18 (4)

57. Subordination.—In Bombay (and Calcutta) all Presidency Magistrates and Benches are subordinate to the Chief Presidency Magistrate, and the Chief Presidency Magistrate has power to transfer a case from one Presidency Magistrate to another under Sec 528 of this Code—*In re Nageshwar*, 1 Bom L R 347 But in Madras the Court of the Chief Presidency Magistrate and the Courts of the other Presidency Magistrates are of equal jurisdiction—*Venkateswara v Emp*, 10 M L T 518 · 12 Cr L J 451.

By a Notification No 6787 J dated 23 10 1923, the Bengal Government has declared the Additional Chief Presidency Magistrate of Calcutta to be subordinate to the Chief Presidency Magistrate The latter has therefore power under sec 528 to withdraw a case from the file of a Presidency Magistrate to whom that case was transferred by the Additional Chief Presidency Magistrate for disposal—*Mohini v Punam Chand*, 51 Cal 820 (826) 28 C W N 903

58 Benches.—Section 18 has conferred on Benches of Magistrates all the powers of a Presidency Magistrate, and the Chief Presidency Magistrate has no power either to confer, restrict or enlarge those powers—*J Hassan v Yashubar*, 7 Bom L R 833 Therefore, where a Chief Presidency Magistrate revived a case that had been dismissed by him, and transferred it for trial to a Bench of Magistrates, it was held that the latter had jurisdiction to entertain a preliminary objection as to the jurisdiction of the Chief Presidency Magistrate so to revive and transfer—*Walters v Ibrahim* 7 C W. N 527

E.—Justices of the Peace

Justices of the Peace
for the mufassal.

22. * * * Every Local Government, so far as regards the territories subject to its

administration, * * *

may by notification in the official Gazette appoint such persons resident within British India and not being the subject of any foreign State as he or it thinks fit, to be Justices of the Peace within and for the territories mentioned in such notification

Change—The words 'The Governor General in Council so far as regards the whole or any part of British India outside the Presidency Towns and which occurred at the beginning of this section have been omitted by the Devolution Act XXXVIII of 1920. Moreover in the same para the words (other than the towns aforesaid)' have also been omitted and in para 3 the italicised words have been substituted for the words 'European British subjects' by sec 3 of the Criminal Law Amendment Act (XII of 1923)

By omitting section 23 and by assimilating the provisions of section 22 and 23 this clause has removed the qualification of being an European British subject for being appointed as a Justice of the Peace.—*Notes on Clauses* (Criminal Law Amendment Bill)

59 Powers—The powers conferred on the Justices of the Peace are the ordinary powers conferred on 1st class Magistrates under sec 36. The power to entertain complaints is not one of such powers.—*Loghan v Homer* 34 Mad 343 12 Cr L J 535

23. [Repealed by section 4 of the Criminal Law Amendment Act XII of 1923]

24. [Repealed by ditto]

Section 24 is incidentally repealed as being spent.—*Notes on Clauses* (Criminal Law Amendment Bill)

25. In virtue of their respective offices, the Governor-
Ex officio Justices of General, Governors, Lieutenant Governors
 the Peace and Chief Commissioners, the Ordinary
 Members of the Council of the Governor General, and the Judges
 of the High Courts are Justices of the Peace within and for the
 whole of British India, Sessions Judges and District Magistrates
 are Justices of the Peace within and for the whole of the territories
 administered by the Local Government under which they
 are serving, and the Presidency Magistrates are Justices of the
 Peace within and for the towns of which they are respectively
 Magistrates

F—Suspension and Removal

26. All Judges of criminal Courts other than the High Courts established by Royal Charter and all Magistrates may be suspended or removed from office by the Local Government ;

Suspension and removal of Judges and Magistrates
 Provided that such Judges and Magistrates as now are liable to be suspended or removed from office by the Governor-General in Council only shall not be suspended or removed from office by any other authority

27. The Governor-General in Council may suspend or remove from office any Justice of the Peace appointed by him and the Local Government may suspend or remove from office any Justice of the Peace appointed by it

CHAPTER III

POWERS OF COURTS

1—Description of Offences cognizable by each Court.

28. Subject to the other provisions of the Code, any offence under the Indian Penal Code may be tried—

(a) by the High Court, or

(b) by the Court of Session, or

(c) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable

Illustration.

A is committed to the Sessions Court on a charge of culpable homicide. He may be convicted of voluntarily causing hurt, an offence triable by a Magistrate

61 Commitment to Sessions.—The illustration shows that in a case committed to the Sessions Court for a more heinous offence the accused

can be convicted of a minor offence triable by a Magistrate—*Q E v Schade* 19 All 465 The provisions as to the other Courts indicated in clause (c) do not cut down or restrict the jurisdiction of the High Court or the Sessions Court This section gives powers to the High Court and the Court of Session to try any offence under the Penal Code—*Q E v Kharga* 8 All 665 Therefore the fact that in a case committed to the Sessions the Sessions Judge adds a charge of an offence triable exclusively by a Magistrate does not affect the jurisdiction of the Sessions Judge to try it—*Q E v Kharga* 8 All 665 There is nothing illegal in a Magistrate committing a person charged with an offence under section 147 I P C to the Sessions Court if in his opinion it cannot be adequately punished by him though the second Schedule of this Code says that the offence is triable by a Magistrate only—*Q E v Kayemulla* 24 Cal 429

But if the offence falls under some other law and that law specifies a particular Court the *forum* cannot be changed (see sec 29) Thus an offence under sec 9 of the Opium Act must be tried by a Magistrate a Sessions Judge has no jurisdiction over the offence and the Magistrate has no power to commit the case to the Sessions—*Q E v Schade* 19 All 465

62 Offences within and beyond jurisdiction —When an offence triable by an inferior tribunal contains an element which puts the offence beyond the jurisdiction of that tribunal the jurisdiction of that tribunal is not necessarily ousted thereby—2 Weir 20 In other words where the facts disclose an offence within the jurisdiction of the Magistrate it is a complete fallacy to say that he is not empowered to try the offence merely because the same facts disclose a more serious offence beyond his jurisdiction—*A E v Ajjan* 24 Mad 675 Where the facts disclose a major offence (e.g. offence under section 330 I P C) triable exclusively by a Court of Session the Magistrate can convict the accused for a minor offence (e.g. under section 323 342 or 348 I P C) triable by him which constitutes a component of the major offence—*Dawson v K E* 2 Rang 455 But no tribunal can properly elude jurisdiction by intentionally ignoring facts of aggravation which make the offence really cognisable only by a higher tribunal—2 Weir 21 *In re Maduri* 12 Mad 54 *Enp v Japu Rao* 4 N L R 18 *Q E v Gundja* 13 Bom 502 *Lakhray v Crown* 1910 P R 31 11 Cr J J 639

Where two or more persons are jointly indicted and the jurisdiction of the Magistrate is ousted in the case of one of them the proper course is to commit both or all for trial before the Court of Session—1 Weir 448

A Magistrate is not entitled to decline jurisdiction on the ground that the offence is a petty one ordinarily triable by heads of villages and to

direct the complainant to seek redress from the head of the village—7 M H C R App 31 So also a Magistrate is not entitled to decline to exercise jurisdiction in a case on the ground that it falls under the jurisdiction of ecclesiastical authority when the act of that authority plainly amounts to an offence. Thus where the ecclesiastical authority threatened a Roman Catholic that unless he abstained from certain acts (which he was legally entitled to do) he would be excommunicated the action of the ecclesiastical authority was illegal and amounted to criminal intimidation and the Criminal Courts had therefore jurisdiction over the offence—*In re Paul De Cruz* 8 Mad 140

29. (1) Subject to the *other provisions of this Code*, any offence under other laws, any offence under any other law shall when any Court is mentioned in this behalf in such law be tried by such Court

(2) When no Court is so mentioned it may be tried by the High Court or *subject as aforesaid* by any Court constituted under this Code by which such offence is shown in the eighth column of the second schedule to be triable

Change —In sub section (1) the italicised words have been substituted for the words subject to the provisions of sec 447 by sec 5 of the Criminal Law Amendment Act (XII of 1923)

In sub-section (2) the italicised words have been added by the Criminal Procedure Code Amendment Act (XVIII of 1923)

63 Shall be tried by such Court —An offence under a special law triable only by a Magistrate invested with special powers cannot be transferred to an ordinary Magistrate or be tried by any other Magistrate—*Emp v Deasmandan* 1886 A W N 289 An offence under sec 9 of the Opium Act must be tried by a Magistrate and not by a Court of Session—*Q E v Schade* 19 All 465 An offence under Madras Act I of 1868 (e.g. supplying liquor without a license) is triable only by a Magistrate and not by the High Court—5 M H C R 277 An offence under sec 16 of the Bombay Village Police Act (VIII of 1867) is triable by Police Patels duly empowered and not by Taluk Magistrates—*Q E v Hanmantia Ratanlal* 196 An offence under sec 52 of the Prisons Act is not triable by a Presidency Magistrate since he is not a District Magistrate or a First Class Magistrate mentioned therein—*Emp v Chola Singh* 32 Mad 303 An order under sec 3 (1) of the Defence of India Act (IV of 1915) whereby the Local Government had directed that all persons accused of the offence of committing dacoity on 27th February 1915 at Basti Naurang should be tried by the Commissioners appointed under the provisions of

the said Act ousted the jurisdiction of the regular Courts in respect of the persons accused of the offence specified—*Samaila v Crown* 1917 P R 38 Under section 83 of the Registration Act an offence under sec 82 of that Act is triable by a Magistrate not inferior to a Magistrate of the second class—*Q E v Krishna* 7 Mad 347 A third Class Magistrate has jurisdiction to try an offence under sec 68 of the Bombay District Municipal Act (VI of 1873)—*Q E v Naran Narsing Ratanlal* 763 An offence under sec 20 of the Calcutta Rent Act must be tried by the President of the Calcutta Improvement Tribunal which is the Court mentioned in sec 20 of that Act—*Ishan v Manmatha* 37 C L J 298 A I R (1923) Cal 339

64 When no Court is mentioned—A Magistrate can try a landlord for an offence under sec 58 (3) of the Bengal Tenancy Act (failure to prepare and retain counterfoils of rent receipts) in the same way as he would try a summons case the Act not having specified any particular Magistrate to try such an offence—*Emp v Mohunt Ramdas* 9 C W N 816

29A. [New] No Magistrate of the second or third class shall
Trial of European British Subject by second and third class Magistrates *inquire into or try any offence which is punishable otherwise than with fine not exceeding fifty rupees, where the accused is an European British subject who claims to be tried as such*

This section has been added by sec 6 of the Criminal Law Amendment Act (VII of 1923) The Bill does away with all provisions under which a person who may try an European British subject must be a Justice of the Peace Except in cases punishable with sentences of fine only not exceeding rupees fifty the Bill provides that European British subjects shall not be triable by second or third class Magistrates but all first class Magistrates are given power to try European British subjects no matter what their nationality may be—*Statement of Objects of Reasons* Para 8 (i)

29B. [New] Any offence other than one punishable with
Jurisdiction in the case of juveniles *death or transportation for life, committed by any person who at the date when he appears or is brought before the Court is under the age of fifteen years may be tried by a District Magistrate or a Chief Presidency Magistrate or by any Magistrate specially empowered by the Local Government to exercise the powers conferred by section 8 sub-section (1) of the Reformatory Schools Act, 1897, or, in any area in which*

the said Act has been wholly or in part repealed by any other law providing for the criminal trial or punishment of youthful offenders by any Magistrate empowered by or under such law to exercise all or any of the powers conferred thereby.

This section has been added by the Criminal Procedure Code Amendment Act (XVIII of 1923). This amendment was for the first time introduced by Bill 3 of 1921 and did not exist in the Bill of 1914.

The reasons for the amendment have been thus stated. The existing procedure of committal to a Court of Session is lengthy and often involves the prolonged detention of juvenile offenders as undertrial prisoners although the offences generally committed by them seldom require to be so severely punished as to necessitate the intervention of a Sessions Court the sentence or order eventually passed being often incommensurate with the time and energy expended upon a committal and sessions trial. It is therefore proposed that offences of children unless so serious as to be punishable with death or transportation for life should be triable by a District Magistrate a Chief Presidency Magistrate or by any Magistrate specially empowered to exercise the powers conferred by sec 8 sub-section (i) of the Reformatory Schools Act 1897 — *Statement of Objects and Reasons* (1921).

30. In the territories respectively administered by the Lieutenant Governors of the Punjab and Burma and the Chief Commissioners of Oudh the Central Provinces Coorg and Assam in Sind and in those parts of the other provinces in which there are Deputy Commissioners or Assistant Commissioners the Local Government may, notwithstanding anything contained in section 29 invest the District Magistrate or any Magistrate of the first class with power to try as a Magistrate all offences not punishable with death.

65 Magistrate must purport to act under this section — A first class Magistrate who is simply described on the heading of his judgment as invested with the powers under this section but not purporting to act under such powers cannot exercise those powers in passing the sentence — *Mah v Crown* 1908 P W R 17.

66 Powers of District Magistrate — As a general rule the cases which a District Magistrate should refrain from trying under his higher powers are those in which a sentence more severe than a District Magistrate can inflict under sec 34 appears to be called for if the offence be established.

and secondly those cases in which the issues are so complex or the difficulty of ascertaining the true facts or of correctly applying the law to them so considerable as to make a trial before a Sessions Judge more appropriate than a trial before a District Magistrate—*Saw Kudu v Q E L B R* (1893 1900) 219

In the exercise of special powers under this section a District Magistrate has no power to try cases summarily—*Fashu v Emp* 1879 P R 25

A District Magistrate empowered under this section cannot try an offence punishable with death (e.g. murder) and find the accused guilty of culpable homicide not amounting to murder on the ground that the case falls within one of the exceptions mentioned in sec 300 I P C—*Q E v Gurdit Singh* 1891 P R 3 He cannot legally try the offence of culpable homicide not amounting to murder punishable under the first part of sec 304 I P C an offence not punishable with death. The reason is that where there is credible evidence both of murder and of qualified murder the accused should be committed for trial before a Court which is competent to try both offences once for all and to pronounce a judgment which shall be an effectual bar to a second trial on the same facts—*Mangal Singh v Emp* 1893 P R 1 So where there is sufficient evidence to constitute an offence of murder a Magistrate exercising special powers under this section should not try the case as on a minor charge—*Emp v Paramananda* 10 Cal 85 Similarly the offence of attempting to wage war against the Queen should not be tried as a dacoity case by a District Magistrate—1 Bur S R 158

67 Deputy Commissioner —A Magistrate holding an inquiry into a case triable by a Court of Session cannot make over the case to a Deputy Commissioner specially empowered under this section to try such cases because the Deputy Commissioner is a Magistrate and not a Sessions Judge. Such a commitment was held to be illegal and was quashed and the case was ordered to be committed to the Court of Session—*Crown v Piran Lilla* 1873 P R 17 *Q v Poorun* 5 N W P H C R 219 But in a Calcutta case the High Court maintained the conviction by the Deputy Commissioner where it was found that the accused had not been prejudiced by such trial—*Amir Khan v King Emp* 7 C W N 457

Where a Deputy Commissioner tries a case exclusively triable by a Sessions Court under the powers conferred by this section he does so as a Magistrate and if he tenders conditional pardon to one of the accused he is precluded from trying the case himself—*Paban Singh v Emp* 10 C W N 847

68 Appeals —See sec 408 proviso (b) Where the Magistrate

was acting within his ordinary powers as a Magistrate of the 1st class and not within the special powers conferred by this section an appeal would lie to the Court of Session and not to the High (Chief) Court—*Tulsi Ram v Emp* 1881 P R 23 Where however it appeared from the sentence awarded that the District Magistrate in trying the particular case had exercised enhanced powers under this section the appeal would lie to the High Court and not to the Court of Session—*Bahadur v Crown* 1877 P R 8 *Mokamed Aewas v Emp* 1879 P R 33 *Jayhimal v Emp* 1880 P R 36 *Q E v Jai Singh* 1900 P R 12 *Q E v Batara*, 1898 P R 3 If however the offence is not one exclusively triable by a Court of Session and the sentence of imprisonment awarded does not exceed two years an appeal lies to the Court of Session and not to the High Court even though the District Magistrate records that he is exercising his powers under this section—*Nathu v Crown* 1875 P R 10

69 Revision.—A Sessions Judge is competent under sec 437 (now 436) to revise the order of a District Magistrate and order further inquiry even though the latter was exercising enhanced powers under this section. The District Magistrate acting under this section is inferior to the Sessions Judge within the meaning of sec 435—*Jaloo v King Emp* 1904 P R 15

B—Sentences which may be passed by Courts of various Classes

Sentences which High
Courts and Sessions
Judges may pass

31. A High Court may pass any sentence authorised by law

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court

(3) An Assistant Sessions Judge may pass any sentence authorized by law, except a sentence of death or transportation for a term exceeding seven years or of imprisonment for a term exceeding seven years

70 Transportation in default of fine.—Under sec 19 I P C it is competent to the Judge to award a sentence of transportation in lieu of a substantive term of imprisonment but this section does not authorise the award of a sentence of transportation in lieu of the imprisonment awarded in default of payment of fine—*Kunhussa v Queen* 5 Mad 28, *Emp v Nuran* 1880 P R 17

substantive sentence awardable by the Magistrate is insufficient for the offence the case should be sent for trial to a Court which can award adequate sentence—*Mohana v Emp* 1895 P R 20

An order for payment of daily fine is illegal in as much as it is an adjudication prospectively in respect of an offence which has not been committed when the order is passed—*Ram Krishna v Mahendra* 27 Cal 565 There must be proof of a continuing offence before the jurisdiction of a Magistrate to make such an order arises—*Emp v Hazir Ahmad* 24 All 309 Thus under section 580 of the Calcutta Municipal Act (III of 1899) the failure to comply with an order of the Municipality on each subsequent day is a continuing offence for which a daily fine can be imposed and no fresh order is necessary to authorise the imposition of the daily fine—*Noni Lal v Corporation of Calcutta* 7 C W N 853

Fine under other laws —Under this Code and the Penal Code a Magistrate has power only to inflict fine up to Rs 1000—*In re Abdoor Rahman* 7 W R 37 But if an offence under any other law e.g. under sec 33 of the Companies Act is proved the Magistrate is bound to impose a fine of Rs 500 in respect of each offence of issuing an unstamped share-certificate and the fact that section 32 of this Code gives the Magistrate power to inflict only a fine of Rs 1000 will not curtail the Magistrate's jurisdiction to impose a fine of more than Rs 1000 in a case where more than two unstamped share certificates have been issued—*Q E v Moore* 20 Cal 676 So also under section 12 of the Opium Act the Magistrate can impose any amount of fine in lieu of confiscation and his power is not limited by section 32 of this Code—*Manghan v Rahim* 23 Cr L J 747 (Pat)

76 Whipping —A second class Magistrate cannot pass a sentence of whipping under this Code although he was empowered to do so under the old Code of 1872—*Emp v Dhavanta* 7 Bom 303

A sentence of whipping is not appropriate in the case of a person holding a respectable position in life—*Dhagel v Crown* 1907 P W R 9

Whipping cannot be awarded in default of payment of fine—1866 P R 5 nor can fine be awarded in addition to whipping—*Emp v Thushu* 6 C. P. L. R 34

A sentence of whipping should be imposed when there is an aggravation in the commission of the offence Whipping should not be added to imprisonment where the hurt caused (in a case of robbery) was very slight and negligible and the accused was a young man and a first offender—*Badri Prasad v Emp* 44 All 538 20 A L J 388 23 Cr L J 274 Where dacoity is attended with acts of great cruelty a sentence of whipping may be properly inflicted in addition to a substantive sentence of transportation—*Ram Sakal v Emp* 19 A L J 610 22 Cr L J 397

Rules for whipping —The Governor General in Council observes

that the extent to which the punishment of whipping is inflicted in the several provinces is a matter which should even during ordinary times when the circumstances of the country are normal be carefully watched by Local Governments and administrations in order that any tendency towards an indiscriminate or ill judged resort to this form of punishment may be promptly checked. This is especially necessary during times of scarcity when from causes more or less beyond their own control, the poorer classes of the population are driven to the commission of petty crimes. The policy of largely resorting during times of agricultural distress to whipping as a punishment for petty thefts and other offences of a similar nature, may, no doubt, be defended by the argument that it would be impossible at such times to provide accommodation for all offenders in the jails. But if due and timely provision is made for employment of the industrious poor, there need be no excessive resort to punitive measures of this kind; and the Governor General in Council trusts that if such times should unfortunately recur, the matter will be watched with especial care by the Local Governments and Administrations concerned, and that it may be found possible to distinguish between those members of the criminal classes who take advantage of seasons of public trouble to prey upon their neighbours, and the honest labouring poor who are driven by sheer necessity to grain-puffing or similar offences. For the former, the punishment should be sharp and effective and whipping may often be most appropriate. The latter should be considerably dealt with, and put in the way of relief after such punishment of fine or moderate imprisonment as may seem to be appropriate in each case."

—*Proceedings of the Government of India, Home Department (Judicial)*, 11th January, 1882

'The Judges of the Punjab Chief Court have invited the attention of the Criminal Courts to the following points —(1) that persons in respectable position of life should not ordinarily be whipped (2) that the punishment should be inflicted only in case of false evidence extortion and forger under any exceptional circumstances. (3) that whipping, as an additional punishment, should only be ordered when a further deterrent appears to be really called for in the interests of justice, (4) that special care and judgment should be exercised in times of agricultural scarcity and distress"—*Punjab Cir*, LXII. p 280

'Whipping being a punishment which, to certain classes of the community, carries great disgrace with it, shall not be inflicted when there are special circumstances which render it undesirable or make it in reality a greater punishment than the law intends. More especially should this be borne in mind in cases where it is proposed to inflict whipping as the sole punishment, and where consequently either no appeal lies in law or there is often no practical appeal. No man who up to the

substantive sentence awardable by the Magistrate is insufficient for the offence the case should be sent for trial to a Court which can award adequate sentence—*Mohana v Emp* 1895 P R 20

An order for payment of daily fine is illegal in as much as it is an adjudication prospectively in respect of an offence which has not been committed when the order is passed—*Ram Krishna v Mahendra* 27 Cal 565 There must be proof of a continuing offence before the jurisdiction of a Magistrate to make such an order arises—*Emp v Wazir Ahmad* 24 All 309 Thus under section 580 of the Calcutta Municipal Act (III of 1899) the failure to comply with an order of the Municipality on each subsequent day is a continuing offence for which a daily fine can be imposed and no fresh order is necessary to authorise the imposition of the daily fine—*Noni Lal v Corporation of Calcutta* 7 C W N 853

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A sentence of whipping shall be imposed when there is an aggravation in the commission of the offence Whipping should not be added to imprisonment where the hurt caused (in a case of robbery) was very slight and negligible and the accused was a young man and a first offender—*Badri Prasad v Emp* 44 All 535 20 A L J 388 23 Cr L J 274 Where dacoity is attended with acts of great cruelty a sentence of whipping may be properly inflicted in addition to a substantive sentence of transportation—*Ram Sahai v Emp* 19 A I J 610 22 Cr L J 397

Rules for whipping —The Governor General in Council observes

that the extent to which the punishment of whipping is inflicted in the several provinces is a matter which should even during ordinary times when the circumstances of the country are normal be carefully watched by Local Governments and Administrations in order that any tendency towards an indiscriminate or ill judged resort to this form of punishment may be promptly checked. This is especially necessary during times of scarcity when from causes more or less beyond their own control the poorer classes of the population are driven to the commission of petty crimes. The policy of largely resorting during times of agricultural distress to whipping as a punishment for petty thefts and other offences of a similar nature may no doubt be defended by the argument that it would be impossible at such times to provide accommodation for all offenders in the jails. But if due and timely provision is made for employment of the industrious poor there need be no excessive resort to punitive measures of this kind and the Governor General in Council trusts that if such times should unfortunately recur the matter will be watched with especial care by the Local Governments and Administrations concerned and that it may be found possible to distinguish between those members of the criminal classes who take advantage of seasons of public trouble to prey upon their neighbours and the honest labouring poor who are driven by sheer necessity to grain pilfering or similar offences. For the former the punishment should be sharp and effective and whipping may often be most appropriate. The latter should be considerably dealt with and put in the way of relief after such punishment of fine or moderate imprisonment as may seem to be appropriate in each case.

—*Proceedings of the Government of India Home Department (Judicial)*, 11th January 1882

The Judges of the Punjab Chief Court have invited the attention of the Criminal Courts to the following points —(1) that persons in respectable position of life should not ordinarily be whipped (2) that the punishment should be inflicted only in case of false evidence extortion and forgery under any exceptional circumstances (3) that whipping as an additional punishment should only be ordered when a further deterrent appears to be really called for in the interests of justice (4) that special care and judgment should be exercised in times of agricultural scarcity and distress —*Punjab Cir LXII p 280*

Whipping being a punishment which to certain classes of the community carries great disgrace with it shall not be inflicted when there are special circumstances which render it undesirable or make it in reality a greater punishment than the law intends. More especially should this be borne in mind in cases where it is proposed to inflict whipping as the sole punishment and where consequently either no appeal lies in law or there is often no practical appeal. No man who up to the

time of his conviction has occupied a position of some respectability should be subjected to this punishment which is meant rather for persons of the lowest classes who commit such petty thefts etc as are properly visited with whipping Neither adults nor juveniles may be punished with whipping for an offence under a special Act unless the Act contains a special provision to that end —C P Cr Part III No 3

33 (1) The Court of any Magistrate may award such term

Power of Magistrates to sentence to imprisonment in default of fine	of imprisonment in default of payment of fine as is authorized by law in case of such default
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Provided that—

Provido as to certain cases	(a) the term is not in excess of the Magistrate's powers under this Code
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(b) in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence the period of imprisonment awarded in default of payment of the fine shall not exceed one fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 32

77 Imprisonment in default of fine —The imprisonment in default of payment of fine need not always be proportionate to the amount of the fine imposed—1 Bur S R 483 This section does not authorise a Magistrate to pass a sentence of imprisonment in default of payment of fine in excess of the term prescribed by Sec 65 I P C—Q E v Venkatesagadu 10 Mad 165 10 Mad 166 (Note) overruling 1 Mad 277

34 The Court of a Magistrate, specially empowered under

Higher powers of certain District Magistrates	section 30 may pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years or of imprisonment for a term exceeding seven years
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78 Under sec 34 read with sec 33 a District Magistrate specially empowered under sec 30 in trying a case under sec 471 I P C can pass

a sentence of imprisonment for one year and nine months (i.e. one fourth of 7 years) in default of payment of fine—*Karam Chand v Emp* 1885 P R 35 A Magistrate exercising powers under this section is competent under sec 59 I P C to pass a sentence of transportation for seven years instead of awarding a sentence of imprisonment—*In re Boodhoo* 9 W R 6

Sentences which Courts and Magistrates may pass upon European British Subjects

34A. Notwithstanding anything contained in sections 31, 32 and 34—

(a) no Court of Session shall pass on any European British subject any sentence other than a sentence of death penal servitude, or imprisonment with or without fine or of fine and

(b) no District Magistrate or other Magistrate of the first class shall pass on any European British subject any sentence other than imprisonment which may extend to two years or fine which may extend to one thousand rupees or both

This section has been added by section 7 of the Criminal Law Amendment Act XII of 1923 Under the old law the sentences that could be awarded by Magistrates of the first class District Magistrates and Courts of Session in the case of European British subjects were limited to three months imprisonment and a fine of Rs 2 000 six months imprisonment and a fine of Rs 2 000 and one year's imprisonment and unlimited fine, respectively These restrictions are now removed The Bill proposes that so far as sentences of death penal servitude or imprisonment with or without fine, or of fine only are concerned the powers of those officers shall be identical in the case of European British subjects and Indian British subjects except as regards Magistrates who have been specially empowered under section 30 of the Code Such Magistrates will only be able to pass those sentences on European British subjects which could be passed by ordinary first class Magistrates Such Magistrates will however have power to try European British subjects for the same additional offences as they are able to try Indian subjects under their special powers'—*Statement of Objects and Reasons* Para 8 (iii)

This section further shows that an European British subject shall not be punished with whipping

35 When a person is convicted at one trial of two or more * * * offences the Court may, subject to the provisions of section 71 of the Indian Penal Code sentence him for such offences to the several punishments prescribed therefor which such Court is

Sentence in case of conviction of several offences at one trial

competent to inflict, such punishments, when consisting of imprisonment or transportation, to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently

(2) In the case of consecutive sentences, it shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court

Provided as follows —

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years ,
 Maximum term of punishment.

(b) if the case is tried by a Magistrate (other than a Magistrate acting under section 34) the aggregate punishment shall not exceed twice the amount of punishment which he is in the exercise of his ordinary jurisdiction, competent to inflict

(3) For the purpose of appeal, the aggregate of consecutive sentences passed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence

Explanation—Separable offences which come within the provisions of section 71 of the Indian Penal Code are not distinct offences within the meaning of this section

(Omitted)

Illustration

A breaks into a house with intent to commit theft and steals property therein A has not committed distinct offences

(Omitted)

Change —This section has been amended by the Cr P Code Amendment Act XVIII of 1923 In sub-section (1) the word distinct has been omitted and the italicised words have been added in sub-section (3),

the words aggregate of consecutive have been substituted for the word "aggregate" and the *Explanation* and *Illustration* have been omitted.

The existing *Explanation* and *Illustration* to section 35 have occasioned considerable misunderstanding. It is therefore proposed to omit them and state definitely that section 35 must be read subject to section 71 I P C. It is also declared that aggregate sentences passed under section 35 in case of conviction for several offences at one trial shall be deemed to be a single sentence for the purpose of appeal if they run consecutively. — *Statement of Objects and Reasons* (Bill 3 of 1914)

Section 71 I P C. —Section 71 of the Indian Penal Code provides as follows —

Where anything which is an offence is made up of parts any of which parts is itself an offence the offender shall not be punished with the punishment of more than one of such offences unless it be so expressly provided

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished or

where several acts of which one or more than one would by itself or themselves constitute an offence constitute when combined a different offence

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences "

In all other cases (*e g* where the offences are distinct) the Court can pass separate sentence for each of the offences under section 35 of the Cr P Code

78A Cases under sec 71, I P C. —In awarding punishment under sec 71 I P C in case of convictions for several separable offences falling within the purview of the section it is illegal to impose a sentence for each offence—*Nilmony v Queen Emp* 16 Cal 442 *Keamuddi v Emp* 51 Cal 79 *Mithoo Sing v Gopal Lal* 3 C W N 761 *Bhagwan v Emp* 1901 P R 4. Thus it is improper to pass separate sentences upon the accused both for rioting and theft when the former offence is but an element of the latter—3 C W N 761. Separate sentences under sections 148 and 324/149 I P C are illegal—16 Cal 442. The infliction of separate punishments under sections 147 and 325/149 of the Penal Code is illegal even though the sentences are made to run concurrently—*Keamuddi v Emp* 51 Cal 79 28 C W N 347 25 Cr L J 947. Where an accused is charged under sections 121 and 124A of the I P Code in respect of a single speech he will be liable to one punishment only even if he is convicted of both the offences charged—*Emp v Hasrat Moham* 24 Bom L R 885 A I R (1922) Bom 284. The Bombay High Court holds in other cases that though a Court in awarding punishment under

the provisions of sec 71 I P C should pass one sentence for either of the offences and not a separate one for each offence still if two sentences are passed and the aggregate of them does not exceed the punishment provided by law for any one of the offences or the jurisdiction of the Court it would be an irregularity only and not an illegality—*Q E v Malu* 23 Bom 706 (F B) *Emp v Piru Ram* A I R (1926) Bom 64, *Q E v Bana*, 17 Bom 160 The Allahabad High Court likewise holds that it is not illegal to pass separate sentences for all the offences but the amount of punishment should not be heavier than that which the Court can inflict for any one of the offences—*Q E v Wazir* 10 All 58

Where the offences are independent of each other e g the offence of house breaking at night with intent to commit theft (sec 457 I P C) and the offence of theft of ornaments in a dwelling house (sec 380 I P C) the case does not fall under sec 71 I P Code and separate sentences can be passed for the two offences the one sentence to commence after the expiration of the other—*Kanchan v A E* 41 C L J 563 A I R 1925 (Cal) 1015

79 Scope of Section — *Contracted* — This section applies only to convictions of offences it does not apply to imprisonments under sec 123 of the Code—*Emp v Kany* 5 Bom L R 26 *Emp v Tukaram* 4 Bom L R 876

Therefore it is illegal for a Magistrate to direct under this section that a sentence of imprisonment for an offence should take effect after the expiry of the sentence which the accused may be undergoing for default of furnishing security for good behaviour—*In re Pichari Anthu* 16 Cr L J 622 (Mad) The order is also illegal under sec 120

This section is not restricted to cases where the several punishments are all of the same kind i e all are sentences of imprisonment or all are sentences of transportation It covers cases of the description where one of the punishments is imprisonment while the other is transportation—*Akhua v King Lmp* 21 C W N 608 17 Cr L J 238

80 One trial — This section has reference only to the conviction of an accused person of two or more offences at one trial It does not apply to sentences passed at different trials—*Q v Puban* 7 W R 1 *Bahadur v Emp*, 1806 1 R 14 *In re Daulatal* 3 All 305 *Lmp v Thakur* 1881 1 W N 23 *Humat v King Lmp* 20 C W N 1300 Thus it does not include the case of separate trials held on the same day for separate offences committed by the same accused—*Q E v Venkatesagadu* 2 Weir 30 This section has no application whatever when a person is convicted in two or more separate trials even though in all of them the complainant is the same and the offences are similar and they are concluded on the same date—*Sher Varan v Crown* 1350 P L R 105 11 Cr L J 672

81 **Distinct offences** —By reason of the omission of the word *distinct* the present section applies to all cases whether the offences are distinct or not. In all cases the Court will be competent to inflict an aggregate punishment in excess of the punishment which it is ordinarily competent to inflict in respect of a single offence.

Owing to this change in the law the rulings in *Emp v Mondeyappa gozda* 8 Bom L R 850 and *Emp v Rameswarrdas* 13 C P L R 124 are overruled. In these cases it was held that if the offences were not distinct the trying Magistrate had no jurisdiction to pass enhanced sentence under the provisions of sub-section (2) and proviso (b).

82 **May sentence** —The words *may sentence* do not mean that the Court *must* necessarily pass distinct sentences—*Q E v Mahomed Ratanlal* 597 (*per* Jardine J). The use of the word *may* shows that this section only permits and does not make it obligatory on Courts to pass separate sentences in one trial—L B R (1900—1902) 33 L B R (1872 189) 271. *Ngalyan v Emp* 1 Bur S R 271.

But though it is not illegal to pass one sentence for all the offences still it is generally the proper course to pass a separate sentence for each offence—*Ratanlal* 597. 4 M H C R App 27 because such a course will enable the Appellate Court to know the punishment to be remitted in case the conviction for one of the offences is set aside—4 M H C R App 27. If one aggregate sentence is imposed for all the offences it is impossible to apportion it to the different offences of which the accused is convicted—*Bahadur v Emp* 1886 P R 14. 2 B H C R 391.

On the other hand if the offences are not separate (*e g* offences under secs 392 and 75 I P C) the awarding of two separate sentences is illegal—*In re Mullirakha* 18 M L T 111. 18 Cr I J 111.

83 **Consecutive sentences** —If separate sentences are passed for each offence of which an accused stands convicted the sentences must commence one after the expiry of the other—L B R (1872 1892) 526. Where a man is imprisoned under two warrants ordering consecutive sentences the first should be completely executed both in regard to the substantive term of imprisonment as well as the imprisonment in default of fine before any effect is given to the second warrant—*Ratanlal* 132.

84 **Concurrent sentences** —The Court must expressly direct whether the sentences are to run concurrently or consecutively. Omission to determine whether the sentences of imprisonment and transportation (in a case where both sentences have been passed) are to run concurrently or consecutively makes the sentence defective in form—*Khohua v King Emp* 21 C W N 608. 23 C L J 596. 17 Cr L J 138.

Before Sec 397 was amended by the Cr P C Amendment Act 3 it was held that the only cases in which a Court could pass

sentences for two offences were when the accused was convicted at the *same trial* for both the offences (Sec 35) and if the trials were *separate* Sec 397 applied and the sentences were to take effect consecutively—*Imp. v Khuda Bux* 2 S L R 23 *Kamal v King Emp* 20 C W N 1300 18 Cr L J 410 *Joyenulla v Emp* 22 C W N 597 *Dulla v Emp* 45 All 59 26 Cr L J 570 *Harak Narain v Emp* 19 A L J 310 15 C P L R 57 *Debi Dayal v A E* 16 O C 370 *Makbul v Aug Emp* 11 A L J 263 14 Cr L J 240 *Emp v Mahomed Isab* 13 Bom L R 200 *Nga Pya v Emp* 6 Bur L T 67 14 Cr L J 388 *Nga Sein v Emp* 1 Rang 306 21 Cr L J 398 (All) But section 397 has now been amended and under the amendment made at the end of the first para of that section it is no longer illegal to make the sentences in the two trials *concurrent* See Note 1082 under Sec 397

It is not illegal to direct a sentence of imprisonment to run concurrently with a sentence of transportation—*Bogi v Crown* 1913 P R 21 15 Cr L J 68

The imprisonment referred to in this section is a substantive sentence of imprisonment an order directing that the terms of imprisonment awarded in default of payment of fine shall run concurrently is illegal—S I R 263 *Emp v Subrao*, A I R (1926) Bom 62

85 Appeal—An accused who has been sentenced to *concurrent* sentences of imprisonment no one of which is individually appealable has no right to aggregate them and appeal against them collectively—*Azis Shaikh v Emp* 17 C W N 825 40 Cal 631 *Abdul Jabbar v Emp* 25 C W N 613 23 Cr L J 225 *Suknaidan v Emp* 17 C L J 392 13 Cr L J 787 *Gur Sahay v Emp* 3 P L J 138 19 Cr I J 90 *Tulsi Ram v Emp* 35 All 154 [Contra—*Abdul Khahk v K E* 17 C W N 72 and *Bepin Behari v Emp* 15 C W N 734 where it was held that concurrent sentences must be aggregated for purposes of appeal as otherwise there would be no distinction between a concurrent sentence and a single sentence in which no sentence was passed under the second charge But these two rulings can no longer stand as good law in view of the recent amendment made in sub section (3) under which only *consecutive* sentences can be aggregated for the purpose of appeal]

86 Proviso (a)—According to proviso (a) fourteen years is the maximum term of imprisonment which can be awarded as an aggregate sentence A sentence of transportation in lieu of imprisonment awarded under section 59 I P C is therefore subject to the limitation which has been provided by sec 35 Cr P Code in the case of sentences of imprisonment—*Emp v Guman* 7 C P I R 29 An aggregate sentence of 20 years rigorous imprisonment is contrary to proviso (a) of this section—*Sheo Narain v Crown*, 1910 P L R 105 11 Cr L J 679

Sentences of imprisonment may be accumulated beyond 14 years in more than one trial. The limit of 14 years has reference only to sentences passed simultaneously at one trial or passed on charges tried simultaneously—*Queen v Luban* 7 W R 1

The fact that the Magistrate passes the maximum term of imprisonment under this section is no bar to his awarding further punishment on the same accused for a distinct offence tried separately. Thus where a person was charged with two charges of dacoity and one charge of kidnapping and was tried separately for the dacoity and for the kidnapping and the Magistrate inflicted a sentence of 14 years for the charges of dacoity held that this would not disqualify him from passing further sentence for the offence of kidnapping although the trial for that offence was contemporaneous with the trial on the dacoity charges and terminated on the same day—*Bahadur v Emp* 1896 P R 14

87 Proviso (b) —Where there are *separate* trials the Magistrate's power of punishment is not limited to twice the amount which he is competent to pass—*In re Daulatal*, 3 All 305 *Nga Kyin v Emp* 1 Bur. S R 271

88 Sub section (3) —*For the purpose of appeal* —It is only for the purposes of appeal (and for no other purpose e.g. for the purpose of commutation into transportation) that the consecutive sentences can be treated as one sentence therefore two or more offences cannot be added up so that the aggregate period may be commuted into transportation—*Queen v Ootum Mal* 2 W R 1

For the purposes of appeal only *consecutive* sentences are allowed to be taken in the aggregate as one sentence. This sub section does not apply to concurrent sentences—*Saw Hlaing v Emp*, U B R (1897 1901) 13 *Nga Shue v Emp* L B R (1900-1902) 57 *Sher Muhammad Emp* 1901 P R 25 See notes under Appeal above

Only substantive sentences can be aggregated under this section a sentence of imprisonment in default of payment of fine must not be included for the purposes of calculation—1892 P R page 22

89 Splitting up of offences —No Magistrate is entitled to split up an offence (over the whole of which he had no jurisdiction) into its component parts for the purpose of giving himself jurisdiction over a part thereby depriving the prisoner of the right of appeal—*Emp v Abdool Karim* 4 Cal 18

C—Ordinary and Additional Powers

36 All District Magistrates Sub divisional Magistrates
Ordinary powers of and Magistrates of the first, second
Magistrates third classes have the powers 1 r

respectively conferred upon them and specified in the third schedule. Such powers are called their ordinary powers.

90 Secs 36 and 107 —Where a person is not sent before the District Magistrate by any other Magistrate under Sec 107 (3) the District Magistrate has no jurisdiction to commit him to custody under sec 107 (4). Nor can the District Magistrate commit the accused to custody under sec 36 because this section does not override the provisions of sec 107—*Chithambaran v Emp* 31 Mad 315

91 Ordinary powers —Power to entertain complaints is not one of the ordinary powers of a first class Magistrate—*Loghan v Romer* 34 Mad 343 12 Cr L J 535

37 In addition to his ordinary powers any Sub-divisional Magistrate or any Magistrate of the first second and third class may be invested by the Local Government or the District Magistrate as the case may be with any powers specified in the fourth schedule as powers with which he may be invested by the Local Government or the District Magistrate

Additional powers
conferable on Magis-
trates

38. The power conferred on the District Magistrate by section 37 shall be exercised subject to the control of the Local Government

Control of District
Magistrate's investing
power

D—Conferment Continuance and Cancellation of Powers

39 (1) In conferring powers under this Code the Local Government may by order, empower persons specially by name or in virtue of their office or classes of officials generally by their official titles

Mode of conferring
powers

(2) Every such order shall take effect from the date on which it is communicated to the person so empowered

92 Where a Magistrate of the second class begins a trial in that capacity and previous to his passing the sentence is empowered as a first class Magistrate he can inflict a sentence in the latter capacity—*Q E v Pershad* 7 All 414 (F B)

Generally or specially —When by a notification of the Government a class of officials is invested with powers to try certain offences

such officials are only *generally* empowered and not *specially* empowered—*Mahomed Kasim v. A. E.* 17 M. L. T. 191 16 Cr. L. J. 268. The term *specially* refers to the empowering of a particular official by name or by virtue of his office. Thus a notification of the Government which empowers second class Magistrates of certain places to try cases under the Opium Act is a *special* empowering of the persons holding those offices in virtue of their office—*Alina v. Emp.* 24 Cr. L. J. 846 (Mad.)

40. Whenever any person holding an office in the service of Government who has been invested with any powers under this Code throughout any local area is appointed to an equal or higher office of the same nature within a like local area under the same Local Government, he shall, unless the Local Government otherwise directs or has otherwise directed, exercise the same powers in the local area in which he is so appointed.

Change.—The word *appointed* has been substituted for *transferred* by the Criminal Procedure Code Amendment Act XVIII of 1923. The object of this amendment is to cover cases of officers going on leave and returning to the same district and to obviate the necessity of investing them again with their old powers and re-gazetting the same—*Statement of Objects and Reasons* (1914). The amendment will save a great deal of routine work in the Secretariat and in the Government printing press—*Leg. Ass. Debates* 15 1 23 page 1047.

93. Continuance of powers.—When a Tahsildar is invested with the powers of a Magistrate of the first class while acting as a Deputy Collector his powers continue so long as he is a Magistrate until they are withdrawn by a fresh notification though he is posted in a less responsible post—*In re Hanumanta* 2 Weir 36. A Sub-Registrar invested with third class powers for trial of certain offences in a certain place is competent to exercise on his transfer to another place the powers conferred upon him as Sub-Registrar of the place from which he was transferred unless the Local Government directed him not to exercise them—*Q. E. v. Veeranna* 15 Mad 132. A Mamlatdar invested by name with second class powers in a district retains them though he ceases to be a Mamlatdar and becomes an Awalkarkun his revenue title being a matter of description only—*Q. E. v. Rama Ratanlal* 322.

94. Continuance of trial.—Where a Head Assistant Magistrate having almost completed the trial of a case was appointed to the office of a Deputy Magistrate in another place in the same district and

case was by order of the District Magistrate brought on to his file to the latter place it was held that the Magistrate could proceed with the case from the point at which he had arrived as Head Assistant Magistrate and the trial need not be commenced *de novo*—*Karuppana v Akobalamatam* 22 Mad 47

But where during a trial the Magistrate is transferred to another district he cannot continue the trial See notes under sec 12

95 Going on leave —The Magisterial powers conferred on an officer are kept alive under this section even though he is absent on leave (This is now made clear by the present amendment) But the case is different if he vacates his office by absenting himself without leave—*Bas Harku v Sitaram* 2 Bom L R 536

41 (1) The Local Government may withdraw all or any Powers may be cancelled of the powers conferred under this Code on any person by it or by any officer subordinate to it

(2) Any powers conferred by the District Magistrate may be withdrawn by the District Magistrate

PART III.

GENERAL PROVISIONS

CHAPTER IV

OF AID AND INFORMATION TO THE MAGISTRATES THE POLICE AND PERSONS MAKING ARRESTS

42 Every person is bound to assist a Magistrate or police officer reasonably demanding his aid whether within or without the presidency towns —

(a) in the taking or preventing the escape of any other person whom such Magistrate or police officer is authorized to arrest,

(b) in the prevention or suppression of a breach of the peace or in the prevention of any injury attempted to be committed to any railway canal telegraph or public property

95A Every person* —A police officer charged with the duty of arresting an accused can ask a *chowkidar* to assist him in arresting the accused or preventing his escape—*Manik v Kenaram* 6 C W N 337

96 Reasonably —No person is bound to obey an unreasonable order of a Magistrate or Police officer. Thus where a Magistrate ordered a landholder to find a clue to a theft within 15 days it was held that such an order was unreasonable and unwarranted by this section and the landlord was not bound to perform an act for which the police are appointed and paid. Disobedience by the landlord to such an order is no offence—*Emp v Bakshi Ram* 3 All 201. Members of the public are bound to assist a police officer reasonably demanding their aid in the taking of any dacoits or suspected dacoits whom that officer is authorized by law to arrest. The law however does not intend that the police officers should have a general power of calling upon the members of the public to join them in arresting a number of unknown persons whose whereabouts are not known. Refusal to assist the police officer in such a quest is not an offence—*Josi Prasad v Emp* 42 All 314 15 A L J 169 21 Cr L J 801

(e) the commission of or intention to commit at any place out of British India near such village any act which if committed in British India would be an offence punishable under any of the following sections of the Indian Penal Code namely 231 232 233 234 235 236 237 238 302 304 382 392 393 394 395 396 397 398 399 402 435 436 449 450 457 458 459 460 489A 489B 489C and 489D

(f) any matter likely to affect the maintenance of order or the prevention of crimes or the safety of person or property respecting which the District Magistrate by general or special order made with the previous sanction of the Local Government has directed him to communicate information

(2) In this section—

(i) village includes village lands and

(ii) the expression proclaimed offender includes any person proclaimed as an offender by any Court or authority established or continued by the Governor General in Council in any part of India in respect of any act which if committed in British India would be punishable under any of the following sections of the Indian Penal Code namely 302 304 382 392 393 394 395 396 397 398 399 402 435 436 449 450 457 458 459 and 460

(3) Subject to rules in this behalf to be made by the Local

Appointment of village headman by District Magistrate in certain cases for purposes of this section

Government the District Magistrate or Sub divisional Magistrate may from time to time appoint one or more person with his or their consent to perform the duties of a village headman under this section whether a village headman has or has not been appointed for that village under any other law

Change —The italicised words show the amendments made by the Cr P C Amendment Act XVIII of 1923 The reasons are stated below

100 Object of Section —The provisions of this section are not to be worked solely for the purpose of vexation but for the purpose of ensuring that information be not intentionally withheld by persons whose position renders them liable to give it. Therefore when information is given to the nearest Magistrate or Police by one of the persons bound to give such information it is not reasonable that every other person bound to give the information should be prosecuted for not having done so—*Emp v Sashi Bhushan*, 4 Cal 623. *In re Pandya*, 7 Mad 436, *Q E v Gopal*, 20 Cal 316 *Q E v Hari Gopal Ratanlal* 778. Where the police are already informed of a fact by the Chowkidar, there is no further obligation upon the village headman to report the same information again to the police—*Rampal v Emperor*, 23 Cr L J 162 (Oudh)

101 Persons bound — Village headman in Madras means a Village Munsiff or Village Magistrate—*In re Sivan Chellu*, 32 Mad 258. A Zailder is not a village headman within the meaning of this Section—*Q E v Hari Singh* 1894 P R 25, *Shah Mahammad v Emp*, 1886 P R 19

Every mukhaddam and Kotwar in C P. is bound to give information under this section because they have to perform the duties of a village headman—*Local Govt v Mamharsingh*, 7 N L R 101=12 Cr L J 441

A Village Accountant was not bound under the corresponding section of the Code of 1872 or 1882—*In re Ramunih Nayar*, 1 Mad 266, but now he is expressly mentioned

The owner or occupier of a house in a village is not the 'owner or occupier of land'—*Q E v Achula*, 12 Mad 92. Residence in a dwelling house belonging to another is not occupation of land—23 W R 60

Owner and agent —The liability of the resident agent arises when the owner is not resident and has no personal knowledge of the fact to be reported. Where the owner has such knowledge, the liability certainly attaches to the owner (and not to the agent)—*In re Mudhoo Soodun*, 23 W R 60. Under the present law the agent is liable only if he is 'in charge of the management of the land'

These words have been added during the Debate in the Legislative Assembly on the motion of Mr Agnihotri who stated the reasons as follows—'The word 'agent' should be qualified and made definite in such a way that only such agents be made liable to give information under sec 45 as may be connected with the land or be in charge of the management of that land the occurrence on which is to be reported. The word 'agent' is very comprehensive and vague, for instance there may be agents for various purposes, they may be for the collection of land revenue, they may be for looking after the cultivation of the land they may be for the construction of buildings on the land or for conducting and defending suits for title of such land and so on, the word may apply even to servants. And

to make such agents liable would be to make the term very wide and troublesome so it is necessary to restrict it only to such persons as are in charge of the management of the land and who may be in a better position to know about the occurrences on that land — *Legislative Assembly Debates*, January 16 1923 page 1114

A Khazanchi of a Zemindar of a village is not an agent. A dewan may be an agent during the absence of his master, but not a dewan who acts only under the orders of his resident master—*Emp v Achiraj*, 4 Cal 603

Forthwith —The word 'forthwith' must be construed with reference to the object of the enactment. Where a Kulkarni gave information of a suspicious death some 7 or 8 hours after he was aware of the same, held that the information was not given forthwith—*Reg v Pirlappa*, Ratanlal 78

102 Information —The persons enumerated in this section are bound to report an information and not a mere rumour—*Iachnis v Emp*, 5 P L T 305 25 Cr L J 972. Where the Zemindar heard of the disappearance of a man from the village and a rumour that he had been murdered the omission to report such rumour to the police was not an offence—*In re Bhup Singh* 1900 A W N 207. But under clause (d) as now amended, the disappearance of a man under suspicious circumstances must be reported

'Possess' —This word has been substituted for the word 'obtain'. In 1904 the Madras Government found that the word 'obtain' did not cover information obtained by personal observation, because the word undoubtedly meant 'obtain by making inquiries'. There was therefore some difficulty in making certain that information obtained by personal observation, such as for example the discovery of a corpse on the ground came within the scope of the law. Moreover the deletion of the word was absolutely necessary, because it implied an obligation to seek the information. The Magistrates were likely to be misled by the word 'obtain' they might come to the conclusion that it was obligatory on the persons concerned to obtain information. It was therefore necessary to make an amendment by substituting the word 'possess' for the word 'obtain'. In moving the amendment Mr Pantulu observed "The offending portion of the section is that the landholder would be called upon to give information which he may possibly obtain but which he may not have in his possession. Now if we take away the word 'obtain' and substitute the word 'possess' it comes to this that the landlord is bound to give only the information which he possesses and not information which he may possibly obtain by making inquiries. If my amendment is carried, it will be incumbent upon the prosecution to show that the

accused had that information in his possession, and not merely that he might have obtained it. Therefore, I think that if this amendment is carried, the sting will be taken out of the section"—*Legislative Assembly Debates*, January 16, 1923 page 1116 See also *Lachmi v Emp*, (ubi supra)

103 Clause (b) —*Resort to or passage through*:—The bringing of a suspected robber under arrest to the village and releasing him there does not amount to the resorting to or the passage through the village of such robber—*Emp v Malik Daud*, 1887 P R 30

Proclaimed offender:—These words include persons over and above those to whom the words in their ordinary sense apply—*Q E v Narpat*, 1901 A W N 10 The fact that the offender's property has been attached and sold under the provisions of Sec 88 of this Code does not raise any presumption that he is a proclaimed offender. It is on the prosecution to prove that the proclamation was made in the manner prescribed by Sec 87 of this Code—*In re Pandya Nayak*, 7 Mad 436

104 Clause (c) —The information to be given to the police under clause (c) is the information of the commission of an offence. An information that a certain jewel is missing is not an information that an offence has been committed, and need not be communicated to the police—*In re Venu Reddi*, 5 M L T 257 9 Cr L J 224

If the offence is a bailable one, the persons enumerated in this section are not bound to give information of it—*Emp v Malik Daud*, 1887 P R 30, *In re Sitan Chetti*, 32 Mad 258

105 Clause (d)—*Occurrence of death* —The duty imposed by this section on a village headman etc of giving information as to the occurrence of any sudden or unnatural death is intended to apply only when the death takes place at or near the village of which he is the headman, owner, occupier, etc —*In re Mudhoosoodun*, 23 W R 60

If a body is found on one's land, the presumption is that the death took place there, and the owner is under an obligation to give information regarding the matter—*Maluki v Queen*, 11 Cal 619 (Witter J, dissenting, held in this case that there could be no such presumption, it could be equally presumed that the death took place in another village and the dead body was thence removed to this village) Under clause (d) as now amended, the finding of a corpse must be reported, without reference to the question of presumption as to whether the death took place in the same village or in another village

If a dead body is found in a stream, it is enough to give rise to a presumption that the death took place under suspicious circumstances, and the person finding it is bound to report it under this section—*Saker Muhammad v. Emp*, 1887 P. R 20

Where a man fell from a tree and died two days afterwards *held* that although the death was 'unnatural' in the ordinary sense of the word still it would not come within the meaning of the word 'unnatural' as used in sec 45 (d) so as to require to be reported immediately, unless it occurred fairly soon after the cause—*Domarsing v Emp*, 23 Cr L J 345 (Nag)

106 Punishment —For omission to give information under this section see Sec 176 I P C But omission to give information by persons not enumerated in this section is not an offence—*Bahadur v Emp*, 1882 P R 34

False information —A person giving a false information of an offence to a village Magistrate who is bound to pass the information on to the higher authorities under this section will be guilty of an offence under Sec 211 I P C—*In re Sivan Chellis* 32 Mad 258 It would be otherwise if the offence complained of is one in regard to which the information need not under this section be passed to the higher authorities—*Ibid*

Proof —To support a conviction for omitting to give information under this section it should be proved that the accused bears the character which raises the obligation under this section—3 Mad 266, it must be proved that a specified offence has been committed by some one that the accused knew of its having been committed and that he wilfully omitted to give the information—*Queen v Ahmed Ali* 22 W R 42

107 Sub-section (3)—*Appointment of village headmen* —An order of a District Magistrate dismissing a person from the office of a head man of a village under the rules framed under this sub section is an executive order and is not subject to revision by the High Court—*In re Damma* 29 All 563

'*With his or their consent*' —These words were added during the Debate in the Assembly on the motion of Mr Rangachariar "My amendment would remove any misconception there may be as to the power of the District Magistrate to appoint persons against their will and it is for this reason that I have inserted this clause that when they are so appointed it should be with their consent I know that in the case of enlisting special police people without their consent are enlisted This ought not to degenerate into such a provision It must be a voluntary duty to be performed by people who are given a certain status' —*Legislative Assembly Debates*, January 16 1923 page 1117

Bengal rules for the appointment of headmen —

(1) In all villages in which Bengal Act VI of 1870 has been introduced, the Magistrate of the District may appoint the principal member of the Chowkidari Panchayat or the collecting member, where there is one to be village headman

(2) In villages where Bengal Act VI of 1870 has not been introduced, the Magistrate of the District may appoint the principal resident agent of land owner, or rent receiver, or his representative, or the principal resident cultivator to be village headman

(3) In the case of a principal or collecting member of a Chowkidari Panchayat, a clause shall be added to the appointment under sec 3 of the Chowkidari Act to the effect that he has also been appointed to be village headman under sec 45 of the Criminal Procedure Code When a person other than a member of a Chowkidari Panchayat is appointed, he shall receive a special *sanad* from the Magistrate

(4) The Magistrate shall keep a register of all persons who have been appointed village headmen, showing their names and father's names and the village for which they are responsible, and shall take measures to effect mutations in that register from time to time when one headman dies and is succeeded by another—*Calcutta Gazette*, 26 12 1894

CHAPTER V

OF ARREST, ESCAPE AND RETAKING.

A —Arrest Generally

46. (1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with transportation for life

108 Warrant —When a warrant of arrest has been issued the officer making the arrest must have the warrant in his possession otherwise the arrest is illegal—*Emp v Amar Nath* 5 All 318

109 Arrest —An arrest is a restraint of the liberty of the person Unless there is submission actual contact is necessary to effect it Where a bailiff met the accused in the street showed his staff told him he was under arrest but did not touch him and the accused instead of going with him walked away and entered a shop, *held* that the accused was not arrested at all and could not be convicted of escape from custody—*Aludomal v Crown* 9 S L R 141 17 Cr L J 87

110 All means —*Justifiable violence* —The means employed to stop the fugitive should be such as an ordinary prudent man would make use of who had no intention of doing any serious injury The wounding of a thief by a Chowkidar in order to effect his arrest was held to be justifiable under the circumstances—*Q v Protap Chowkedar* 2 W R 9 Under clause (3) of this section an Excise officer pursuing an opium smuggler has no right to fire at him where he so fired and the accused cut the Excise officer on his thigh with a sword but did not cause a severe wound *held* that the act of the officer in firing at the accused was illegal and the latter exercised his right of private defence in wounding the officer with his sword—*Nga Nan v K E* 21 Cr L J 97 (Bur)

Punishment for resistance to arrest—see secs 224 225 225B I P C

47 If any person acting under a warrant of arrest or any Search of place entered by person sought to be arrested police officer having authority to arrest, has reason to believe that the person to be arrested has entered into or is within any place the person residing in or being in charge of such place shall on demand of such person acting as aforesaid or such police officer allow him free ingress thereto and afford all reasonable facilities for a search therein

111 Scope —This section is not intended to restrict the powers of the Police to enter the place to be searched On the contrary it is a provision compelling householders to afford the police facilities in carrying out their duties and the next section provides that if difficulties are placed in the way of a Police officer he may use force to obtain ingress—*Ramesh Chandra v Emp* 41 Cal 350

Demand —No precise words are needed it is enough to give notice that entry is sought under proper authority *Russell on Crimes* p 745

48 If ingress to such place cannot be obtained under section 47 it shall be lawful in any case for a person acting under a warrant and Procedure where ingress not obtainable

in any case in which a warrant may issue but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police officer to enter such place and search therein, and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance

Provided that, if any such place is an apartment in the actual occupancy of a woman (not being the person to be arrested) who, according to custom, does not appear in public, such person or police-officer shall, before entering such apartment, give notice to such woman that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing and may then break open the apartment and enter it

112 A Police officer entering into a building for the purpose of arresting suspected persons will not be liable for trespass—*Clarke v Brojendra Kishore*, 36 Cal 433

49. Any police officer or other person authorised to make an arrest may break open any outer and inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein

50. The person arrested shall not be subjected to more restraint than is necessary to prevent his escape

No unnecessary restraint For punishment for unnecessary restraint see sec 20, I P C

51. Whenever a person is arrested by a police officer under a warrant which does not provide for the taking of bail or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail, and

whenever a person is arrested without warrant or by a private person under a warrant and cannot legally be admitted to bail or is unable to furnish bail

the officer making the arrest or when the arrest is made by a private person the police officer to whom he makes over the person arrested may search such person and place in safe custody all articles other than necessary wearing apparel found upon him

52 Whenever it is necessary to cause a woman to be searched

Mode of search ng the search shall be made by another
women woman with strict regard to decency

53 The officer or other person making any arrest under

Power to seize this Code may take from the person
offensive weapons arrested any offensive weapons which he has about his person and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested

B — Arrest without Warrant

When police may arrest without war 54 (1) Any police officer may with
rant out an order from a Magistrate and with
out a warrant arrest—

first any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned

secondly any person having in his possession without lawful excuse the burden of proving which excuse shall lie on such person any implement of house breaking

thirdly any person who has been proclaimed as an offender either under this Code or by order of the Local Government

fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property, and who may reasonably be suspected of having committed an offence with reference to such thing,

fifthly, any person who obstructs a police officer while in the execution of his duty or who has escaped, or attempts to escape, from lawful custody

sixthly any person reasonably suspected of being a deserter from Her Majesty's Army or Navy or of belonging to Her Majesty's Indian Marine Service and being illegally absent from that service,

seventhly, any person who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in any act committed at any place out of British India, which, if committed in British India, would have been punishable as an offence and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise liable to be apprehended or detained in custody in British India,

eighthly, any released convict committing a breach of any rule made under section 565 sub-section (3), and

ninthly, any person for whose arrest a requisition has been received from another police officer provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition

(2) This section applies also to the police in the town of Calcutta

Change —In the fourth clause the word "and" has been substituted for

the word or and the ninth clause has been newly added by the Criminal Procedure Code Amendment Act XVIII of 1923 For reasons see below

113 Any Police officer —Village Chowkidars are not Police officers within the meaning of this section—*Kalai v Kalu Chowkidar* 27 Cal 366 *Emp v Kallu* 3 All 60 *Bolai v Emp* 35 Cal 361 *Purna Chandra v Hachanali* 41 Cal 17

The words any police officer show that where a warrant has been issued for the arrest of certain culprits on a charge of a cognizable offence any police-officer even though he is not entrusted with the execution of such warrant and has not got the warrant with him will be justified under this section in making the arrest—*Ratna Mudali v Emp* 40 Mad 1028 18 Cr I J 709

Where a complaint has been made against any person in respect of a cognizable offence any police officer may arrest him without warrant even though the Police officer be not in his uniform—*Mahadeo v Emp* 21 A L J 791

114 Power of arrest —The words may arrest show that the power of arrest is discretionary A Police officer is not always bound to arrest for cognizable offences If a complaint of such an offence is made to him he ought if there be circumstances in the case which lead him to suspect the information to refrain from arresting persons of respectable position and to leave the complainant to go to a Magistrate and convince him that the information justifies the serious step of the issue of a warrant of arrest—*Q E v Irappa Ratanlal* 79,

The powers under this section must be cautiously used This section gives wide powers to a Police officer to make an arrest without an order from the Magistrate and without warrant only in certain circumstances limited by the provisions contained in this section and it is necessary in exercising such large powers to be cautious and circumspect—*In re Charu Chandra* 44 Cal 76 20 C W N 1233

Power to detain —Authority given to arrest under this section implies authority to detain—*Q E v Ramchandra Ratanlal* 270 But when certain persons were arrested under section 54 Cr P Code on suspicion of having been concerned in a dacoity, and afterwards the investigating police-officer reported to the Magistrate that there was no sufficient evidence upon which to charge those persons with participation in the dacoity the Magistrate ought to discharge these persons and ought not to detain them in order that the police might institute proceedings under sec 110 If the police believe that those persons were habitual thieves or robbers they ought to re arrest them under section 55 —*Emp v Rahu* 43 All 186 18 A L J 1114

115 Punishment —A police officer arresting a person unjustifiably or otherwise than on a reasonable ground is guilty of an offence under sec 220 I P Code

A person causing obstruction to a Police officer making an arrest under this section is guilty of an offence under section 25 I P C —*Raina Mudali v Emp* 40 Mad 1078 *Gopal Singh v K E* 36 All 6

116 Clause (1)—Reasonable complaint or suspicion, credible information —What is a reasonable complaint or suspicion must depend on the circumstances of each particular case but it must be at least founded on some definite fact tending to throw suspicion on the persons arrested and not a mere vague surmise or information Still less have the police any power to arrest persons as they sometimes appear to do merely on the chance of something being hereafter proved against them—*7 W R 3*

A general definition of what constitutes *reasonableness* in a complaint or suspicion and credibility of information cannot be given Both must depend upon the existence of tangible legal evidence within the cognisance of the Police officer and he must judge whether the evidence is sufficient to establish the reasonableness and credibility of the charge information or suspicion—*Reg and Ord N IV P Sec 10 para 366 (8)* *Subodh v K E*, 52 Cal 319 29 C W N 98 26 Cr L J 625

If a Magistrate after taking the statement of the complainant respecting an offence under section 406 I P Code issues a warrant for the arrest of the accused there is a reasonable complaint of the accused being concerned in a cognizable offence consequently a constable who arrests the accused without a warrant is justified in doing so under this section—*Alay Muhammad v Emp* 22 Cr L J 758 (All) If a warrant of arrest is issued against the accused on a charge of cognizable offence by the Police of any other province it amounts to a credible information that the accused has committed a cognizable offence—*Gopal Singh v Emp* 36 All 6 11 A L J 957

Where a complaint of a cognizable offence was made to the Magistrate who recorded it under section 200 and directed the police to make an investigation and send a report and the police after making the investigation arrested three persons it was held that the complaint recorded under sec 200 was a credible information upon which the police were entitled to arrest under this section even though the Magistrate had not issued process against the accused—*Emp v Bhole Bhi at Pat* 379 4 P L T 521 24 Cr I J 375 The police can make an arrest under this section on a complaint of a cognizable offence made before them—*Mahadeo v Emp* 21 A L J 791 25 Cr I J 65

117. Clause (4) —A formal complaint need not be made in order

to authorise a police officer to arrest under this clause any person found with stolen property—*Queen v Gourtee Singh* 8 W R 28

The possession of stolen property must be recent and exclusive—*Ibid*

The word and has been substituted for 'or' Under the old law as it stood before 1923 a police officer could arrest any person in whose possession anything was found which might reasonably be suspected to be stolen property even though he might come in possession of that property innocently The effect of the amendment is that the mere possession of stolen property will not empower a police officer to arrest the person in possession of it but the person must also be reasonably suspected of having committed an offence in respect of the thing See the *Legislative Assembly Debates*, 16th January, 1923 page 1154

117A Clause (5)—Obstruction to police-officer —Where a police constable, after questioning a person carrying bundles of cloth under his arms (suspecting the cloth to be stolen) and receiving unsatisfactory replies, took hold of the pieces of cloth in order to inspect them, but the latter refused to allow the officer to inspect the cloth and scuffled with him, after which the police-officer arrested him *held* that the person was legally arrested under the fifth clause of this section, for obstructing a police officer while acting in the execution of his duty—*Bhawoo v Mulji*, 12 Bom 377.

118. Clause (7) —Offence committed out of British India —By virtue of this clause the ruling in 19 Bom 72 is no longer good law This clause authorises the police in British India to arrest without warrant a British subject committing outside British India any of the offences enumerated in the first Schedule of the Extradition Act—*Emp v Hussein-ally*, 7 Bom L R 463

An arrest in British India by a police of the Native State of a person suspected to have committed an offence in the Native State is illegal—*Emperor v Debi*, 29 All 377

The wording of this clause indicates that the arresting Police-officer has to exercise his own judgment and form his own opinion as to whether he should or should not act, and to enable him to do so he must have the necessary facts before him A bare assertion of the commission of an offence does not amount to a reasonable suspicion or a credible information, on the basis of which an arrest can be made under this clause If there is a credible information of the issue of a warrant by the Foreign State, that would justify an action under this section—*Subodh v. Emp*, 52 Cal 319 29 C W. N 98 40 C L J 489

The expression 'liable to be apprehended' etc contemplates cases in which there is a *present* liability to apprehension or detention in custody in British India under the laws of extradition or the Fugitive Offenders

Act or any other law and not cases in which there may be liability in future for apprehension or detention. The issue of some sort of process under the law would create such a liability though the process may not have arrived and is not available for execution—*Ibid*

119 Clause (9)—The first two lines of this clause have been added on the recommendation of the Select Committee in 1916 and the latter portion on the recommendation of the Joint Committee in 1922. As regards the first two lines the Select Committee of 1916 observed. The Committee are of opinion that an amendment is required in section 54 to meet the case of a requisition from a police officer to arrest a man at a distance. We think it is clear that there should be power for an investigating officer to require by telegram the arrest of a person who may perhaps have absconded from the place where the investigation was taking place. We therefore propose to add a clause at the end of section 54. As regards the rest of the clause the Joint Committee (1922) added

We agree with those critics who desire that some safeguard should be provided and we have therefore proposed to lay down that the requisition should reveal the offence or other cause for which the arrest is to be made so that the arresting officer can satisfy himself that the arrest could lawfully have been made without warrant by the officer issuing the requisition.

Before the ninth clause was added it was held that the reasonable suspicion and credible information in this section must be based upon definite facts which the Police officer must consider *for himself* before he could act under this section. He could not delegate his discretion or take shelter under *another person's belief or judgment*. Any other interpretation of these words would tend to diminish the sense of responsibility of the officers concerned and to make the exercise of their powers dangerous. Thus where a Police-officer arrested the accused on receipt of a letter written by an inspector of Police in which it was stated that the accused committed offences under secs 409 and 420 I P C and it appeared that the officer effecting the arrest relied solely on the aforesaid letter and had no personal knowledge of the facts of the case it was held that the arrest of the accused was not proper—*In re Charu Chandra* 44 Cal 76. This ruling is no longer correct in view of this new clause.

120 Arrest without warrant under Special Acts.—Arrest of a person in possession of a contraband salt (Sec 24 Madras Act VII of 1864 Sec 4 of Madras Act I of 1887) carrying arms under suspicious circumstances (Sec 12 Arms Act XI of 1878) Gambling in open streets (Sec 13 of Act III of 1867) committing offences under the Railways Act (Sec 13 Railways Act) Cantonments Act (Sec 15 of Act XIII of 1861) the Criminal Tribes Act (Secs 20 and 26 of Act XXXII of 1871) Emigration Act (XXI of 1883 Sec 17) Ind in Explosives Act (IV of 1864 Sec 2

13) Forest Act (Act VII of 1878 Sec 63) European Vagrancy Act (Act IX of 1874 Sec 19) Assam Labour and Emigration Act (VI of 1901 section 195) Bengal Excise Act (VII of 1878 secs 40 and 41) Cruelty to Animals Act (Bengal Act III of 1869 section 1) Punjab Municipal Act (XX of 1891 secs 18 83) Bombay Gambling Act (IV of 1867 sec 12A) Rangoon Tramways Act (XXII of 1883 sec 19)

Arrest of vagabonds, habitual robbers, etc 55. (1) Any officer in charge of a police station may, in like manner arrest or cause to be arrested—

- (a) any person found taking precautions to conceal his presence within the limits of such station under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence, or
- (b) any person within the limits of such station who has no ostensible means of subsistence or who cannot give a satisfactory account of himself, or
- (c) any person who is by repute an habitual robber house-breaker or thief or an habitual receiver of stolen property knowing it to be stolen or who by repute habitually commits extortion or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury

(2) This section applies also to the police in the town of Calcutta

121 Object of section —The powers with which officers in charge of police stations have been armed under the Code for the purpose of restraining bad characters are exceptional powers. They provide very strong remedies and should never be put in force without the greatest deliberation and except upon convincing evidence. This section was intended for the suppression of habitual bad characters whom an officer in charge of a Police station suddenly finds within his jurisdiction or about whom he has good cause to fear that they will commit serious harm before there is time to apply to the nearest Magistrate empowered to deal with the case under sec 112—*In re Daulat Singh* 14 All 45

122 Illegal arrest —A person against whom proceedings under Chapter VIII were held by the High Court to be illegal was re-arrested under this section after giving him ostensible release. It was held that

the re arrest was illegal and an unlawful exercise of authority as it was an attempt in another way to do what had been declared by the High Court to be illegal—1883 A W N 123 Similarly where the Sessions Judge has passed orders for the immediate release of an accused person who had been prosecuted for dacoity the action of a Police officer or a Magistrate in re arresting him under this section and subsequently taking proceedings against him is a grave irregularity and wholly without jurisdiction—*Emp v Maiku* 41 All 483 17 A L J 458 20 Cr L J 381

In order to justify an arrest under clause (c) of this section the prosecution will have to prove that the man was reputed to be a habitual robber or house breaker etc it is illegal to arrest a person merely on the ground that the police had reason to suspect that he was concerned in several offences—*Appasami v King Emp* 47 Mal 442 (445) 46 M L J 447 25 Cr L J 563

123 Section applies to Calcutta Police—This section is expressly made applicable to the Police of Calcutta Therefore an officer in charge of a Police-station in Calcutta may arrest a person although there is no declaration by Government declaring a thana or police station in Calcutta to be a police station within the meaning of this Code—*Emp v Madho Dhoti* 31 Cal 557

124 Bail—When the Police arrest under this section they are bound to give the person arrested the option of bail and the bond should not be excessive but in accordance with the position in life occupied by the person arrested—*In re Daulat Singh* 14 All 45

125 Clause (a)—*Habitual gambler*—Only the persons enumerated here can be arrested under this section Persons who are suspected of earning their livelihood by unlawful gambling are not liable to arrest by the Police The proper course is to proceed under sec 112 of the Code—*King Emp v Kyaw Dun* 3 L B R 91 3 Cr L J 10

126 Sections 55 and 110—This section is independent of Chapter VIII of this Code although proceedings under that Chapter might follow on arrest under this section as a natural sequence A police-officer can therefore arrest or cause to be arrested without a warrant or an order of a Magistrate any person who is by repute a robber house-breaker or thief or otherwise comes under section 110 of the Code—*Nepal v Emperor* 35 All 407 14 Cr L J 618 11 A L J 596

56 (1) When any officer in charge of a police-station

Procedure when or any police officer making an investigation sub-ordinate to arrest under Chapter XII requires any without warrant officer subordinate to him to arrest without a warrant (otherwise than in his presence) any pe

who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing specifying the person to be arrested and the offence or other cause for which the arrest is to be made

The officer so required shall before making the arrest notify to the person to be arrested the substance of the order and, if so required by such person shall show him the order

(2) This section applies also to the police in the town of Calcutta

Change —The italicised words have been added by sec 11 of the Criminal Procedure Code Amendment Act (XVIII) of 1923)

We consider that a Police officer making an investigation should no less than an officer in charge of a police station have power to depute a subordinate to effect an arrest under the provisions of section 56 (1) and we propose an amendment in this subsection accordingly '*Report of the Select Committee of 1916*

The second para of subsection (1) did not exist in the Bills of 1914 or 1921, but was added on the motion of Mr Rangachariar during the debate in the Assembly See *Legislative Assembly Debates*, January 17, 1923, page 1186

127 "Officer subordinate" —A *chowkidar* is an officer subordinate to an officer in charge of a police station—*Bahubal v Emp* 10 C W N. 287 *Umrao v Emp* 26 Cr L J 795

128 In his presence —If the arrest is made in the presence of the officer in charge of the Police station the arrest is virtually made by him, and no order in writing is necessary, a verbal order is sufficient—*Queen v Shaikh Emoo* 11 W R 20

129 Order in writing —The order in writing is an authority to a subordinate officer to make an arrest which the superior Police officer, if present could himself make on his own responsibility—*Q E v Basant Lal*, 27 Cal 320 The mere writing of the name of the subordinate on the back of the warrant and the signing of that endorsement by the officer in charge of the station does not constitute the warrant an order in writing But adding the words 'arrest the person within named and for the offence within stated' would make it a valid order in writing—*Q E v Dalip*, 18 All 246

Section 80 of the Code applies only to warrants and not to orders in writing mentioned in this section therefore it was held that a subordinate officer making an arrest under an order in writing was not bound to notify to the person arrested the authority for and the cause of his arrest—*Q E*.

v Basant Lal 27 Cal 320 (323) This is no longer good law because the new second para of subsection (1) now expressly makes it *obligatory* on the subordinate officer to notify to the person arrested the substance of the order in writing and to show him the order if called upon to do so.

The subordinate officer making the arrest is not bound to show the accused the order given by the officer in charge of the police station unless he is asked to produce the order—*Umrao v L* 1 p 26 Cr L J 795

130 Warrant by a Magistrate —The issuing of a warrant by a Magistrate for the arrest of a person does not exclude the jurisdiction of the officer in charge of the Police station and prevent him from issuing the order under this section. It might be different if the Magistrate has decided that no warrant should issue and that summons only should issue—*Q E v Dalip* 18 All 246

57 (1) When any person, who in the presence of a police officer has committed or has been accused of committing a non cognizable offence, refuses on demand of such officer to give his name and residence or gives a name or residence which such officer has reason to believe to be false he may be arrested by such officer in order that his name or residence may be ascertained

(2) When the true name and residence of such person have been ascertained he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required

Provided that if such person is not resident in British India the bond shall be secured by a surety or sureties resident in British India

(3) Should the true name and residence of such person not be ascertained within twenty four hours from the time of arrest or should he fail to execute the bond or if so required to furnish sufficient sureties he shall forthwith be forwarded to the nearest Magistrate having jurisdiction

131 Refusal to give name and address —A police constable asked a man not to create any disturbance on the public road. Upon the man's declining to do so the constable demanded his name and address which were not given. Then the constable arrested and dragged him to the police chowky and detained him there till his name and address were

ascertained It was held that the constable had lawfully exercised the powers conferred by this section—*Lmp v Goolab Rasul* 5 Bom L R 597

Where two police officers arrested without warrant a person who was drunk and creating disturbance in a public street and confined him in the police station though one of them *knew his name and address* held that the police officers' action was not justified under this section—*Gopal Naidu v King Emp* 46 Mad 605 6-5 (T B) 44 M L J 655 24 Cr L J 599

58 A police officer may, for the purpose of arresting without warrant any person whom he is authorized to arrest under this Chapter, pursue such person into any place in British India

132 Pursuit in foreign territory —The Police may in *hot pursuit* follow an offender into an independent Native State, if they arrest him there, they must take him at once to the nearest Police authority of that State, if not in hot pursuit they should ordinarily apply to the nearest Police authorities of the State and request them to effect the arrest of the fugitive—*C P Pol Man* p 170

<p>59 (1) Any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence, or who has been proclaimed as an offender, and shall, without unnecessary delay, make over any person so arrested to a police-officer, or in the absence of a police-officer, take such person to the nearest police station</p>	<p>59 (1) Any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence or any proclaimed offender, and without unnecessary delay, shall make over any person so arrested to a police-officer, or, in the absence of a police-officer, take such person or cause him to be taken in custody to the nearest police-station</p>
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(2) If there is reason to believe that such person comes under the provisions of section 54, a police-officer shall re-arrest him

(3) If there is reason to believe that he has committed a non-cognizable offence, and he refuses on the demand of a

police-officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 57. If there is no sufficient reason to believe that he has committed any offence, he shall be at once released

Change —Subsection (1) has been re drafted by sec 12 of the Criminal Procedure Code Amendment Act (XVIII of 1923), but the actual amendment made in the subsection is the addition of the words "or cause him to be taken in custody " This amendment gives effect to the ruling in 29 All 575 cited below

133 Principle —The principle of this section is that "for the sake of preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts"—*per* Parke B in *Timothy v Simson*, (1835) 4 L J Ex 81 Thus, if a person is drunken and disorderly and is committing assaults on others, so that his conduct is at that time a grave danger to the public, he may be rightly arrested under this section by a private citizen—In *Ramaswamy Ayyar*, 44 Mad 913. 22 Cr L J 412

134 Scope of Section.—The intention of this section is to prevent arrest by a private person on mere suspicion or information, and the power of arrest by such person is restricted only to *non bailable* and *cognizable offences* committed *in his presence*, and to a proclaimed offender—*Q E v. Potadu*, 11 Mad 480 The words "in his view" mean 'in his presence' or 'within his sight' and not 'in his opinion' The Legislature did not intend to give a private person authority to arrest an offender, if upon information received or from other circumstances appearing before him he is of opinion that an offence has been committed—*Gakul v Emp.*, 7 P L T. 65; 26 Cr L J. 1462. A I R (1926) Pat. 53

This section enables a private person to arrest an accused for committing the *abetment* of a non-bailable and cognizable offence (*e g* abetment of the offence of extortion)—*Raghunath v K E.* 5 P L J 129. 1 P L T. 60.

The arrest by a private person is authorised only in case the offence is committed *in the presence* of such person; therefore an arrest by a private person would be illegal if it is made after the offence (which is not a continuing one) has been completed before such person comes up and makes the arrest—*Holus v Emp.*, 35 Cal 361 Where a private person whose bullock was lost, traced the bullock to the house of the thief arrested him and made him over to the police *ekhidir*, held that the arrest was not lawful as the offence of theft was not committed in the presence of the private person arresting the thief—*K. E v. John*, 23 All 266 A private

person has no power to arrest an accused who is running away after committing murder where the murder did not take place in the presence of such person—*Alawal v Emp* 1922 P L R 19=23 Cr L J 3

135 Make over to a police officer —A village Chowkidar (*Kalas v Kalu Chowkidar* 27 Cal 366 *Purna Chandra v Hachanali* 41 Cal 17 17 C W N 978) or a village Talayari or a village Toti (*Q v Bojigan* 5 Mad 22) is not a Police officer to whom the arrested person may be made over But under the present amendment the arrested person may be made over to the Chowkidar etc so that the Chowkidar may take such person to the nearest police station

Take such person to the Police-station —It is not the intention of the Legislature that the person making the arrest should be bound himself to take the arrested person to the police station—*Emp v Parsiddhan Sing* 29 All 575 *Q E v Potadu* 11 Mad 480 See also *King Emp v Johns* 23 All 266 The directions are sufficiently complied with if the person arresting the accused forwards him in charge of a servant or a village servant—*Ibid* This is now made clear by the addition of the words or cause him to be taken

60 A police officer making an arrest without warrant shall,
 Person arrested to be taken before Magistrate or officer in charge of police-station without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station

136 Send the person —On a police officer arresting a person the prisoner should not be kept in confinement in any place which the officer might select, but should be sent immediately to the police station and be placed in the custody of the officer in charge of the station who is the person entrusted by the Act with the conduct of the enquiry—*Q v Tarinee* 7 W R 3

Report to the Magistrate —Where a policeman arrested a thief but being himself unable to send or take the accused to a Magistrate made a report upon which the Magistrate issued a warrant it was held under the circumstances that the accused was legally brought before the Magistrate—*Reg v Mahipya* 5 B H C R 99

61 No police-officer shall detain in custody a person arrested
 Person arrested not to be detained more than twenty-four hours without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special

order of a Magistrate under section 167 exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court

137 Object of section —The intention of the Legislature having regard to this section and section 167 is that an accused person should be brought before a Magistrate competent to try or commit with as little delay as possible—*Q E v Engadu* 11 Mad 98 *Ponnusami v Queen* 6 Mad 69 *Narendra v Emb* 36 Cal 166 *In re Nagendra Nath* 51 Cal 402 (412) 38 C L J 388 The precautions laid down in sections 60 and 61 seem to be designed to secure that within not more than 24 hours some Magistrate shall have seisin of what is going on and some knowledge of the nature of the charges against the accused however incomplete the information may be—*Dwarkanadas v Ambalal* 28 C W N 830 25 Cr L J 1203

138 Detention in custody —Where the accused were not allowed to leave the thana or to go to their homes held that they were detained in custody within the meaning of this section and the mere fact of there not being a special guard over them would not alter the nature of their position—*Queen v Basooram* 19 W R 36

139 Period of detention —In no case is a Police officer justified in detaining a person for a single hour in excess of 24 hours without bringing him before a Magistrate except upon some reasonable ground justified by all the circumstances of the case—6 W R 88 Even if a person be rightly arrested it does not rest with the police officer to keep the prisoner in custody where and as long as he pleases Under no circumstances can he be detained without the special order of a Magistrate under sec 167 for more than 24 hours Unless the special order has been obtained, the prisoner must either be discharged or sent on to the Magistrate and any longer detention is absolutely unlawful—*Q v Tarinee* 7 W R 3

The provisions of this section are imperative and where a police officer is charged with having detained prisoners for more than 24 hours without the special order of a Magistrate it is not necessary for the Crown to prove that the police officer detained them with a guilty knowledge—*Queen v Basooram* 19 W R 36

The detention mentioned in this section means continuous detention This section does not apply to cases where there has not been a continuous detention for more than 24 hours The law does not mean that the number of hours during which an accused person is detained at a thana is to be added up irrespective of circumstances Thus where the accused person was brought to the thana at 3 o'clock in the afternoon and was allowed to go (to get bail) at noon the next day and was not a prisoner in the

till his return on the morning of the next day and then he was sent up to the sudder station by the evening *held* that although the period of detention exceeded 24 hours there was no *continuous* detention for more than 24 hours and that the detention was not illegal—*In re Indrobeer* 1 W R 5

Time occupied in journey —The time occupied in journey to the Magistrate is not to be counted in the 24 hours but it is the duty of the Magistrate to see that the time so occupied is reasonable with reference to the distance to be travelled and other local considerations—Ratanlal 22

62 Officers in charge of police-stations shall report
Police to report to the District Magistrate, or, if he so
apprehensions directs to the Sub divisional Magistrate,
the cases of all persons arrested without warrant, within the
limits of their respective stations, whether such persons have
been admitted to bail or otherwise

Failure to report on the part of the police officer is punishable under
section 217 I P Code

63 No person who has been arrested by a police officer
Discharge of person shall be discharged except on his own
apprehended bond or on bail, or under the special
order of a Magistrate

64 When any offence is committed in the presence of a
Offence committed in Magistrate within the local limits of his
Magistrate's presence. jurisdiction, he may himself arrest or
order any person to arrest the offender, and may thereupon,
subject to the provisions herein contained as to bail, commit
the offender to custody

140 Secs 64 and 556 —Although this section gives to a Magistrate
authority to arrest a person committing an offence in his presence yet
it is clearly not intended to trench upon the general principle embodied
in Sec 556 of this Code that no Judge or Magistrate shall *try* a case in
which he is personally interested Therefore, where a Magistrate while
travelling in a railway carriage requested the accused who were his fellow
passengers to desist from smoking and on their contemptuously refusing
to do so arrested and subsequently tried and convicted them it was held
that the Magistrate was legally and morally disqualified from exercising
his judicial functions in relation to the offence imputed—*Q F v Venkana*,
Ratanlal 339

65 Any Magistrate may at any time arrest or direct the arrest in his presence within the local limits of his jurisdiction of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant

141 Arrest under Bombay Gambling Act —Under the provisions of sec 6 of the Bombay Gambling Act IV of 1887 a first class Magistrate has power to give authority under a special warrant to a Police officer to make an arrest and search those provisions must be read subject to the provisions of secs 63 and 105 of this Code that is the Legislature must be presumed to have intended that the Magistrate should have authority to make the arrest and search himself if necessary—*Fmp v Fernandez* 31 Bom 438 9 Bom L R 695 6 Cr L J 60

66 If a person in lawful custody escapes or is rescued the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in British India

67 The provisions of sections 47, 48 and 49 shall apply to arrests under section 66 although the person making any such arrest is not acting under a warrant and is not a police officer having authority to arrest

CHAPTER VI

OF PROCESSES TO COMPEL APPEARANCE

A —Summons

68 (1) Every summons issued by a Court under this Code shall be in writing in duplicate signed and sealed by the presiding officer of such Court or by such other officer as the High Court may from time to time by rule direct

(2) Such summons shall be served by a police-officer or subject to such rules as the Local Government may prescribe in this behalf by an officer of the Court issuing it or other public servant

(3) This section applies to the police in the towns of Calcutta and Bombay

Scope—The corresponding sections in the Code of 1872 (secs 152 and 153) were limited to service of summons against an accused person only. The scope has now been enlarged. This is the only section which provides for the issue of a summons under this Code and a summons to an assessor must comply with the terms of this section—1 C W N cxvi

142 Application for summons—Duty of Court—When an application is made for a process to compel the appearance of witnesses it is the duty of the Court to pass an order either granting the prayer or refusing it. To make a mere order directing the petition to be filed is to leave the matter open and is improper—*Bhomar v Diganbar* 6 C W N 548

143 Form and Contents—A summons should be clear and specific in its terms as to the title of the Court, the place at which and the day and the time of the day when the attendance of the person summoned is required and it should go on to say that such person is not to leave the Court without permission and if the case in which he has been summoned is adjourned without ascertaining the date of the adjournment. If these formalities are not duly observed a conviction for non attendance in obedience to the summons cannot be sustained—*Express v Ram Saran* 5 All 7

Where a defendant was summoned to appear before a Magistrate on a certain date but the summons did not specify the place at which he was to appear it was held that the Magistrate was not competent to dispose of the case *ex parte* on failure of the person to appear before the Magistrate—7 M H C R App 43 See 1 Weir 100

A summons should contain the name of the father of the person summoned, his caste or tribe and his residence so as to place his identity beyond all doubt—See *Punj Cir* Vol II p 151. In a process issued against a person residing in a large town the description should contain not merely the name and father's name of the person to whom the process is addressed and the name only of the town in which such person resides but should give such further particulars regarding the section or street of the town in which such person resides as can be ascertained and will facilitate his identification—*Cal G R & C O* Ch 1 Rule 19

Signing—Signing not by full name but by initials is only an irregularity and does not affect the validity of the proceedings—Sec 537 *Illustration* (under the old law). The illustration to Sec 537 has now been omitted by the 193 Amendment Act but the law does not seem to have been changed. See also *Q E v Jais Prasad* 8 All 293 and *Banka Behari v Emp* 3 P L J 493 19 Cr L J 747

Sealed —A summons which is not sealed is not valid in law and therefore disobedience to a summons not sealed is not an offence—1 Weir 100, *In re Abdul Rahim* 37 M L J 588 21 Cr L J 800

By whom served —Under clause (2) of section 68 of the Criminal Procedure Code the Lieutenant Governor of Bengal has declared that the processes issued under that Act shall be served by peons appointed under the rules framed by the High Court under Sec 22 of the Court Fees Act VII of 1870 vide Notification Government of Bengal the 11th May 1883 *Calcutta Gazette* 23rd May 1883 page 426 Similar orders were passed by the Chief Commissioner of Assam see *Assam Gazette* 23rd June 1883 page 290

69 (1) The summons shall if practicable be served personally on the person summoned by delivering or tendering to him one of the duplicates of the summons

(2) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate

(3) Service of a summons on an incorporated company or other body corporate may be effected by serving it on the secretary local manager or other principal officer of the corporation, or by registered post letter addressed to the chief officer of the corporation in British India In such case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post

This is the only section which provides for the procedure of service of summons and every summons (e g summons to attend as assessor) under this Code must be served in accordance with the provisions of this section Any other mode (e g sending summons by post or under registered cover) is illegal and not justifiable—1 C W N 651

144 *Service how effected*—The mere showing of a summons to the person summoned is not sufficient service Either the original should be left with the party meant to be served or should be exhibited to him and a copy of it delivered to him—*Reg v Karsintil* 5 B H C R 0

Refusal to take or sign —If however the person refuses to take the summons the mere tendering is sufficient service—*Er p v Ganga Ram* 1886 A W N 93 *Sahadeo v Emp* 40 All 577 16 A L J 433 19 Cr

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This is the only section which provides for the procedure of service of summons and every summons (s g summons to attend as assessor) under this Code must be served in accordance with the provisions of this section Any other mode (s g sending summons by post or under registered cover) is illegal and not justifiable—1 C II \ LXVI

144 Service how effected—The mere showing of a summons to the person summoned is not sufficient service Either the original should be left with the party meant to be served or should be exhibited to him and a copy of it delivered to him—R s \ *Kursatil* 5 B II C R 20

Refusal to take or sign —If however the person refuses to take the summons the mere tendering is sufficient service—*Erp* \ *Ganga Pam*

14 A W N 93 *Sahdeo v Erp*, 40 All 577

B—Warrant of Arrest

75 (1) Every warrant of arrest issued by a Court under this Code shall be in writing signed by the presiding officer or in the case of a Bench of Magistrate by any member of such Bench and shall bear the seal of the Court

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed

147 Grounds for issuing warrants —A Magistrate should issue a warrant on good and legal grounds. It is essential that he should have a knowledge of the offence having been committed and that knowledge must be either personal or derived from testimony legally given before him. The report of the Police or any statement which is not on oath and which falls short of actual formal complaint is not sufficient to give the Magistrate jurisdiction to issue a warrant—*Q v Surendra* 13 W R 27 (31)

148 Warrant —Form —When any Act does not provide a form of warrant the form to be used is the ordinary one prescribed by this Code—*Alter Caufman v Govt of Bombay* 18 Bom 636

Pardanashin lady —Until and unless a Magistrate is convinced that there is strong likelihood of the charge being proved a pardanashin lady of good position should not be ordinarily compelled to appear in person in the first instance—*Prem Kuar v Mai Stam Nath* 1908 P W R 20

General warrants —The issuing of a general warrant which means a warrant to apprehend all persons committing a particular offence or offences is illegal—*In re James Hashigs* 9 B H C R 154. No general warrant for arrest should ever be issued by a Court of Justice. Every warrant should state as shortly as possible the special matter on which it proceeds. A strict adherence to the forms of warrants of arrest prescribed by the Code will tend to prevent their being granted irregularly and without inquiry as to whether the circumstances justify their issue—*Punj Cir* P 144

Conditional warrants —A warrant which directs that in the event of a certain named person not leaving British India forthwith all officers to whom the warrant is directed are to arrest that person is invalid—*Alter Caufman v Govt of Bombay* 18 Bom 636. The proper procedure in this case would be first to issue an order directing the person to leave British India forthwith which should be duly served upon him and then in case of his refusal or neglect to comply with its terms there should be a further

order by the Governor in Council authorising his arrest and detention in jail—*Ibid*

149 Requisites of a valid warrant —

(a) It must be in writing

(b) It must be signed signing not by full name but by initials is a mere irregularity and does not affect the validity of the warrant or vitiate the arrest—*Ra 143 Behary v Emp* 3 P L J 493 19 Cr L J 747 *Q E v Janki Prosad* 8 All 293 [*In Abdul Gafur v Q E* 23 Cal 896 it was held that the signing must be by full name But this does not seem to be correct See note 143 under sec 68] The signing must be by pen and ink and not by stamp—*Subramania Ayyar v Queen* 6 Mad 396 The warrant must be signed by the presiding officer of the Court and not by any other Magistrate A warrant signed not by the Magistrate who took cognisance of the case but by an Honorary Magistrate who lived in the same town is invalid and a person resisting or escaping from an arrest made in pursuance of such warrant does not commit an offence under Sec 353 I P C—*Jagpat Koori v Emp* 2 P L J 487 18 Cr L J 526

(c) It must be sealed An unsealed warrant is void—*In re James Hastings* 9 B H C R 154 *Mahajan v Emp* 42 Cal 708 19 C W N 224 *Alter Causman v Govt of Bombay* 18 Bom 636

(d) The person named in the warrant must be described with sufficient certainty and particularity—18 Bom 636 The warrant must give particulars of the person to be arrested so as to identify him clearly. A warrant which directs the committal of James Hastings without giving any further description of him is invalid since it may lead to the arrest of any person bearing that name—*In re James Hastings* 9 B H C R 154 So also a warrant containing a wrong description of the accused (e.g. giving a wrong name of his father) is invalid—*Debi Sing v Q E* 28 Cal 399

(e) The warrant must specify the offence Where a warrant was issued for the arrest of a person on a charge of abduction it was held that since the act with which the accused was charged did not amount to an offence without a specific intention the warrant must state the intent with which the offence was committed otherwise it would be invalid—*Bidhoomookhi v Sreenath* 15 W R 4

(f) And lastly the warrant must contain the name and designation of the police officer or other person who is to execute it If the name is left blank the warrant is invalid—*Emp v Gama* 1913 P R 16 14 Cr L J 142 A warrant not addressed to a bailiff as required by Form 154 of Sch V of this Code or to any other person is not valid—*Mahammad Daksh v King Emp* 1904 P R 16

Language of warrant —A warrant should be written in the language

of the District from which it is issued. If sent to another District or Province where a different language is in ordinary use it should be invariably accompanied by a translation—*Caf G R and C O* p 3, *Bom H C Cr Civ* p 10

Warrant by telegram —A Court should not issue a judicial order or communicate the purport of a warrant or process by telegram—*N W P Reg and Ord* p 71

150 Shall remain in force —When the law has not fixed any period limiting the duration of a warrant the presumption is that it remains valid until it is executed—*Emp v Alloomiya* 28 Bom 129

A warrant on which there is an endorsement for bail to be taken for the appearance of the accused on a particular date does not lapse on the expiry of that date after that date only the direction to take bail lapses but the warrant continues in force until it is cancelled by the Court which issued it or until it is executed—*Raushan Singh v King Emperor* 13 C W N 1091

151 Cancellation of warrant —A Magistrate has discretion on sufficient cause shown to cancel a warrant and issue summons instead—*Imp v, Janal* 1 S L R 69 *Prem Keor v Mai Sham Nath* 1908 P W R 20

When a warrant is cancelled it is at an end and cannot be re issued. Even where a subordinate Magistrate issued warrants for the apprehension of some accused persons for trial and afterwards cancelled the warrants the District Magistrate had no authority to direct the re issue of the warrants against the accused—*In re Guru Charan* 1 C W N 650

76 (1) Any Court issuing a warrant for the arrest of any person may in its discretion direct that security be taken by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

(2) The endorsement shall state—

(a) the number of sureties,

(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound, and

(c) the time at which he is to attend before the Court

(3) Whenever security is taken under this section the
 Recognizance to be officer to whom the warrant is directed
 forwarded shall forward the bond to the Court.

152 Scope of section —This section now applies to witnesses as well as to accused persons. In the 1872 Code there were instead of the words for his attendance before a Court the words to answer the complaint which applied only to accused persons—2 Weir 39

152A Bond —Under sec 513 the Court or officer may allow a sum of money or G P Notes to be deposited in Court in lieu of executing a bond

A Magistrate should issue a bailable warrant even in non bailable cases when the offence charged borders on the technical (e g when the head of a mutt is alleged to have committed robbery in respect of property which he admittedly claims to be his) and the accused is a man of position and respectability—*Sivamulu v Emp* (1911) 1 M W N 452 12 Cr L J 430

Bail bonds in criminal cases are exempt from Court fees under sec 19, Cl 13 of the Court Fees Act; but the bonds given by sureties are not—*Ahmedabad Magistrate's Endorsement* Ratanlal 126

153 Attendance before a Court —The Magistrate may issue a warrant of arrest for attendance before himself or some other Court, but he has no power to issue a warrant for the arrest and production of a person in order that he may give evidence before the Police in an investigation under Chap XIV—*Q E v Jogendra* 24 Cal 320

77. (1) A warrant of arrest shall ordinarily be directed
 Warrant to whom to one or more police officers, and, when
 directed issued by a Presidency Magistrate, shall
 always be so directed, but any other Court issuing such a warrant may, if its immediate execution is necessary and no police-officer is immediately available, direct it to any other person or persons, and such person or persons shall execute the same

(2) When a warrant is directed to more officers or persons
 Warrants to several than one, it may be executed by all, or
 Persons by any one or more, of them

154 This section merely directs that a warrant shall be ordinarily directed to one or more Police officers but it does not say that the name of that Police-officer should be inserted in the warrant as well as his designation—*Bankey Behary v Emp* 3 P L J 493 19 Cr L J 747 The

reasons have been thus stated It would be extremely difficult to carry on the Police administration of the country if every warrant had to be directed by name to a Police officer and upon his transfer it were to become incapable of execution till the name of some other officer had been substituted in his place —*Ibid* In *K E v Shankar Dayal* 25 O C 111 24 Cr L J 14 it has been held however that a warrant which does not contain the name of the police officer to whom it was issued and to whom authority to make the arrest was given is irregular but it has been conceded that the evidence of the Magistrate who signed the warrant or of the Sub Inspector who executed it may supply the omission The Rangoon High Court also holds that if a warrant is directed to a police thana without specifying the name of any officer in the station it is at most a clerical error and does not invalidate the arrest if the accused has not suffered any prejudice—*Mahin v Emp* 3 Bur L J 18 A I R (1924) Rang 383

Warrant by Presidency Magistrate—A warrant issued by a Presidency Magistrate shall always be directed to Police officers Where such a warrant was directed to a person other than a Police officer though such officer was immediately available the High Court severely condemned the procedure—*Queen v Syud Hossain* 8 W R 74

Any other person—A Magistrate may under this section direct a warrant to an unofficial person only when its immediate execution is necessary and when he cannot immediately obtain the assistance of the Police—*Queen v Surendra Nath Roy* 13 W R 27

78. (1) A District Magistrate or Sub divisional Magistrate may direct a warrant to any landholder farmer or manager of land within his district or sub division for the arrest of any escaped convict proclaimed offender or person who has been accused of a non bailable offence and who eluded pursuit

(2) Such landholder, farmer or manager shall acknowledge in writing the receipt of the warrant and shall execute it if the person for whose arrest it was issued is in or enters on his land or farm or the land under his charge

(3) When the person against whom such warrant is issued is arrested he shall be made over with the warrant to the nearest police-officer who shall cause him to be taken before a Magistrate having jurisdiction in the case unless security is taken under section 76;

79 A warrant directed to any police-officer may also be executed by any other police-officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed

155 Endorsement —If a warrant directed to a police officer is executed by another officer without endorsement (*e g* if a warrant addressed to the bailiff of the Court is executed by a *naiib nazir* and process server without any endorsement by the bailiff) the execution is illegal—*Ghasita v Emp* 22 Cr L J 145 3 Lah L J 346 The endorsement should be regularly made by *naiib* to a certain person in order to authorise him to make the arrest—*Durga Tewari v Rahman* 4 C W N 85

Again the endorsement must be made by the Police officer to whom the warrant is directed Where a warrant was directed to a Court Sub Inspector and the endorsement was made by the Court Head Constable it was held to be invalid—*Durga Charan v Q E* 27 Cal 457

Any other Police officer —A process serving peon is not included in the term any other police officer in the section—*Durga Charan v Q E* 27 Cal 457

156 Warrant under special Acts —A special warrant issued under sec 6 of the Bombay Gambling Act IV of 1887 cannot be executed by any other officer except the officer therein named—*Crown v Mishu* 3 S L R 56 Similarly a warrant under sec 45 of the Bengal Chowkidari Act (VI of 1870 B C) can be executed only by the person named therein—*Sheikh Nasur v Emp* 37 Cal 122 The Burma Gambling Act does not contain any provision for endorsement of the warrant issued under section 6 of that Act by the officer to whom it is issued to another officer—*Po Thuas v Emp* 12 Bur L T 165 21 Cr L J 9

80 The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and if so required shall show him the warrant

157 Notify the substance —Where a Police-officer simply shows the warrant to the accused but does not give him an opportunity of reading it, and does not notify its substance to him the arrest so made is unlawful—*Satish Chandra v Jadunandan* 26 Cal 748 *Abdul Gafur v Q E* 23 Cal 806 But if the Police-officer shows the warrant to the accused and gives him sufficient opportunity of reading the warrant itself the omission on the part of the officer to explain the particulars of the warrant does not invalidate the arrest, because all that this section requires is that the accused should have reasonable opportunity of knowing on what charge he

is being arrested and before what Court he is to appear so that he may take steps for arranging for his defence—*Bankey Behary v Emp* 3 P L J 493 19 Cr L J 747

158 Show the warrant —This implies that the arresting officer must have the warrant of arrest in his possession at the time of making the arrest otherwise it is illegal—*Emp v Amar Nath* 5 All 318 see also *Emp v Ganesh Lal* 27 All 258

Merely showing is not sufficient An opportunity should be given to the person to be arrested by showing him the warrant so that he might read it (26 Cal 748) and see that the person arresting has authority—*Al Dul Gafur v Q E* 3 Cal 896 *Satish Chandra v Jadunandan* 26 Cal 748 *Anand Lal v Empress* 10 Cal 18 *Q E v Tulsiram* 13 Bom 168 *Sheikh Nasir v Emp* 37 Cal 12

81 The police-officer or other person executing a warrant of arrest shall (subject to the provisions of section 76 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person

Person arrested to be brought before Court without delay

159 Further detention —When the arrested person is brought before the Magistrate the Magistrate cannot lawfully commit him to prison or remand him without sufficient grounds and in the complete absence of evidence there can be no grounds—*Queen v Surendra Nath* 13 W R 27

The warrant is exhausted as soon as the person arrested is brought before the Court If the accused is to be further detained it must be under some fresh warrant or order such as an order of remand under Sec 344 The warrant for further detention would be one of commitment directed to some jailor or other person having authority to receive and keep the prisoner—*In re H Bourke* 13 W R 1

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Where warrant may be executed 82 A warrant of arrest may be executed at any place in British India

160 Arrest outside British India —Where the accused was arrested by a constable of the Jeypur State, and was afterwards

arrested by a British Constable in the Residency of Jeypur, the arrest was made outside British India—*Empress v. Sheu Bun*, 7 Bur L R 83

The arrest of a person at a Railway Station in a Native State (e.g. the Gwalior State) on a charge of an offence committed in British India is illegal. The Gwalior State has ceded to the British Government jurisdiction over the Railway lands for the administration of civil and criminal justice in connection with the Railway and not in respect of offences not committed on those lands and having no connection with the Railway administration—*Radha Kishen v. Crown* 1 Lah 406 21 Cr L J 303. So also the grant by the Nizam to the British Government of civil and criminal jurisdiction along the line of Hyderabad State Railway does not justify the arrest of a person on the lands of the State Railway under the warrant of a Magistrate in British India for an offence committed in a British territory and not committed in the Railway nor in any way connected with the administration of the Railway—*Valammad Yusufuddin v. Q. E.* 25 Cal 70 (P C)

83 (1) When a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same such Court may, instead of directing such warrant to a police-officer forward the same by post or otherwise to any Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency town within the local limits of whose jurisdiction it is to be executed

(2) The Magistrate or District Superintendent or Commissioner to whom such warrant is so forwarded shall endorse his name thereon and if practicable, cause it to be executed in manner hereinbefore provided within the local limits of his jurisdiction

161 Warrant under Act XIII of 1859.—The provisions of this section read with Sec 5 apply to a warrant issued under the Workmen's Breach of Contract Act. Therefore a Magistrate cannot refuse to execute within his district a warrant issued by a Magistrate of another district under that Act—*Queen Empress v. Chatu* 1898 P R 11, *Q. E. v. Kattayan* 10 Mad 235, *Q. E. v. Muthya* 20 Mad 457, *Gauri Shankar v. Mata Prosad* 20 All 124

84 (1) When a warrant directed to a police-officer is to be executed beyond the local limits of the jurisdiction of the Court issuing the same, he shall ordinarily take it for endorse

Warrant directed to police-officer for execution outside jurisdiction

ment either to a Magistrate or to a police officer not below the rank of an officer in charge of a station within the local limits of whose jurisdiction the warrant is to be executed

(2) Such Magistrate or police officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police-officer to whom the warrant is directed to execute the same within such limits and the local police shall if so required assist such officer in executing such warrant

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police officer within the local limits of whose jurisdiction the warrant is to be executed will prevent such execution the police-officer to whom it is directed may execute the same without such endorsement in any place beyond the local limits of the jurisdiction of the Court which issued it

(4) This section applies also to the police in the town of Calcutta

85 When a warrant of arrest is executed outside the district in which it was issued the person arrested shall unless the Court which issued the warrant is within twenty miles of the place of arrest or is nearer than the Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency town within the local limits of whose jurisdiction the arrest was made or unless security is taken under section 76 be taken before such Magistrate or Commissioner or District Superintendent

86 (1) Such Magistrate or District Superintendent or Commissioner shall if the person arrested appears to be the person intended by the Court which issued the warrant direct his removal in custody to such Court

Procedure on arrest of person against whom warrant issued

Procedure by Magistrate before whom person arrested is brought

Provided that if the offence is bailable and such person is ready and willing to give bail to the satisfaction of such Magis

trate, District Superintendent or Commissioner, or a direction has been endorsed under section 76 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate District Superintendent or Commissioner shall take such bail or security as the case may be and forward the bond to the Court which issued the warrant

(2) Nothing in this section shall be deemed to prevent a police officer from taking security under section 76

C—Proclamation and Attachment

87. (1) If any Court has reason to believe (whether after Proclamation for taking evidence or not) that any person person absconding against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation

(2) The proclamation shall be published as follows —

- (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides,
- (b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village, and
- (c) a copy thereof shall be affixed to some conspicuous part of the Court house

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with and that the proclamation was published on such day

162 Summons cases —This section read with section 88 shows that even in summons cases and as against witnesses a proclamation may be issued But to lay a foundation for the issue of a proclamation under

this section with an accompanying order for attachment under Sec 88. It is necessary strictly to comply with the provisions of law relating to the issue of a warrant in a case where a summons is the ordinary mode of enforcing attendance—*Yasin Khan v Emperor*, 5 N L R 125

163 Conditions precedent to proclamation —The processes of attachment and proclamation are not to issue whenever a warrant fails of its effect. Before issuing a proclamation the officer sent to serve the warrant must be examined as to the measures adopted by him to serve it. If on his evidence or in any other manner the Magistrate is satisfied that the accused is absconding or concealing then and then only the processes of proclamation and attachment may be issued—*Bishonath Petitioner*, 3 W R 63 *Queen v Runjeet Santal* 6 W R 73 *King Emp v Po Ni*, 3 L B R 116 *In re Ramkishore* 19 W R 12 *Yasin Khan v Emp* 5 N L R 15

The previous issue of a warrant against the person whose attendance is required before the Court is a necessary condition. Therefore if the Court has no authority to issue a warrant an order for the issue of proclamation and a subsequent order for attachment are illegal—*Kanwar Singh v Q E* 1893 P R 15 *In re Ramyibat* 14 Bom L R 889. If a warrant is not served upon the accused the proclamation and subsequent order of attachment are illegal—*Emp v Jina Badhar* 14 Bom L R 163 13 Cr L J 293

164 Absconding —The term abscond does not necessarily imply change of place. Its etymological and ordinary sense is to hide oneself and it matters not if a person departs from his place or remains in it if he conceals himself. In either case he is said to abscond. Moreover the term does not apply to the commencement of concealment. If a person having concealed himself before process issues continues to do so after it is issued he is said to abscond—*Srinivasa Aiyengar v Queen*, 1 Mad 393

To be deemed an absconder one need not be proclaimed as such under this section. But an absent person should not be too readily assumed to be an absconder without due inquiry and notice—2 Weir 40

A man who files a petition against an order issuing the warrant and takes steps to procure the order of a superior Court that he should be allowed to remain on bail after such warrant has been issued cannot be said to be absconding or concealing himself and a Magistrate is not justified in proceeding under this section—*Qamardin v Emp* 19 P L R 66 23 Cr L J 451

165 Mode of publication —The provisions of subsection (2) as to the mode of publishing a proclamation are perfectly clear and explicit in their terms and failure to comply with the rules will vitiate the subsequent

attachment and sale—*Utan Jan v Abdul* 27 All 572 Where the provisions of clause (a) were not complied with at all and although the provisions of clause (b) and (c) were complied with the proclamation did not specify a place and a time for the appearance of the absconder held that the proclamation was not made according to law—*Abdullah v Jitu* 22 All 216 (218), *Abdul v Kazim* 1904 A W N 159 (cited in 27 All 572 at p 513)

But where the proclamation was made and was read and published in the places where the absconders were most likely to hear of them but a copy was not affixed to the Court house the flaw would in no way prejudice the proceedings and would be cured by section 537—*Mali v Crown* 1917 P R 39 18 Cr I J 979

The most important part of the publication is the publishing of the proclamation in the accused's place of residence and it is from the date of such publication that the 30 days should be counted—*Mali Singh v Emp* 1917 P R 6 17 Cr L J 414 *Q E v Subbarayar* 19 Mad 3

Burden of proof —It is on the prosecution to prove that the proclamation was made in the manner prescribed by this section—*Inore Pandya Vayak* 7 Mad 436

166 Thirty days' time —The period of thirty days is to run from the date of publishing such proclamation i e from the date of the complete publication by doing all that is required under subsection () of this section—*In re Ram Ashore* 19 W R 11

The rules prescribed by this section with regard to time and place are imperative and if the date fixed for the appearance of the accused is less than 30 days from the date of publishing the proclamation it is illegal and all subsequent proceedings (attachment and sale) will also be invalid and must be quashed—*Emp v Mullan Singh* 1919 P R 32 21 Cr L J 210 *Q E v Subbarayar* 19 Mad 3 *In re Subba Naichen* 17 M I J 438

167 Disobedience to proclamation —An accused person against whom a proclamation has been issued must until he has surrendered be regarded as in contempt and the Court will not entertain any application on his behalf He must appear before the Magistrate and apply to him to be discharged on the ground that the warrant is informal or offer some explanation by way of purging his contempt and at the same time application may be made for the release of his property It will then be the duty of the Magistrate to determine judicially whether the warrant was valid and when he has done so the person against whom and whose property the warrant was respectively issued may if he be so advised apply for the resumption of proceedings—*Q v Bistekur* 2 A W P H C P 4111 *Q v Homesh Chandra* 5 W R 71

168 Statement in writing —When there is no endorsement or statement in writing made by the Court validating the proclamation the proclamation is not made according to law and the subsequent attachment and sale are invalid—*Mian Jan v Abdul* 27 All 572 *Abdulla v Jitu* 22 All 216 The Magistrate ought to take particular care to preserve the proclamation and there must be records in the Court to show that the formalities were strictly observed Where such records were lost (*e g* where neither the proclamation nor its copy was forthcoming) the High Court set aside the proclamation and attachment and restored the property to the owner—*Erip v Jina Badhar* 14 Bom L R 163 13 Cr L J 293

The statement in writing should state clearly that the proclamation was duly published and should also mention the date of publishing the proclamation Where the validating order merely stated that the proclamation was duly published but omitted to specify the date of the publication *held* that it could not be considered as a conclusive evidence that the requirements of Sec 87 had been complied with—*Erip v Mullan Singh* 1919 P R 3 1 Cr L J 210

88 (1) The Court issuing a proclamation under section 87 may at any time order the attachment of any property moveable or immovable or both belonging to the proclaimed person

Attachment of property of person absconding

(2) Such order shall authorize the attachment of any property belonging to such person within the district in which it is made and it shall authorize the attachment of any property belonging to such person without such district when endorsed by the Magistrate or Chief Presidency Magistrate within whose district such property is situate

(3) If the property ordered to be attached is a debt or other moveable property the attachment under this section shall be made—

- (a) by seizure or
- (b) by the appointment of a receiver, or
- (c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf, or
- (d) by all or any two of such methods as the Court thinks fit

(4) If the property ordered to be attached is immoveable the attachment under this section shall in the case of lands paying revenue to Government be made through the Collector of the district in which the land is situate, and in all other cases—

- (e) by taking possession or
- (f) by the appointment of a receiver or
- (g) by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf, or
- (h) by all or any two of such methods as the Court thinks fit

(5) If the property ordered to be attached consists of livestock or is of a perishable nature the Court may if it thinks it expedient, order immediate sale thereof and in such case the proceeds of the sale shall abide the order of the Court,

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under Chapter XXXVI of the Code of Civil Procedure 1882

(6A) *If any claim is preferred to or objection made to the attachment of any property attached under this section within six months from the date of such attachment, by any person other than the proclaimed person on the ground that the claimant or objector has an interest in such property and that such interest is not liable to attachment under this section, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part,*

Provided that any claim preferred or objection made within the period allowed by this sub-section may, in the event of the death of the claimant or objector, be continued by his legal representative

(6B) *Claims or objections under sub-section (6A) may be preferred or made in the Court by which the order of attachment is issued or, if the claim or objection is in respect of property attached under an order endorsed by a District Magistrate or Chief*

168 Statement in writing —When there is no endorsement or statement in writing made by the Court validating the proclamation, the proclamation is not made according to law and the subsequent attachment and sale are invalid—*Mian Jan v Abdul* 27 All 572 *Abdulla v Jitu*, 22 All 216 The Magistrate ought to take particular care to preserve the proclamation and there must be records in the Court to show that the formalities were strictly observed Where such records were lost (e g where neither the proclamation nor its copy was forthcoming) the High Court set aside the proclamation and attachment and restored the property to the owner—*Emp v Jina Badhar* 14 Bom L R 163 13 Cr L J 293

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(6A) If any claim is preferred to, or objection made to the attachment of, any property attached under this section within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under this section, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part.

Provided that any claim preferred or objection made within the period allowed by this sub-section may, in the event of the death of the claimant or objector, be continued by his legal representative

(6B) Claims or objections under sub section (6A) may be preferred or made in the Court by which the order of attachment is issued or, if the claim or objection is in respect of property attached under an order endorsed by a District Magistrate or C

Presidency Magistrate in accordance with the provisions of sub-section (2) in the Court of such Magistrate

(6C) Every such claim or objection shall be inquired into by the Court in which it is preferred or made :

Provide that, if it is preferred or made in the Court of a District Magistrate or Chief Presidency Magistrate, such Magistrate may make it over for disposal to any Magistrate of the first or second class or to any Presidency Magistrate, as the case may be, subordinate to him

(6D) Any person whose claim or objection has been disallowed in whole or in part by an order under sub-section (6A) may, within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive

(6E) If the proclaimed person appears within the time specified in the proclamation, the Court shall make an order releasing the property from the attachment

(7) If the proclaimed person does not appear within the time specified in the proclamation, the property under attachment shall be at the disposal of Government but it shall not be sold until the expiration of six months from the date of the attachment and until any claim preferred or objection made under sub-section (6A) has been disposed of under that sub-section, unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner, in either of which cases the Court may cause it to be sold whenever it thinks fit

Change —Sub-sections 6A to 6F and the italicised words in sub-section (7) have been added by Sec 13 of the Cr P C Amendment Act XVIII of 1923. The reasons are stated below in their proper places

169 Proclamation and attachment —Having regard to the words at any time a Magistrate may issue a simultaneous order of proclamation (under Sec 87) and attachment (under this section)—*Bhai Lal v. Emperor* 20 Cal 117. Since the object of attachment is to enforce the appearance of the absconder, the attachment must immediately follow a

the proclamation and it is unnecessary or even illegal to wait till the time specified in the proclamation has run out and then to order attachment because the proclamation has not been obeyed—*Espress v Mulchand Pewray* 6 C P L R 38

170 Property—The words of the section order the attachment of any property moveable or unmoveable are enabling and not restrictive so that the Court may attach both kinds of property—4 M H C R App 48

But the Magistrate has no power to order the attachment of any property that does not belong to the absconder. He should be most careful not to interfere with or disturb the rights of third persons—*Queen v Kisorce Pater* 7 W R 35

The Lahore High Court holds that with regard to ancestral lands all that can be attached is the interest of the absconder and on his death the lands must be released in favour of his heirs—*Shah Muhammad v Crown* A I R (19 5) Lah 6-9 (1925) P L R 395 See also *Sadhu Singh v Secy of State* 1908 P R 18 and *Niamat Ali v Secy of State* 1915 P R 52 But according to the Madras High Court the undivided property of a coparcener of a joint Hindu family cannot be attached and sold under this section because his interest cannot be ascertained—*In re Ciumlan*, 2 Weir 43 *Contra*—2 Weir 43 (Footnote)

The unascertained share of a partner in the assets of the partnership which were then in the hands of a Receiver under a winding up order was not attachable such share not being property belonging to the defaulter—*Abbott v Abbott* 5 B I R 382 But the share of a judgment debtor in partnership with another person who alone was in possession of the property at the time of attachment was liable to attachment, but the attachment must be by prohibitory order and not by actual seizure—*Thama Sing v Kalidas* 5 B L R 386

171 Subsection (6A)—Claims of third parties—Before the addition of this subsection by the Amendment Act of 19 3 it was held in a number of cases that Secs 88 and 89 did not provide for the investigation by a Magistrate of the claims of third parties whose property had been attached as the property of the accused the remedy of the claimant was by way of a civil suit, as the question was one more for the Civil Court than for the Magistrate—*Q L v Sheodihal*, 6 All 487, *Queen v Kisorce Pater* 7 W R 35 *Su Wa v King Emp* 4 L B R 109, *Q E v Kaudappa Ganudan* 20 Mad 88 *Emp v Gaman* 1911 P R 8 These rulings are now rendered obsolete by the new subsection 6A which provides for the investigation by the Magistrate of claims and objections preferred by third parties

The proviso to the subsection provides for the continuance of proceed-

Presidency Magistrate in accordance with the provisions of sub-section (2) in the Court of such Magistrate

(6C) *Every such claim or objection shall be inquired into by the Court in which it is preferred or made*

Provide that, if it is preferred or made in the Court of a District Magistrate or Chief Presidency Magistrate, such Magistrate may make it over for disposal to any Magistrate of the first or second class or to any Presidency Magistrate as the case may be, subordinate to him

(6D) *Any person whose claim or objection has been disallowed in whole or in part by an order under sub-section (6A) may, within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive*

(6E) *If the proclaimed person appears within the time specified in the proclamation the Court shall make an order releasing the property from the attachment*

(7) If the proclaimed person does not appear within the time specified in the proclamation, the property under attachment shall be at the disposal of Government, but it shall not be sold until the expiration of six months from the date of the attachment and until any claim preferred or objection made under sub-section (6A) has been disposed of under that sub-section, unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner, in either of which cases the Court may cause it to be sold whenever it thinks fit

Change —Sub sections 6A to 6E and the italicised words in sub-section (7) have been added by Sec 13 of the Cr P C Amendment Act XIII of 1923. The reasons are stated below in their proper places

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The proviso to the subsection provides for the continuance of proceed-

ings by the legal representative of a claimant or objector who may die pending the inquiry into his claim or objection

Subsection (6B) — We have provided for the case of claims to property in another district from that in which the order of attachment was made — *Report of the Select Committee of 1916*

Subsection (6C) — The subsections which the Bill adds to section 88 imply that the Court which issues an order of attachment or endorses the same under subsection (2) is to investigate and determine a claim or objection. We think that a limited power to transfer claims and objections for disposal to subordinate Magistrates would be useful and we have therefore provided that the District Magistrates may transfer such cases to Magistrates not below the rank of second class Magistrates and that Chief Presidency Magistrates may likewise transfer cases to Presidency Magistrates subordinate to them — *Report of the Joint Committee (1912)*

172 Subsection (6D) — We have provided a period of limitation within which proceedings in a Civil Court to establish a claim which has been disallowed by a Magistrate must be instituted — *Report of the Select Committee of 1916*. The language of this subsection may be compared with that of O XXI rule 63 C P Code

A civil suit is maintainable by the real owner against the Government and the person at whose instance the criminal proceedings were instituted to recover possession of the property attached with mesne profits and damages done to the property while it was at the disposal of the Government—*Secretary of State v Jagat Mohan* 28 Cal 540

173 No revision of order passed on a claim — It was held in *Q E v Sheodhal* 6 All 487 *Queen v Kissors Pater* 7 W R 35 *Abdulla v Jitu* 22 All 216 and *Q E v Kandappa Goundan* 20 Mad 88 that since the Code did not contain any provisions for the investigation of claims of third parties to the attached property the orders of Magistrates passed on claims of third parties were not judicial proceedings and therefore they were not open to revision under Secs 435 439 of the Code

Under the present law also though the claim proceeding held by the Magistrate would be a judicial proceeding still the Magistrate's order in such a proceeding is not liable to revision because the words subject to the result of such suit if any the order shall be conclusive show that the order is not liable to be contested in appeal or revision

Subsection (6E) — Release of property — This subsection did not exist in the Bills or Reports but was added (on the motion of Mr Ranga chariar) during the debate in the Legislative Assembly

The reasons have been thus stated by the mover of the amendment

The object of the proclamation and attachment is a compulsory process to compel the party to appear in obedience to the summons or warrant of the Court and there is no provision here ordering the release of property from attachment in case he complies with the condition contained in the proclamation. This is a slip I take it. Whereas section 89 provides that if within two years from the date of attachment any person whose property is at the disposal of Government appears and shows that he had sufficient cause for not appearing then the property shall be restored to him but if he appears within the time limited in the proclamation, there is no provision ordering the release of attachment. An attachment has got some legal effects as Honourable members are aware. It prohibits the party from alienating the property. It prohibits the Civil Court from attaching the same property over again and various other complications do arise. Therefore it is necessary that once the condition on which the attachment has been made is fulfilled the attachment should cease *ipso facto*—*Legislative Assembly Debates* January 17 1923 page 1199.

The High Court can interfere in revision with an order passed by a Magistrate refusing to release the property from attachment—*Santia Singh v Emp*, 25 Cr L J 82 (Lab)

174 Subsection (7)—Property shall be at the disposal of Government—Before the passing of an order declaring the property to be at the disposal of Government there must be a proclamation specifying a time within which the absconder is required to appear—*Queen v Runjeet Santal* 6 W R 73

The mere seizure of property of an absconder by the police does not confer any right to the Government unless and until proceedings are taken under secs 87 and 88 of this Code. Therefore where the Police seized certain property of an absconder in August 1911 but no proceedings were taken under secs 87 and 88 until December an attachment of the property in October 1911 made by a creditor of the absconder in a civil suit would prevail and the refusal of the Magistrate to hand over the property in obedience to the order of the Civil Court was held to be wrong—*Subramanyam v A E*, 6 L B R 57 13 Cr L J 368. But when proceedings have been taken under these sections and the property has been at the disposal of the Government no title can be conferred by an attachment and sale subsequently made in execution of a money decree by the Civil Court—*Golam Abed v Toolseeram* 9 Cal 861.

When the property has been declared to be at the disposal of the Government the title of the accused to the property is put an end to. The Government can regrant the property (which consists of vatan lands) to some other person. Such grant does not confer on the accused any right to institute a suit to recover the property from such person—*Dattaji v Narayan* 25 Bom L R 228 A I R (1923) Bom 198.

Time —The law does not lay down any express time when the order of forfeiture should be made if by mistake it has not been passed before the accused appears it may be passed after he has appeared if he does not satisfy the Court that he has not been evading justice—*Bishonath Sarkar Petitioner* 3 W R 63 But it has been held in *In re Ravikishore* 19 W R 12 that if an order of forfeiture has not been made before the person has come in or has been brought in it ought not to be made at all because by that time its purpose has been effected though even possibly by other means than that of the process that was evaded

Irregularity —An order of forfeiture under this section if in substance quite legal cannot be disturbed on the ground of an irregularity in procedure—*Baijn Baul v Gajun* 8 W R 61

Power to restore property —Property which has been declared to be at the disposal of the Government can be restored to its owner only by the Government and not by the Court—*Government of Bengal v Mir Sarwarjan* 18 W R 33 even the High Court has no power to make any order with respect to that property—*Government of Bengal Petitioner* 9 B L R 347

175 Sale —Where the land was subject to a lease the sale should be subject to the right of the lessees to remain in possession until the expiry of the lease—*Ilam Din v King Emperor* 1908 P R 9

Sale of revenue paying land should be done by the Collector and the procedure laid down in the C P Code for execution sale should be strictly followed See *Cal G R and C O* p 6

176 Setting aside of sale —Where the publication of the proclamation was not in accordance with law and the accused applied in revision to have the sale set aside and to have the purchase money refunded to the purchasers held that whatever irregularities there might have been in the publication of the proclamation when a sale has taken place and the purchasers have acquired some sort of title it is not open to the High Court in exercising its revisional power to pass an order affecting the title of persons (purchasers) who are strangers to the legal proceedings in which the order is made—*Abdulla v Jisu* 22 All 716 But the accused can institute a suit in a Civil Court for setting aside the sale and for recovery of his property from the purchaser if it turns out that the proclamation was illegal—*Abdul v Razim* 1904 A W N 159 (cited in 27 All 572 at p 574) *Mia Jan v Abdul* 27 All 572

But the Punjab Chief Court holds that it is within the revisional powers of that Court to set aside an attachment on the ground of illegality of the proclamation or defect in its publication—*Mallu v Emp* 1917 P R 39 18 Cr L J 979, *Emp v Mullan Singh* 1919 P R 32

89 If within two years from the date of the attachment of any person whose property is or has been attached property at the disposal of Government under sub section (7) of section 88 appears voluntarily or is apprehended and brought before the Court by whose order the property was attached or the Court to which such Court is subordinate and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant and that he had not such notice of the proclamation as to enable him to attend within the time specified therein such property or if the same has been sold the nett proceeds of the sale, or, if part only thereof has been sold the nett proceeds of the sale and the residue of the property shall after satisfying thereout all costs incurred in consequence of the attachment be delivered to him

177 Scope—This section prescribes a remedy where there has been a good and legal publication of proclamation under sec 87 but offers no facility for contesting the validity of an *illegal* proclamation. In the latter case the person aggrieved has his remedy by a civil suit—*Abdulla v Jitu* 22 All 216 *Abdul v Karim* 1904 A W N 159 *Mala Singh v Emp* 1917 P R 6

But in two other cases the Punjab Chief Court has held that it cannot be said that the person aggrieved by an illegal attachment has no remedy except by a civil suit for the Chief Court has revisional powers which it would employ to annul such an attachment—*Malli v Emp* 1917 P R 39 18 Cr L J 979 (d approving *Mala Singh v Emp* 1917 P R 6) *Emp v Multan Singh* 1909 P R 32 21 Cr L J 210

178 Two years—An application under sec 89 not made within two years from the date of attachment is not entertainable—*Mala Singh v Emp* 1917 P R 6

And proves etc—The phrase within two years qualifies not only the word appears but also the word proves therefore it is not enough that the accused person appears within two years it is also necessary that the proof that the accused has not been absconding should be offered within two years—*In re Asikanth* 15 Bom I R 175 14 Cr L J 237

Forfeiture of property—Forfeiture of property of an absconding offender who appears within two years from the attachment of his property should not be carried into effect until after a regular inquiry into the cause of the offender's absence—*In re Bishanath* 3 W R 63

179 Restoration of property.—For the purpose of this section it is not necessary that the absconding accused should himself personally apply for the restoration of the property; the application can be made by any one on his behalf. But it is essential that the absconding accused should appear and prove the facts required, viz., that he did not abscond or conceal himself for the purpose of avoiding the arrest and that he had not notice of the proclamation—*In re Nilkanth*, 15 Bom L R 175: 14 Cr L J 237

A Magistrate's direction to his subordinate to write to the Collector and authorise the taking off of a certain attachment will amount to an order releasing the property from attachment—*Jhundoo Singh*, 5 W R 8.

After the sale of the property of an absconding accused, if an application by him for restoration is allowed, all that he can get is the nett sale-proceeds and not the property itself—*Emp v. Fazalddad*, 24 Cr L J 573 (Lab).

180. No civil suit.—Where the accused did not appear within two years of the attachment and the property was ordered to be sold, no civil action could lie to set aside the sale—*Mirza Zowad Ali v. Hussain Bibee*, 8 W. R 207 (civil)

Appeal:—An order refusing restoration of property is appealable, see Sec 405

D.—Other Rules regarding Processes

90. A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest—

Issue of warrant in lieu of, or in addition to, summons.

- (a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he had absconded or will not obey the summons; or
- (b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith, and no reasonable excuse is offered for such failure.

181. Scope:—This section applies to witnesses as well as to the accused. [But witnesses brought up under arrest should be dealt with not as cri-

minals but simply as persons arrested on civil process *Cal G R & C O P 7*

This section empowers the Court to issue a warrant only in cases in which it is empowered to issue summons and not in a case in which it has no power to issue the latter. Therefore where no case is found against the accused and he is discharged by a Magistrate under sec 253 it is not in the power of the District Magistrate to issue a warrant for his arrest for a retrial until the order of discharge is set aside and the case is taken to his own file—*Kanwar Singh v Q E* 1893 P R 15

182 Recording of reasons—A Magistrate ought not to issue a warrant either in lieu of or in addition to summons in a summons case, unless he has previously recorded his reasons for so doing—*Yasin Khan v Emp* 5 N L R 125 *Q E v Anant Pershad O S C* 99 *Bela Singh v Emperor* 1918 P L R 50 19 Cr L J 443 Where an accused person has been let out on his own bond a warrant issued under this section without recording reasons is illegal. The recording of reasons is a necessary preliminary to the issue of a warrant and omission to do so vitiates the warrant such omission cannot be overlooked and cannot be cured by sec 537—*Re Karuthan Ambalam* 38 Mad 1088 17 Cr L J 132 In *Mahar Singh v Emperor* 18 A L J 1149 the omission by the Magistrate to record reasons for the issue of a warrant in the first instance was held by the Allahabad High Court to be a mere irregularity and not an illegality

The Calcutta High Court also holds that the provisions as regards the recording of reasons are merely directory and not mandatory. Therefore in a case in which the Magistrate had materials before him sufficient to justify the issue of a warrant and to which the Magistrate did apply his judicial discretion and the warrant was good and valid on the face of it and the Magistrate stated in the warrant the reasons upon which he relied the warrant was not invalid by reason of the fact that the Magistrate omitted to record *separately in his order sheet* the reasons which actuated him in issuing the warrant—*Govt of Assam v Salehulla* 51 Cal 1 (F B) 27 C W N 857 24 Cr L J 881 (overruling *Sukheslar Phukan v Emperor* 38 Cal 789) Magistrates should record their reasons specifically in writing in the warrant (though not necessarily in the order sheet) before issuing the warrant and should not be satisfied with merely signing their names to warrants in the form given in the schedule—51 Cal 1 (at p 21)

183 Issue of warrant in the first instance—Grounds—In the absence of special grounds mentioned in this section the Court ought to issue a summons—*Yasin v Emp* 5 N L R 125 *A C v Po Ali* 3 L B R 116 Great care should be taken that a warrant which implies personal arrest and restraint never goes forth when a summons to attend would

be sufficient for the ends of justice and any attempt to cover or restrain a party who has been summoned only should be checked and punished—*Punj Cir Chap XLI p 144*

A warrant cannot be issued to enforce the attendance of a witness unless the Magistrate is first satisfied that the witness will disobey or has disobeyed the summons served on him—*Sutherland* 14 W R 20 or unless he believes that the witness will not give evidence voluntarily—*In re Bourke* 13 W R 1 or unless it is proved that summons has been duly served and in spite of it the witness did not appear—*In re Abdoor Rahman* 7 W R 37 *King Emp v Po Nt* 3 L B R 116

Where in proceedings under section 498 I P C the complainant stated on oath that a warrant should be issued for the attendance of the abducted woman or else the accused would remove the woman from their house held that the Magistrate was justified in issuing a warrant for the arrest of the woman—*Mahar Singh v Emp* 18 A L J 1149 22 Cr L J 111

184 Clause (b)—*Proof of service of summons*—A warrant ought not to issue unless due service of summons is proved But a report by the station writer that he served the summons is no evidence of service of summons under clause (b) of this section—*K E v Po Nt* 3 L B R 116

Bail—A Magistrate is competent to admit to bail a recalcitrant witness arrested under this section—2 Weir 39

91 When any person for whose appearance or arrest the officer presiding in any Court is empowered to take bond for appearance, the officer is empowered to issue a summons or warrant is present in such Court such officer may require such person to execute a bond with or without sureties for his appearance in such Court

185 Bond by Mukhtear—A bond by a mukhtear by which he undertook to produce a witness when called upon was held to be sufficient although no security for appearance had been taken from the witness herself—*Q E v Kazim Husain* 1901 A W N 35

Power to lock up—Even though a Magistrate may suspect that the witness who is present may in future be kept out of the way by the accused still it will not justify the Magistrate in arresting the witness and placing her in the lock up—*Ibid*

92 When any person who is bound by any bond taken under this Code to appear before a Court, Arrest on breach of bond for appearance does not so appear, the officer presiding

in such Court may issue a warrant directing that such person be arrested and produced before him

186 Scope —Sec 9 has reference to the case of a person who is bound by a bond to appear in Court. It provides for a warrant only in case the person does not appear at the time when he is bound by the bond to appear and does not apply to a case where prior to the time for appearance arrest by warrant is sought to be effected. Such a case falls under sec 90—*Re Karuthan Ambalam* 38 Mad 1088 17 Cr L J 132

93 The provisions contained in this Chapter relating to a summons and warrant and their issue service and execution shall so far as may be apply to every summons and every warrant of arrest issued under this Code

Provisions of this Chapter generally applicable to summonses and warrants of arrest

CHAPTER VII

OF PROCESSSES TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVEABLE PROPERTY AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED

A —Summons to produce

94 (1) Whenever any Court or in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a police station, considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation inquiry trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons or such officer a written order, to the person in whose possession or power such document or thing is believed to be requiring him to attend and produce it or to produce it, at the time and place stated in the summons or order

Summons to produce document or other thing

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same

(3) Nothing in this section shall be deemed to affect the Indian Evidence Act, 1872, sections 123 and 124, or to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the Postal or Telegraph authorities

187. Court —It was held in *Brojendra Kishore v Clarke*, 12 C W N. 973, *Clarke v Brojendra Kishore*, 36 Cal 433, and *In re Harilal*, 22 Bom 949 that if there were no proceedings pending before a Magistrate he was not a Court within the meaning of this section, and could not issue an order under sec 94 or 96. But the Privy Council in the case of *Clarke v Brojendra Kishore* 39 Cal 953 (at p 966) has laid down that the words "Court" and "Magistrate" are convertible terms, and that Sch V, Form VIII contemplates the issue of a search warrant *before* any proceedings are initiated, and in view of an inquiry to be made

188. Document —This section deals with documents forming the subject of a criminal offence as also with documents which are or can be used only as evidence in support of a prosecution—*In re Lakshmidas*, 5 Bom L R 980. The words 'document or thing' are general and seem to cover any document, the production and inspection of which are necessary or desirable or will serve the ends of justice. When the premises to be searched are those of the accused person, the warrant issued under sec 96 need not be only for the document or thing in respect of which an alleged offence has been committed—*Municipal Committee, Jhang v Md Hayat*, 1914 P R 36 15 Cr L J 225

The document or thing must be clearly specified, see *Pranhkan v King Emp*, 16 C W N 1078

189. Necessary or desirable —Before the Magistrate can order for the production of any document he must judicially consider whether the production of the document is necessary or relevant for the purpose of the trial—*In re Lakshmi Das*, 5 Bom L R 980. The Magistrate cannot call for anything and everything from anybody and everybody. The document or thing called for must have some relation to or connection with the subject matter of the investigation or the inquiry, or throw some light on the proceeding, or supply some link in the chain of evidence—*Nizam of Hyderabad v Jacob*, 19 Cal 52. Before a person can be punished for the non production of a document, it is necessary to show that its production was material for the decision of the case in which the document was called for—*Damri Ram v Emp*, 4 P L W 65: 19 Cr. L J 217. A document is a necessary document even though it is necessary as a mere piece of evidence only—*In re Lakshmi Das*, 5 Bom. L R 980. It may be that the thing called for may turn out to be wholly irrele-

vant to the inquiry, but so long as it is considered to be necessary or desirable for the purpose of the inquiry, the power is there—*Nizam of Hyderabad v Jacob*, 19 Cal 52

Whether the documents are necessary for the inquiry is a matter to be decided by the Magistrate at the time of issuing a summons under this section or a search warrant under sec 96—*Mahomed Jachariah v Ahmed Mahomed* 15 Cal 109 In a murder case the accused has a right to a copy of the statements made by the witnesses at the inquest inquiry, and if the record of the inquest proceeding is not in the Court the Magistrate has power under this section to call for it to be produced by the Police—*In re Chanlet*, 20 L W 745 26 Cr L J 426

190 Person in possession —The person called upon to produce need not be a party to the proceedings The Magistrate can order the production of things in the possession of the solicitor—*Nizam v Jacob*, 19 Cal 52

Person whether includes 'accused' —The provisions of this section apply to an accused and it is competent for the Magistrate to issue summons to an accused to produce a document or other thing (e g a stolen article) the production of which might incriminate him—*Konda Reddi v Emperor* 37 Mad 112 13 Cr L J 493, *Mahomed Jachariah v Ahmed*, 15 Cal 109 *Nizam v Jacob*, 19 Cal 52 The Magistrate has the power of issuing a search warrant under sec 96 to obtain documents in possession of the accused (*Disser Missar v Emperor* 41 Cal 261) and the issue of summons is a milder means of attaining the same end—*Konda Reddi v Emperor* 37 Mad 112 Contra—*Ishwar Chandra v Emp*, 12 C W N, 1016 and *Bayrang Gope v Emperor* 38 Cal 304 15 C W N 343, where it is held that this section does not refer to stolen articles or to any incriminating document or things in the possession of an accused person

191. Order for production —The order for production must be made on sufficient materials Where a complaint was made against a certain person before the Chief Presidency Magistrate who examined the complainant and directed a local investigation and an application was made thereafter by the complainant for summons under this section, and was granted by the Court after his further examination thereon, held that there were sufficient materials on which an order under this section could properly be made and that it was properly made—*T R Pratt v King Emp* 47 Cal 647 24 C W N 110 21 Cr L J 577

Inspection. —The jurisdiction of the Magistrate to order the production of a document or thing carries with it the jurisdiction to allow the prosecution the right of inspection But the Magistrate can order for production in Court he cannot allow the prosecution to inspect the entries in the account book kept by the accused, in his solicitor's office They

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must be first produced in Court where they can be inspected—*In re Lakshmidas* 5 Bom L R 978 980

Putting it in evidence —On production of a document the accused has no right to insist upon the prosecution putting it in evidence. The prosecution is entitled to determine whether it is to be put in evidence or not—*Mahomed Jackariah v Ahmed* 15 Cal 109 *In re Lakshmi Das* 5 Bom L R 980

Security for production —Where a Magistrate thinks that there are articles in a person's possession the production of which is necessary he can issue a summons under this section or a search warrant under sec 96 there is no section to enable him to demand security from the person for the production of the articles when required instead of issuing a summons under sec 94 or a warrant under sec 96—*Purna Chandra v Sassi Blusan* 7 C W N 52 But after a warrant has been issued against a person for the search of certain articles in his premises if such person offers an undertaking to produce the articles before the Court whenever required the Magistrate may stay execution of the warrant conditionally on the execution of the bond by such person for production of the articles in Court whenever called upon—*Kishore Mohan v Hari Das* 47 Cal 164 21 Cr L J 391

Lien —The mere fact that the person in possession of the articles has a lien over them does not affect the power of the Magistrate to order their production—*Nizam of Hyderabad v Jacob* 19 Cal 52

Punishment —Omission to produce the document or thing is punishable under sec 175 I P C

95 (1) If any document parcel or thing in such custody
 Procedure as to letters is in the opinion of any District Magistrate
 and telegrams Chief Presidency Magistrate High
 Court or Court of Session wanted for the purpose of any investigation inquiry trial or other proceeding under this Code such Magistrate or Court may require the Postal or Telegraph authorities as the case may be to deliver such document parcel or thing to such person as such Magistrate or Court directs

(2) If any such document parcel or thing is in the opinion of any other Magistrate or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose he may require the Postal or Telegraph Department as the case may be to cause search to be made for and to detain such

document parcel or thing pending the orders of any such District Magistrate Chief Presidency Magistrate or Court

192 Production of Post office records before Courts —The attention of all Civil and Criminal Courts in the Provinces of Bengal and Eastern Bengal and Assam is invited to the following departmental instructions which the Director General of Post Office with the approval of the Government of India has issued for the guidance of Postmasters on the subject of the production of Post Office Records before Court —

A summons from a Court of Civil or Criminal jurisdiction to produce any of the records of a Post Office or a certified extract from or copy of any such records must be complied with. The receipt of such a summons and such particulars as are known to the Post Master regarding the case should be at once reported to the Post Master General in case he should see fit to raise any objection in Court under secs 123 and 124 of the Indian Evidence Act (I of 1872) to the production of any of the records. When any journal or other record of a Post Office is produced in Court and admitted in evidence the Officer producing it shall ask the Court to direct that only such portions of the record as may be required by the Court shall be disclosed —*Cal G R and C O* p 7

B —Search warrants

98 (1) Where any Court has reason to believe that a person to whom a summons or order under section 94 or a requisition under section 95 sub section (1) has been or might be addressed will not or would not produce the document or thing as required by such summons or requisition

or where such document or thing is not known to the Court to be in the possession of any person,

or where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection

it may issue a search warrant and the person to whom such warrant is directed may search or inspect in accordance therewith and the provisions hereinafter contained

(2) Nothing herein contained shall authorize any Magistrate other than a District Magistrate or Chief Presidency Magistrate

to grant a warrant to search for a document, parcel or other thing in the custody of the Postal or Telegraph authorities

193 Conditions precedent—Duty of Magistrate —

(a) Before issuing the search warrant the Magistrate must have before him some information or evidence that the document is necessary or desirable for the purposes of the inquiry before him—*Moideen Brothers v Eng Thaung* 9 L B R 45 10 Bur L T 216

(b) The Court issuing the search warrant must have reason to believe that the person against whom the search warrant is issued is not likely to produce the document or thing in his possession in pursuance of a mere summons or order under section 94 or a requisition under section 95 (1) of this Code—*In re Mauekyi Sorabyi* 5 Bom L R 1032 The issue of a search warrant is a *judicial act* and it is the duty of the Magistrate before issuing such warrant to satisfy himself by inquiry that *summons may not have the desired effect* Where without such inquiry the Magistrate issued a search warrant on the mere application of the complainant the order was *ultra vires*—*Iyavoo Chetty v Jehangir* 1917 M W N 494 18 Cr L J 837 *Piyare Lal v Thakur Dal* 1916 P W R 12 17 Cr L J 60

(c) A search warrant ought to be issued only after judicial inquiry and on proper materials—*Mahomed Jackariah v Ahmed* 15 Cal 109 *Queen v Syud Hossain Ali* 8 W R 74 *In re Harilal* 22 Bom 949 *Rash Behary v Emperor* 35 Cal 1076 Of course it is not obligatory on a Magistrate to wait until a preliminary inquiry is held and all the witnesses for the prosecution are examined and cross examined the Magistrate is entitled to act upon information which he considers credible provided that there is a complaint before him and the complainant is examined by him on oath or solemn affirmation—*Q E v Mahant of Tirupati* 13 Mad 18 *In re Sinagurunatha Pillai* 1910 M W N 818 8 M L T 416 If a complaint is laid before a Magistrate a search warrant issued on the complaint without examining the complainant is irregular If the Magistrate is about to issue a search warrant on the strength of information as distinguished from a complaint the Court should if feasible examine the informant on oath and if evidence cannot be taken on oath the Court should act with a due appreciation of the fact that it is taking upon itself the responsibility of issuing upon the basis of that information an order of a very serious nature involving the invasion and search of a man's house—*Mulchand v King Emperor* 8 A L J 517 The statement of a counsel who is appearing for the prosecuting complainant is not information on which a Magistrate is entitled to issue a search warrant—8 A L J 517 A telegram received by the Police is not a good ground for issuing a search warrant—*In re Hari Lal* 22 Bom 949

The provision of the law requiring the sanction of a Magistrate before the issue of a search warrant means that the Magistrate should apply his mind to the facts and ought not to issue a search warrant simply because a Police officer asks him to do so. When there is no inquiry or trial or other proceeding under the Code a general search warrant cannot be issued under this section. Thus in the course of an investigation which was being made by a Police officer appointed by the Government to inquire into the dealings with the Munitions Board a petition was presented by that officer to the Chief Presidency Magistrate of Calcutta stating that certain offences appeared to have been committed in connection with the dealings with the Munitions Board and praying for a search warrant against the firm of one T R Pratt. There was nothing in the petition to connect T R Pratt with those offences. It was held that there were no materials before the Magistrate on which he could decide that a search warrant should be issued—*T R Pratt v Emp* 47 Cal 597 21 Cr L J 313 24 C W N 403. An order under this section cannot be made to further a police investigation which may or may not result in an inquiry. The Magistrate is to form his own opinion upon the materials placed before him. He is not relieved from his duty by stating that he believed that the officer holding the investigation for the purposes of which the documents or things were required had formed a correct opinion—*Jagannath Agarwalla v Emp*, 24 C W N 405 21 Cr L J 573.

Record —Although there is no express provision requiring the Magistrate to make a record or keep notes of the examination of the person on whose application he issues the search warrant still some record ought to be kept to enable the High Court to form an opinion as regards the materials upon which the Magistrate acted—*Jagannath v Emp* 24 C W N 405.

194 Court —It means Magistrate Court and Magistrate are convertible terms and it is not necessary that the Magistrate in order to issue a search warrant should sit as a Court or that some proceeding should have been initiated before him—*Clarke v Brojendra Kishore* 39 Cal 953 at p 966 (P C) overruling *Clarke v Brojendra Kishore* 36 Cal 433.

195 Person —The word person includes the accused—*Municipal Committee Jhang v Muhammad Hayat* 1914 P R 36 15 Cr L J 225. A search can be made for a stolen article or incriminating document in the possession of the accused person—*Bissar Misser v Emp* 41 Cal 261. See Note 190 under sec 94.

196 Who can make the search —The Magistrate who is competent to issue a search warrant is also competent to conduct the search.

himself, see sec 105, *Emp v Ganeski*, 1884 A W N 213, *Clarke v Brojendra Kishore* 36 Cal 433. on appeal, 39 Cal 953 P C)

197 Only specific articles can be searched—The search must be for a *specific* article or thing and not for stolen property *generally*—*Bissar Misser v Emperor* 41 Cal 261 17 C W N 1209 The law does not authorise a search for anything but specified articles which have been or can be made the subject of summons or warrant to produce—*Pran Khan v Emperor* 16 C W N 1078 13 Cr L J 764, *Mosdeen Brothers v Eng Thaung* 9 L B R 45

A search ought not to be conducted for *fishing out evidence* This section contemplates the production of a specified or distinct thing which may be deemed essential for the conduct of the inquiry and the conviction of the accused and for that purpose a specified house or place may be searched It does not empower police officers or other underlings to make harassing domiciliary visits to inquire into the private concerns of individuals and to seize any papers under the bare chance of finding something tending to conviction—*Queen v Syud Hossain*, 8 W R 74, *Mosdeen Brothers v Eng Thaung*, 9 L B R 45 17 Cr L J 543 Therefore, where a Magistrate issued a search warrant for the search and seizure of all letter books letters bills and books of account in a man's house for the purpose of inquiry as to whether he had used or sold articles with a counterfeit trade mark it was held that the issue of such a search warrant was a gross perversion of the law—*Mosdeen Brothers v Eng Thaung*, 9 L B R 45. *Piyare Lal v Thakar Das*, 17 Cr L J 60

198. Extent of search.—In taking action under this section, the Court is authorised to go as far as is physically possible in the search The accused can perhaps defeat the Court by concealing or destroying the document or by having it concealed or destroyed, taking of course the consequences of such action, just as the accused in the dock can, when questioned under sec 342, thwart the Court in its search for truth by answering falsely or refusing to answer But the mere fact that the accused can so defeat or thwart the Court is no reason for holding that the Court is debarred from going as far as the section specifically allows—*Municipal Committee, Jhang v Muhammad Hayat* 1914 P. R 36 The Magistrate has power to issue a search warrant for the production of copies of the infringing book, proofs, plates, printed and set up matters, together with letters and orders with reference to the book, for the purpose of making an order under section 10 of the Copyright Act—*Kishori Mohan v Hari Das*, 47 Cal 164 21 Cr L J 391

199 Miscellaneous —*Taking possession*:—Power to search given by this section includes also the power to take possession of the document

o thing—*Mahomed Jackaria v Ahmed Wahomed* 15 Cal 109 *In re Bhanji Ratanlal* 677

Inspection —When documents and other things seized upon the premises of an accused by virtue of a search warrant are brought before the Court the Magistrate would have the power to allow the prosecution an inspection thereof. They stand when they are brought to the Court precisely in the same position as documents or things found upon the person of a prisoner at the time of his arrest—*Mahomed Jackaria v Ahmed* 15 Cal 109 *In re Lakhmi Das* 5 Bom L R 980 but he is not entitled to examine it all e.g. in case of account books the Court should restrict the examination to the particular book or portions of the book relating to the subject matter under inquiry or trial—*Mahomed Jackaria v Ahmed* 15 Cal 109

Seizure without search warrant —An order of the Magistrate to seize certain account books without issuing a summons under Sec 94 or warrant under this section is illegal—*Hari Charan v Girish Chandra* 38 Cal 68

Search warrant when to be executed, —A search warrant should be executed between sunrise and sunset. If for special reasons it is executed between sunset and sunrise such reasons must be reported to the D S P for the information of the Magistrate—*Bengal Police Manual* 2nd Ed, P 402

Issue of search warrant must be prompt —Where in a case of criminal trespass and theft the complainant at the time of applying for process prayed for the issue of a search warrant but the Magistrate after repeated applications made an order for the issue of warrant more than three weeks after it was held that although the procedure was not contrary to the actual letter of sections 96 and 98 still it was so dilatory that it could only tend to defeat the very object for which such a warrant was issued—*Bilas v Ram Gopal* 22 C W N 719 19 Cr I J 707

200 *Stay of execution of warrant on security* —Where the person against whom a search warrant was issued gives for the stay thereof and offers an undertaking not to sell copies of the infringing book but to produce them before the Court whenever required the Magistrate has jurisdiction to stay execution of the warrant conditionally on the execution of a bond to produce the copies in Court—*Kishore Mohan v Hari Das* 47 Cal 164 (See this case cited in Note 121 under section 94)

97 The Court may, if it thinks fit specify in the warrant the particular place or part thereof to which only the search or inspection shall extend, and the person charged with the execution of such

warrant shall then search or inspect only the place or part so specified

98 (1) If a District Magistrate, Subdivisional Magistrate, Presidency Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property

or for the deposit or sale or manufacture of forged documents, false seals or counterfeit stamps or coin, or instruments or materials for counterfeiting coin or stamps or for forging

or that any forged documents, false seals or counterfeit stamps or coin, or instruments or materials used for counterfeiting coin or stamps or for forging are kept or deposited in any place,

or if a District Magistrate Sub Divisional Magistrate or a Presidency Magistrate upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit sale manufacture or production of any obscene object such as is referred to in section 292 of the Indian Penal Code or that any such obscene objects are kept or deposited in any place,

he may by his warrant authorize any police officer above the rank of a constable—

- (a) to enter, with such assistance as may be required, such place and
- (b) to search the same in manner specified in the warrant, and
- (c) to take possession of any property, documents seals, stamps or coins therein found which he reasonably suspects to be stolen, unlawfully obtained, forged, false or counterfeit, and also of any such instrument and materials *or of any such obscene objects* as aforesaid, and
- (d) to convey such property, documents, seals, stamps, coins, instruments or materials *or such obscene*

objects before a Magistrate or to guard the same on the spot until the offender is taken before a Magistrate or otherwise to dispose thereof in some place of safety, and

- (e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or manufacture or keeping of any such property documents seals, stamps, coins, instruments or materials *or such obscene objects*, knowing or having reasonable cause to suspect the said property to have been, stolen or otherwise unlawfully obtained, or the said documents, seals, stamps, coins, instruments or materials to have been forged, falsified or counterfeited, or the said instruments or materials to have been or to be intended to be used for counterfeiting coin or stamps or for forging *or the said obscene objects to have been or to be intended to be sold, let to hire, distributed publicly exhibited, circulated, imported or exported*

(2) The provisions of this section with respect to—

- (a) counterfeit coin,
- (b) coin suspected to be counterfeit, and
- (c) instruments or materials for counterfeiting coin,

shall, so far as they can be made applicable, apply respectively to—

- (a) pieces of metal made in contravention of the Metal Tokens Act, 1889 [I of 1889] or brought into British India in contravention of any notification for the time being in force under section 19 of the Sea Customs Act, 1878 [VIII of 1878],
- (b) pieces of metal suspected to have been so made or to have been so brought into British India or to be intended to be issued in contravention of the former of those Acts, and
- (c) instruments or materials for making pieces of metal in contravention of that Act

Change —The italicised words have been added by the Obscene Publications Act (VIII of 1925)

201 Secs 98 and 96 —The Calcutta High Court has made a distinction between secs 96 and 98, and laid down that Section 96 contemplates the existence of a judicial proceeding in the course of which alone the Magistrate can issue a search warrant but that section 98 does not require a criminal proceeding as a condition precedent to the issue of a search warrant—*Rash Behary v Emp*, 35 Cal 1076 But See *Clarke v Brojendra Ashore* 39 Cal 953 (P C) which lays down that it is not necessary that there should be any proceeding before the issue of any search warrant See Note 194

202 Search without warrant —If there is no search warrant under this section the search is illegal and the occupiers of the house have a legal right of private defence in resisting it—*Bajrang Gope v Emp*, 38 Cal 304 (306) 15 C W N 343 But a police officer investigating a charge of theft is entitled to search without a warrant a house which he suspects to contain stolen property, in such a case his right to search is incidental to his right to investigate—*Emp v Nirmal Singh*, 42 All 67 (68) 17 A L J 1047, 20 Cr L J 695

99 When, in the execution of a search-warrant at any place beyond the local limits of the jurisdiction of the Court which issued the same, any of the things for which search is made, are found, such things, together with the list of the same prepared under the provisions hereinafter contained, shall be immediately taken before the Court issuing the warrant, unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things shall be immediately taken before such Magistrate, and, unless there be good cause to the contrary, such Magistrate shall make an order authorizing them to be taken to such Court.

Disposal of things found in search beyond jurisdiction
Power to declare certain publication forfeited, and to issue search warrants for the same

99A (1) Where—

(a) any newspaper, or book as defined in the Press and Registration of Books Act, 1867, or

(b) any document,

wherever printed, appears to the Local Government to contain

any seditious matter, that is to say, any matter the publication of which is punishable under section 124A of the Indian Penal Code, the Local Government may by notification in the local Official Gazette, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document, to be forfeited to His Majesty, and thereupon any police officer may seize the same, wherever found in British India, and any Magistrate may by warrant authorize any Police-officer not below the rank of Sub Inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be

(2) In sub-section (1) "document" includes also any painting, drawing or photograph, or other representation

Sections 99A to 99G have been added by Act XIV of 1922 (Indian Press Law Repeal and Amendment Act)

99B Any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture has been made under section 99A, may, within two months from the date of such order, apply to the High Court to set aside such order on the ground that the issue of the newspaper, or the book or other document, in respect of which the order was made, did not contain any seditious matter

202A When an application is made to the High Court under this section the High Court is precluded by section 99D from considering any other point than the question whether in fact the matters contained in the book were seditious or not. The High Court cannot enter into the question as to whether the Government Notification declaring all copies of the book to be forfeited complied with the requirements of section 99A—*Bajnath v. K. E.* 47 All 298 23 A L J 1 26 Cr L J 679

99D Every such application shall be heard and determined by a Special Bench of the High Court composed of three Judges.

Hearing by Special Bench.

99D (1) On receipt of the application the Special Bench shall if it is not satisfied that the issue of the newspaper or the book or other document in respect of which the application has been made contained seditious matter of the nature referred to in sub section (1) of section 99A set aside the order of forfeiture

(2) Where there is a difference of opinion among the Judges forming the Special Bench the decision shall be in accordance with the opinion of the majority of those Judges

Where the applicant is alleged to have published a series of seditious books the whole series must be looked to to determine whether the passages contained therein are seditious—*Baigmath v K E* 47 All 298

99E On the hearing of any such application with reference to any newspaper any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words signs or visible representations contained in such newspaper which are alleged to be seditious matter

99F Every High Court shall as soon as conveniently may be frame rules to regulate the procedure in the case of such application the amount of the costs thereof and the execution of orders passed thereon and until such rules are framed the practice of such Courts in proceedings other than suits and appeals shall apply so far as may be practicable to such applications

99G No order passed or action taken under section 99A shall be called in question in any Court otherwise than in accordance with the provisions of section 99B

C — Discovery of Persons wrongfully confined

100 If any Presidency Magistrate Magistrate of the first class or Sub divisional Magistrate has reason to believe that any person is con-

fined under such circumstances that the confinement amounts to an offence he may issue a search warrant and the person to whom such warrant is directed may search for the person so confined, and such search shall be made in accordance therewith and the person, if found shall be immediately taken before a Magistrate who shall make such order as in the circumstances of the case seems proper

203 Duty of Magistrate —When a Magistrate has an application before him containing the allegations that are required by this section and asking him to issue a search warrant under it it is incumbent on such Magistrate to satisfy himself by holding an inquiry that there is foundation for the application—*Abdul Aziz v Crown* 1916 P. R. 34 17 Cr L J 491

Arrest of ward —The powers conferred on a first class Magistrate under this section may be exercised by a District Judge in arresting a ward removed from the custody of the guardian See section 25 (3) of the Guardians and Wards Act

On an application for the recovery of a boy by his adoptive mother
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204 Wrongful confinement —The Magistrate is not bound to issue a search warrant under this section unless he has reason to believe that the confinement amounts to an offence The jurisdiction conferred by this section is not as wide as that conferred by sec 491—*Q E v Muktabai Ratanlal* 839

Complaint against husband —In the case of a complaint being made against the husband that he was keeping his wife in confinement a Magistrate cannot make a summary order but before disposing of the proceedings he is bound to hear both sides and after making such inquiry as may seem necessary, he should pass such order as may seem right If he finds the confinement amounted to an offence he should let the wife go and warn the husband against interfering with her except through a Civil Court If on the other hand he arrives at the conclusion that such is not the case he should advise the wife to go home with her husband warning the husband at the same time against using any coercion in taking the wife with him—*Sher Sha v Sakina Begam* 1910 P. W. R. 29, 11 Cr L J 450

205 Form of warrant —There being no prescribed form of warrant under this section a Magistrate who had to issue one under this section adapted a form under Sec 96 to the provisions of this section by

99D (1) On receipt of the application, the Special Bench shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained seditious matter of the nature referred to in sub section (1) of section 99A, set aside the order of forfeiture

(2) Where there is a difference of opinion among the Judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges

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203 *Duty of Magistrate* —When a Magistrate has an application before him containing the allegations that are required by this section and asking him to issue a search warrant under it it is incumbent on such Magistrate to satisfy himself by holding an inquiry that there is foundation for the application—*Abdul Aziz v Crown* 1916 P R 34 17 Cr L J 491

Arrest of ward —The powers conferred on a first class Magistrate under this section may be exercised by a District Judge in arresting a ward removed from the custody of the guardian See section 25 (3) of the Guardians and Wards Act

On an application for the recovery of a boy by his adoptive mother from the natural father the health or safety of the boy in his being allowed to live with his natural parents should be a paramount consideration for the Court—*Chagan v Hera Lal* 24 C W N 104 20 Cr L J 729

204 *Wrongful confinement* —The Magistrate is not bound to issue a search warrant under this section unless he has reason to believe that the confinement amounts to an offence The jurisdiction conferred by this section is not as wide as that conferred by sec 491—*Q E v Muktabal, Ratanlal* 839

Complaint against husband —In the case of a complaint being made against the husband that he was keeping his wife in confinement a Magistrate cannot make a summary order but before disposing of the proceedings he is bound to hear both sides and after making such inquiry as may seem necessary he should pass such order as may seem right If he finds the confinement amounted to an offence he should let the wife go and warn the husband against interfering with her except through a Civil Court If on the other hand he arrives at the conclusion that such is not the case he should advise the wife to go home with her husband warning the husband at the same time against using any coercion in taking the wife with him—*Sher Sha v Sakina Begam* 1910 P W R 29, 11 Cr L J 450

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(2) Where there is a difference of opinion among the Judges forming the Special Bench the decision shall be in accordance with the opinion of the majority of those Judges

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203 **Duty of Magistrate** —When a Magistrate has an application before him containing the allegations that are required by this section and asking him to issue a search warrant under it it is incumbent on such Magistrate to satisfy himself by holding an inquiry that there is foundation for the application—*Abdul Aziz v Crown* 1916 P R 31 17 Cr L J 49r

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C —Discovery of Persons wrongfully confined

100 If any Presidency Magistrate Magistrate of the first class or Sub divisional Magistrate has reason to believe that any person is wrongfully confined

officer or other person executing the warrant may proceed in manner provided by section 48

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made such person may be searched. If such person is a woman the directions of section 52 shall be observed

207 Searches under other Acts —According to Sec 6 of the Burma Gambling Act (I of 1899) all searches made under that Act must be made in accordance with the terms of sections 102 (3) and 103 of this Code—*Ah Shwee v King Emp* 3 L B R 229 *Ana Dewa Sing v King Emp* 4 L B R 134 Section 16 of the Opium Act lays down that searches under secs 14 and 15 of that Act shall be made in accordance with the provisions of this Code—*Mr Hark v Emp* 4 L B R 121 A search under the Madras Abkari Act (I of 1886) must by virtue of sec 36 of that Act be conducted in the manner laid down in the Criminal Procedure Code

But the Gambling Act (III of 1867 sec 5) prescribes a special procedure for searches under that Act and the provisions of Chapter VII of this Code will not apply thereto—*Misinda Ram v Crown* 3 Lah 359 23 Cr L J 621

103 (1) Before making a search under this Chapter the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do

(2) The search shall be made in their presence and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses, but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it

(3) The occupant of the place searched or some person in his behalf shall in every instance be permitted to attend during the search and a copy of the list prepared under this

Search to be made in presence of witnesses

Occupant of place searched may attend

altering the figures and by drawing up the warrant in terms required by this section. It was held that the warrant was perfectly legal it being immaterial what form was used provided that the substance of the warrant complied with the requirements of this section—*Legal Remembrancer v Mozam Molla* 45 Cal 905 20 Cr L J 47 (dissenting from *Bis & Halder v Emp* 11 C W N 836 where it was held that if a warrant was issued purporting to be under sec 96 while it ought to be under sec 100 the warrant was illegal)

A form under sec 98 also may be lawfully used for a warrant under this section with necessary alterations. Where a search warrant (i.e., a printed form used under sec 98) was used for the purpose of this section and was snatched away by the accused and destroyed held that the presumption was that the form under sec 98 was used with the necessary alterations needed for a warrant under sec 100 and that the issue of the search warrant was not illegal or without jurisdiction—*Gora Mian v Abdul Majid* 39 Cal 403 16 C W N 336 13 Cr L J 186

D—General Provisions relating to Searches

101 The provisions of sections 43 75 77 79 82 83 and Direction etc, of 84 shall so far as may be apply to all Search warrants search warrants issued under section 96 section 98 section 99A or section 100

The words section 99A in this section have been added by Act XIV of 1922 (Indian Press Law Repeal and Amendment Act)

206 Sec 79—Endorsement—A search warrant issued under the Gambling Act (III of 1867) is governed by the provisions of this Code and consequently the search warrant may be endorsed by the Police officer to whom it is originally directed to another of equal rank—*Emp v Kasli Nath* 30 All 60 A search warrant issued under sec 98 can be endorsed over to any other police officer of similar rank for execution—*Crown v Mithu* 3 S L R 56 10 Cr L J 3

102 (1) Whenever any place liable to search or inspection under this Chapter is closed any Persons in charge of closed place to allow search person residing in or being in charge of, such place shall on demand of the officer or other person executing the warrant and on production of the warrant allow him free ingress thereto and afford all reasonable facilities for a search therein

(2) If ingress into such place cannot be so obtained, the

officer or other person executing the warrant may proceed in manner provided by section 48

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made such person may be searched. If such person is a woman the directions of section 52 shall be observed

207 Searches under other Acts —According to Sec 6 of the Burma Gambling Act (I of 1899) all searches made under that Act must be made in accordance with the terms of sections 102 (3) and 103 of this Code—*Ah Shuee v King Emp* 3 L B R 229 *Ana Dewa Sing v King Emp*, 4 L B R 134 Section 16 of the Opium Act lays down that searches under secs 14 and 15 of that Act shall be made in accordance with the provisions of this Code—*Mr Hauk v Emp* 4 L B R 121 A search under the Madras Abkari Act (I of 1886) must by virtue of sec 36 of that Act be conducted in the manner laid down in the Criminal Procedure Code

But the Gambling Act (III of 1867 sec 5) prescribes a special procedure for searches under that Act and the provisions of Chapter VII of this Code will not apply thereto—*Ahilinda Ram v Crown* 3 Lah 359 23 Cr L J 621

103 (1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do

Search to be made in presence of witnesses

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses, but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it

(3) The occupant of the place searched, or some person in his behalf shall in every instance, be permitted to attend during the search, and a copy of the list prepared under this

Occupant of place searched may attend

section signed by the said witnesses, shall be delivered to such occupant or person at his request

(4) When any person is searched under section 102 sub section (3) a list of all things taken possession of shall be prepared and a copy thereof shall be delivered to such person at his request

(5) *Any person who without reasonable cause refuses or neglects to attend and witness a search under this section when called upon to do so by an order in writing delivered or tendered to him shall be deemed to have committed an offence under section 187 of the Indian Penal Code*

The italicised words have been added by sec 14 of the Crim Pro Code Amendment Act (XVIII of 1923) For reasons see below

208 Witnesses —It is obligatory on the officer about to execute a search warrant to call on and get two or more respectable inhabitants of the locality to witness the search before he enters the place to be searched —*Emp v Kwe Haw* 4 L B R 213 The witnesses are to be selected by the officer conducting the search and not by any other person—*Q E v Raman* 21 Mad 83

The regularity and proper conduct of the search is to be secured by two or more witnesses the intention of the enactment is to ensure that searches are conducted with decency and in order and that no wrong doing such as planting of articles by the Police in the house searched should take place—*Emp v Kwe Haw* 4 L B R 213 *Ah Shwee v R E* 3 L B R 229 and that no false evidence may be fabricated—*Ts Ya v Emp* 7 Bur L T 143 15 Cr L J 441

Persons unconnected in any way with the Government and officialdom should be called to witness the search—*Ah Shwee v King Emp* 3 L B R 229 Therefore a Teahouse Goung in Burma is not a competent witness to a search as he is a police officer—12 Bur L T 269 so also the Head men of Wards in Rangoon being appointed by the Commissioner of Police and having to do many Police duties it is not advisable that witnesses should be chosen from that class as being Police officials they are not likely to have the confidence of men—*Emp v Kwe Haw* 4 L B R 213 *Ah Shwee v K E* 3 L B R 229 *Emp v Khan Haw* 4 Bur L T 91 (F B) In *Ts Ya v Emp* 7 Bur L T 143 (F B) it is held that Ward Headmen of towns other than Rangoon are competent witnesses to a search

It is objectionable to be constantly calling the same person to witness the search because such a practice is likely to prejudice the mind of the

trying Magistrate against the prosecution—*M: Hauk v Emp.*, 4 L. B. R 121

209 Respectable inhabitants —Only those persons should be chosen as witnesses who can be reasonably relied on to secure the desired result (viz prevention of fabrication of evidence, and decent and orderly conduct on the part of the officers conducting the search) and in whose trustworthiness and ability towards the carrying out of the particular duty required of them confidence can be felt—*Emp v Kwe Haw*, 4 L. B. R 213. *T: Ya v Emp* 7 Bur L T 143 (F B) The intention of the Legislature is to exclude from the category of the inhabitants those persons in whom confidence cannot be felt and against whom a reasonable suspicion exists that they may not carry out the duty required of them—*Ibid*

A respectable person is a person who would be *impartial* and on whom the owner or occupier of the premises searched can *prima facie* rely—*T: Ya v. Emp.*, 7 Bur L. T. 143 (F. B) 15 Cr. L J. 441. The word 'respectable' means 'respectable and independent'—*Emp. v. Khan Haw*, 4 Bur L T 91 F B. (following *Rex v Hall*, 1 B & C. 123), *Sher Ali v. Emp.*, 23 Cr L J. 609 (Lah) Where one of the witnesses was a friend of the Sub Inspector and lived two miles away, and the other witness lived a mile away, held that the search was illegal—*Ma Htazay v Emp.*, 4 Bur L J 2 26 Cr L J 827

210 'Of the locality' —For the purposes of this section a person living in a quarter within a part of the place to be searched may reasonably be regarded as an inhabitant 'of the locality,' even if a river flows between—*T: Ya v Emp.*, 7 Bur L T. 143 The word 'locality' in this section does not mean the same quarter of the town as the place which is to be searched—*Ah Sein v Emp.*, 4 Bur L T. 222; 12 Cr L J. 479 Where the witnesses lived in a quarter exactly half a mile west of the house searched in Rangoon, held that the witnesses lived within easy reach and in the same locality within the meaning of this section—*Ah Poh v. Emp.*, 18 Cr L J 1009 Where the witnesses lived a mile or 2 miles away, held that they were not inhabitants of the locality—4 Bur L J 2.

It has been held in some cases that the fact that the witnesses are not men 'of the locality' is immaterial if they are 'respectable' men; the important point is that the men called in as witnesses should be persons of some standing whose word can be believed, not that they should be persons living within a stone's throw of the house which is to be searched. The stress is on the word 'respectable' and not on the word 'locality'—7 Bur. L. T. 143 (F. B); 18 Cr L. J. 1009 (Bur); and failure to call inhabitants of the locality as witnesses does not make a search illegal—*Q. E v. Ramani*, 21 Mad. 83. *Satagopachari v. Satrugna*, 23 M. L. J. 445

But the intention of the Legislature is to lay equal stress on the words 'respectable' and locality or rather to lay more stress on the word 'locality', for the *Report of the Select Committee of 1916* runs as follows — We think that the power thus given to the police practically to compel the attendance of respectable witnesses from *as near as possible* to the place where the search is to be effected should go far to put an end to the objectionable practice of bringing semi professional search witnesses from a greater distance and will also prevent the frustration of searches by the unreasonable refusal of witnesses to attend which, we understand is by no means uncommon. If executive instructions are issued to the police that with the new sub section (5) to back them they are whenever possible to require the attendance of respectable witnesses from the *immediate* vicinity we think that a considerable improvement will be effected.

211 Right of occupant to be present—The language of sub section (3) is that the occupant of the place shall be permitted to attend during the search, and it means that he is to be given the option of being present and not that he is to be allowed to be present *only if he demands it*. This section permits the occupants of the search to be present at the search and this rule is not one merely of technicality but of substance in that it is enacted to guarantee the reality of the search and the discoveries made thereat. Therefore where the occupants of the house who were inside the room searched by the Police were after the discovery in their presence of a gun and after search of their persons arrested and sent *out of the room* and the search was continued it was held that the exclusion of the occupants during the search was not a technical but a substantial violation of the law enunciated in this sub section—*Romesh Chandra v Emperor* 41 Cal 350 (370 377) 18 C W N 496 15 Cr L J 385

The word occupant is not intended to cover every person who may happen to be in the place at the time but it refers back to the person mentioned in sec 102 i e a person residing in or being in charge of the place—*Ramesh Chandra v Emperor* 41 Cal 350 (377)

212 Search list—A search list prepared under this section is a proper evidence as to the matter contained therein viz the articles found and the place where they were found—Weir 47

After a search list has been prepared and signed it is not proper to make additions thereto subsequently but such additions however will not invalidate the whole search nor is the omission of unimportant articles a circumstance invalidating the search—*Hlaung v Emp* 7 Bur L T 163 15 Cr L J 323

But it is competent for the Court to receive evidence other than the search list regarding the things seized in course of the search and the

places in which they were found. The provisions of section 91 of the Evidence Act do not apply to the case of a search list prepared under this section—*Solai Naik v Emp* 34 Mad 349 (F B) 21 M L J 281 11 Cr L J 576 overruling 2 Weir 515

Non signing of search list —Refusal by a witness to sign the search-list is not punishable under section 187 I P Code (intentional omission to assist a public servant in the execution of his duty) because the assistance referred to in sec 187 I P C must have some direct personal relation to the execution of the duty by the Police officer. The signing of the list is an independent duty cast upon the witness whereas the word assistance in sec 187 I P C implies that the party who assists is doing something which in ordinary circumstances the party assisted could do for himself—*In re Ramaya Naika* 26 Mad 419 (F B)

In *Ana Dewa Sing v Emp* 4 L B R 134 it has been laid down that unless the search list is signed by witnesses the search would not be legal. But a more reasonable view has been taken in *Solai Naik v Emp* 34 Mad 349 cited above.

In the Bill of 1914 it was proposed to add another sub section (6) to this section as follows — The fact that any person so attending neglects or refuses to sign the list of the articles seized shall not affect the legality of the search. But this was thought unnecessary and omitted by the Select Committee of 1916 who observed as follows — We doubt if it would be wise to enact the new sub section (6) proposed by the Bill and we recommend that it should be omitted. We think that it will be sufficient to rely upon the law as expounded recently by the Full Bench in Madras (1 L R 31 Mad 349) which shows that the facts with reference to a search may be proved otherwise than by the production of the search list.

213 Duty of prosecution to summon search witnesses —The prosecution is in duty bound to call search witnesses at the trial unless it is of opinion that they would misrepresent facts and would mis state what happened. The fact that the prosecution thought that these persons had formed an opinion unfavourable to the prosecution story regarding the search, is no reason why those persons should not be called by the prosecution in as much as what these persons would be required to state in their deposition was what they observed and not what they thought—*Munni Sonar v Emperor* 9 C W N 438

Sub section () of this section suggests that while the rendering of assistance in making the search is imperative on the persons called upon to assist they are not compellable by the Inspector to attend the Court to give evidence without a summons in that behalf—*In re Ippili Irappakka*, 38 M L J 77 21 Cr L J 33

214 Refusal to attend and witness search —See sub section (5) If a person who is requisitioned by a Salt-Inspector to assist him in the search made under this section refuses to attend and witness the search, he is punishable under sec 187 I P C—*In re Ippili Inagatha*, 38 M L J 27 21 Cr L J 33

But the new sub section (5) now adds a further condition, namely that an order in writing must have been tendered to the person requisitioned to attend the search 'We accept the proposal of the Bill to penalise an unreasonable refusal or neglect to attend as a search witness, but would make it a condition precedent that the person in question should have been required to attend by an order in writing from the police-officer In order to make this clear we have in addition to the new sub section (5) made a small amendment at the end of sub-section (1)'—*Report of the Select Committee of 1916*

215 Irregular search —A search is irregular if it is conducted in violation of the police rules relating thereto such as the omission to make at the time a note of the articles found and where found the permitting of unauthorised persons to go in and out of the place searched, the omission to send up the articles found as soon as possible to the Magistrate, or the exclusion of the occupant of the place during the search But the effect of such irregularities is only to necessitate a careful scrutiny of the evidence of search, and if in spite of such irregularities it is found that no advantage was taken of them by the police they have no further effect (i.e. the search does not become illegal)—*Romesh Chandra v Emp*, 41 Cal 350 (368 371) 18 C W N 496 A search made without the presence of any witness is irregular, but such irregularity does not entitle the occupants of the place to exercise their right of private defence by assaulting the police officer, when it was not shown that that officer was acting maliciously and otherwise than in good faith—*Queen Emp v Pukot Kotu*, 19 Mad 349 Where the police-officer made a search without a warrant and in the presence of only one witness, and a constable entered the house to be searched by scaling a wall, held that the search was grossly irregular, but the occupants had no right of private defence, and any assault committed by them on the police was punishable under section 323 (though not under sec 332) I P. C.—*Emp v Mukhtar Ahmad*, 37 All 353 13 A L J 439 In a later Allahabad case, however it has been held that a search without witness is absolutely illegal, and the occupant of the house is entitled to exercise his right of private defence by assaulting the police officer so as to prevent him from entering the house—*Emp v Nirmal Singh*, 42 All 67 17 A L J, 1047 20 Cr L J 695

. If for any reason the officer making the search is unable to get two, or more respectable inhabitants of the locality, and a search is effected

in the presence of one or more men available at the time leading to the discovery of an excisable article the accused who is found in possession of that article can all the same be convicted under the Excise Act if the Court is satisfied from the evidence that an offence has been committed. The irregularity in the proceeding leading to the search would not mitigate the offence or operate as a bar to the conviction of the accused—*Abdul Hafiz v Emp* A I R (1946) All 188

C — Miscellaneous

104 Any Court may if it thinks fit, impound any document or thing produced before it under this Code

Power to impound document, etc, produced

216 Before it —A Magistrate can impound a document produced in a case pending before him and not before any other Magistrate subordinate to him—*Byas Hardeo Das v King Emperor* 1 A L J 607

Jurisdiction —Where a Magistrate had no jurisdiction to summon a person to produce his account books this section does not apply so as to justify his sending the books out of his jurisdiction—*In re Permanand Kessowji Ratanlal* 830

Procedure —A note upon the document or thing impounded or attached to it should be made and signed by the presiding officer and it should not be allowed to pass out of the custody of the Court except by his written order—*All H C Bk Cir* p 6

105 Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant

Magistrate may direct search in his presence

217 When the Magistrate is competent to issue a search warrant, then instead of issuing such a warrant he can direct the search to be made in his presence—*Clarke v Brojendra Kashore* 36 Cal 433 *Empress v Ganeshi* 1884 A W N 213

PART IV.

PREVENTION OF OFFENCES

CHAPTER VIII

OF SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR.

A —Security for keeping the Peace on Conviction

106 (1) Whenever any person accused of rioting, assault or other offence involving a breach of the peace, or of abetting the same or of assembling armed men or of taking other unlawful measures with the evident intention of committing the same, or any person accused of committing criminal intimidation, is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class,

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace,

106 (1) Whenever any person accused of any offence punishable under Chapter VIII of the Indian Penal Code, other than an offence punishable under section 143 section 149 section 153A or section 154 thereof or of assault or other offence involving a breach of the peace, or of abetting the same, * * or any person accused of committing criminal intimidation, is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class,

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace,

such Court may at the time of passing sentence on such person order him to execute a bond for a sum proportionate to his means with or without sureties for keeping the peace during such period not exceeding three years as it thinks fit to fix

(2) If the conviction is set aside on appeal or otherwise the bond so executed shall become void

(3) An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision

such Court may, at the time of passing sentence on such person order him to execute a bond for a sum proportionate to his means with or without sureties for keeping the peace during such period not exceeding three years as it thinks fit to fix

(2) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void

(3) An order under this section may also be made by an Appellate Court *including a Court hearing appeals under section 407* or by the High Court when exercising its powers of revision

Change —The words or of assembling committing the same which occurred in sub section (1) of the old section have been omitted and the italicised words have been added by sec 15 of the Criminal Procedure Code Amendment Act (VIII of 1923) The reasons are stated below in their proper places

218 Object of this Chapter —The object of this Chapter is the prevention and not the punishment of offences and its provisions are aimed at persons who are a danger to the public by reason of the commission by them of certain offences—*Emp v Iarian Satharam* 11 Bom L R 743 *Emp v Murl* 1885 P R 43 This Chapter gives a certain amount of discretion to the Magistrates and the High Court must always be slow to interfere with that discretion unless there is an error of law—*Emp v Raoji* 6 Bom L R 34 *In re Umbica Prosad* 1 C L R 768 But the Magistrate should exercise this preventive jurisdiction under this Chapter with cautious discrimination and watchful care and see that the administration of this branch of criminal law does not become harsh and oppressive —Q *E v Nga On* L B R (1993—1900) 2 3

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and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace,

221 Other offences involving breach of the peace —These words refer to offences in which a breach of the peace is an *essential* or *necessary* ingredient and not to offences which merely provoke or are likely to lead to a breach of the peace—*Ayru Samanta v Emp* 30 Cal 366 *Muthia Chetty v Emp* 29 Mad 190 *Kannookaran v Emp* 26 Mad 469 *Abdulla v Crown* 2 Lah 279 22 Cr L J 709 *Raj Narain v Bhagabat* 35 Cal 315 *Kuppa Reddiar v A E* 47 Mad 846 (848) 25 Cr L J 1096 47 M L J 232

But according to the Bombay High Court the words involving a breach of the peace include offences which are offences because a breach of the peace has occurred or because a breach of the peace is *likely to occur*. And therefore when an accused person being convicted of an offence punishable under sec 504 I P C (insult with intent to provoke a breach of the peace) was ordered to furnish security to keep the peace it was held that the order was lawful in as much as a breach of the peace or a *probability* of a breach of the peace was an ingredient of the offence under sec 504 I P C—*Emp v Sayad Yacoob* 43 Bom 554 21 Bom L R 270 (dissenting from 30 Cal 366 and 26 Mad 469) The Allahabad High Court likewise holds that the word involving connotes inclusion not only of a *necessary* but also of a *probable* feature circumstance antecedent condition or consequence. That is an offence involving a breach of the peace' mentioned in sec 106 does not mean only an offence which necessarily involves a breach of the peace or of which a breach of the peace forms an ingredient but includes an offence such as the removal of a landmark (punishable under sec 448 I P. C.) which as a matter of common experience is often followed by serious riots and loss of life. Therefore where the evidence shows that the accused were prepared to commit the act of removal of landmark by a breach of peace and were only prevented from doing so by the other side running away held that the offence was one which came within the terms involving a breach of the peace' —*Emp v Manik Lal* 33 All 771 (dissenting from 30 Cal 93 30 Cal 366 35 Cal 315 and 29 Mad 190) *Nauha v Kanhaiyalal* 25 Cr L J 71 (Nag)

Upon a conviction of criminal trespass where the intention of the trespass is to commit a breach of the peace an order under sec 106 may lawfully be passed. Thus where the accused came armed with lathis to assault the complainant and aimed a blow at him which missed whereupon the complainant took refuge in his house but the accused pushed the door open and assaulted the complainant inside the house held that a breach of the peace was a necessary ingredient of the offence (criminal trespass with intent to cause hurt sec 452 I P C.) of which the accused was convicted and an order for security was proper in this case—*Emp v Dharam Raj* 42 All 345 18 A L J 300 21 Cr L J 388, *Dulsh*

219. Offences under Ch VIII, I. P. C. —In the Bill of 1914 it was proposed to include in this section the "offences which are likely to lead to a breach of the peace" But the *Select Committee* of 1916 changed those words into "offences punishable under Chapter VIII of the I P Code" and observed "We think it is better to enlarge the scope of this section by including all offences under Chapter VIII of the Penal Code than to involve the Court in an inquiry whether the offence of which the accused has been convicted, though not involving a breach of the peace, was nevertheless likely to have occasioned a breach"

A security can be demanded on a conviction for an offence under sec 147 I P C—*Maharaj Singh v Emp*, 20 Cr L J 760 (Nag); or on a conviction for rioting—*In re Marimuthu*, 32 M L T 315, 17 L W 577.

The words 'or of assembling armed men or of taking other unlawful measures with the evident intention of committing the same' which occurred in the old section have now been omitted, because these offences are covered by Chap VIII of the Indian Penal Code, and specific mention of them is unnecessary. The offence of assembling armed men is an offence under Chapter VIII of the I P Code therefore this section applies where armed men were assembled with the intention of committing a breach of the peace and an order for beating men was given, although no breach of the peace actually took place because the assembly did not go so far—*Srihari v Lalkhan* 5 C W N 250. So also the offence of being an armed member of an assembly (sec 144 I P C) or joining such assembly after it has been commanded to disperse (sec 145 I P C) is an offence under Chapter VIII of the I P Code and brings an accused under this section. The case of *Yar Mahammed v Empress* 1890 P R 3 in which the contrary view was held is no longer good law.

An offence under sec 149 I P C is excluded from this section for that section alone does not make any substantive offence—*Chhedt Singh v Emp*, 3 Pat 870 6 P L T 330 26 Cr L J 426

220. Assault —The word 'assault' as used in this section refers to the offence of assault as defined in section 351 I P C. An offence of causing grievous hurt under sec 325 I P C, though it involves the use of criminal force and is in that sense an assault does not strictly fall under the category of 'assault' as contemplated by this section and cannot form the basis of an order for security. Moreover, such offence does not always involve a breach of the peace—*Dubri v Emp*, 24 Cr L J 227 (Oudh). But where the offence of hurt was committed under such circumstances that it clearly implies the use of violence and a breach of the peace, e.g. assaulting a prosecution witness in a public place, the order for security was not improper—*In re Ramaswami Thevan*, 44 M. L J 485. 24 Cr L J 455

222 "Convicted of such offence" —This section refers only to parties convicted of rioting, assault, etc., and cannot be applied to cases where there is only a possible apprehension of a future breach of the peace. It is only when there has been a conviction, and not until then of the accused of the offence charged, that a Magistrate can resort to this section—*Q v Hur Kumari*, 24 W R 10. Therefore where a person was acquitted on a charge of unlawful assembly and trespass etc., the Magistrate would be in error in demanding security from him on the same evidence—*Diloo Singh v Ootini Singh*, 22 W R 9. So also, where the Magistrate only found that the accused threatened to beat the complainant, but did not convict the accused for assault or criminal intimidation, an order under this section was illegal—*Subal v Ramkanat* 25 Cal 628. The conviction must be for an offence specified in this section. Therefore, where the accused was charged with criminal intimidation, but was convicted of theft or unlawful assembly (sec 143 I P C) an order under this section was not legal—*Kishore Sarkar v K E*, 8 C W. N 517, *Raj Narain v Bhagabat*, 35 Cal 315, *Abdulla v Crown*, 2 Lah 279 (280) 22 Cr L J 709.

Annulment of conviction.—If the conviction is annulled on appeal, the order directing security abates *ipso facto* by virtue of sub-section (2) and it is not competent to the Appellate Court to order the security to be continued—*Emp v Chajju Mal*, 1895 A W N 141.

Summary trial.—An order under this section may be made even if the conviction takes place in a summary trial, provided the Magistrate has jurisdiction—*Meghu v K E*, 7 O C 338, *Emp v Lachman*, 1886 A W. N 181.

223 Magistrates empowered.—Since Section 18 confers full powers of a Presidency Magistrate on an Honorary Presidency Magistrate, the latter can take action under this section—*Hassan v Yas Kubar*, 7 Bom L R 833 2 Cr L J 770. If any Bench of Magistrates has first class powers, the Bench is competent to pass an order under this section—See sec 15 (2). The ruling in *Q v Debheki*, 21 W R 12 is no longer good law. A Sub Divisional Magistrate, even though he is a Magistrate of the second class, can pass an order under this section binding over a person to keep the peace for a period exceeding six months. The fact that the order carries with it an alternative sentence of imprisonment in case the security is not furnished, which will be beyond his ordinary powers under sec. 32, cannot have the effect of limiting the powers conferred on the Court of the Subdivisional Magistrate under this section. So long as the order was passed by a Court which had authority to do so under this section, and the period for which security was required did not exceed the limits he was authorised by this section to impose, the liability of the accused to be detained in prison unless he furnished security is something

v Emp 26 Cr L J 1462 (Lah) Where the accused is convicted under sec 323 I P C, he cannot be bound down to keep the peace merely on the ground that the parties were on bad terms There must be a further finding that a breach of the peace was involved in the occurrence—*Md Rahim v Emp* 23 A L J 1053 26 Cr L J 1457 A I R (1926) All 144

221A *Offences involving no breach of the peace*—(a) Merely being a member of an unlawful assembly (Sec 143 I P C)—*Abdulla v Crown* 2 Lah 279 *Jib Lal v Jogmohan* 26 Cal 576 *Raj Narain v Bhagabat* 35 Cal 315 *Kaunookaran v Emp* 26 Mad 469 *Sheo Bhajan v Mosawi* 27 Cal 983 *Abdul Ali v Emp* 43 Cal 671 20 C W N 197 an offence under sec 143 I P C is now expressly excluded from this section by the present amendment

(b) criminal trespass—26 Cal 576 *Badaruddin v Emp* 1901 P L R 127 *Reg v Bhaskar* 3 B H C R 1

(c) criminal trespass with intent to have illicit intercourse with the complainant's wife—*Subal v Ramkanai* 25 Cal 628

(d) merely causing disturbance to religious worship—2 Weir 47

(e) theft or mischief—*Kaunookaran v Emp* 26 Mad 469 *Ram Charan v Umesh* 1 C W N 186 *Q E v Muniram Ratanlal* 6*2

(f) breaking open a locked shop and criminal trespass—*Emp v Kundan* 1885 A W N 303

(g) house trespass with intent to commit theft—*Morali v A E* 4 L B R 277

(h) grievous hurt—*Q v Kunhiya* 4 N W P H C R 154

(i) robbery—*In re Muthurakka* 18 M L T 121 16 Cr L J 611

(j) offence under sec 297 I P C—*Abdulla v Crown* 2 Lah 279

(k) wrongful confinement—*Md Afsal v Emp* 24 Cr L J 271 (Lah) but if the accused is found to have violently seized another person tied his hands and wrongfully confined him in an open garden then it amounts to an offence involving a breach of the peace—*Kuppa Reddiar v K E*, 47 Mad 846 (849) 47 M L J 232 25 Cr L J 1096.

(l) defamation (even though the person defamed was provoked to commit a breach of the peace)—*Emp v Syad Yacoob* 43 Bom 554 (557) 21 Bom L R 270

(m) attempt to seduce married women and behaving indecently and immodestly towards them—*Arun v Emp* 30 Cal 366

When a person is convicted of offences which do not in themselves and apart from any other incidents come within the terms of this section it is incumbent on the Magistrate to record a clear finding with respect to the facts which in his opinion make this section applicable to the case—*Baidya Nath v Nibaran* 30 Cal 93 *Sheo Bhajan v Mosawi* 27 Cal 983 *Jib Lal v Jogmohan* 26 Cal 576, *Kinoo Sheikh v Darastulla*, 29 Cal 393

222 *Convicted of such offence* —This section refers only to parties convicted of rioting assault etc and cannot be applied to cases where there is only a possible apprehension of a future breach of the peace It is only when there has been a conviction and not until then of the accused of the offence charged that a Magistrate can resort to this section —*Q v Hur Kumari* 24 W R 10 Therefore where a person was acquitted on a charge of unlawful assembly and trespass etc the Magistrate would be in error in demanding security from him on the same evidence —*Diloo Singh v Ootim Singh* 22 W R 9 So also where the Magistrate only found that the accused threatened to beat the complainant but did not convict the accused for assault or criminal intimidation an order under this section was illegal—*Subal v Ramkanai* 25 Cal 628 The conviction must be for an offence specified in this section Therefore where the accused was charged with criminal intimidation but was convicted of theft or unlawful assembly (see 143 I P C) an order under this section was not legal—*Kishore Sarkar v A E* 8 C W N 517. *Raj Narain v Bhagabat* 35 Cal 315 *Abdulla v Crown* 2 Lah 279 (280) 22 Cr L J 709

Annulment of conviction —If the conviction is annulled on appeal the order directing security abates *ipso facto* by virtue of sub section (2) and it is not competent to the Appellate Court to order the security to be continued—*Emp v Chajju Mal* 1895 A W N 141

Summary trial —An order under this section may be made even if the conviction takes place in a summary trial provided the Magistrate has jurisdiction—*Meghu v K E* 7 O C 338 *Emp v Lachman* 1896 A W N 181

223 *Magistrates empowered* —Since Section 18 confers full powers of a Presidency Magistrate on an Honorary Presidency Magistrate, the latter can take action under this section—*Hassan v Jas Anbar* 7 Bom L R 833 2 Cr L J 770 If any Bench of Magistrates has first class powers the Bench is competent to pass an order under this section—See sec 15 (2) The ruling in *Q v Bebheli* 21 W R 1 is no longer good law A Sub Divisional Magistrate even though he is a Magistrate of the second class can pass an order under this section binding over a person to keep the peace for a period exceeding six months The fact that the order carries with it an alternative sentence of imprisonment in case the security is not furnished which will be beyond his ordinary powers under sec 32 cannot have the effect of limiting the powers conferred on the Court of the Subdivisional Magistrate under this section So long as the order was passed by a Court which had authority to do so under this section and the period for which security was required did not exceed the limits he was authorised by this section to impose the liability of the accused to be detained in prison unless he furnished security is something

independent of the powers of the Magistrate in the matter of passing substantive sentences of imprisonment—*Raja Singh v Emp* 37 All 230 13 A L J 268 16 Cr L J 350

224 At the time of passing sentence —The order for security is to be made at the time of passing the sentence Where a second class Magistrate convicted a person for assault and sentenced him to a fine but ordered the sentence to be in abeyance pending the order of the District Magistrate for binding over the person and the District Magistrate ordered the accused to furnish security *held* that the order of the District Magistrate was bad in law—*Crown v Nura* 1901 P R 22 If a Magistrate of the 2nd or 3rd class is of opinion that the accused should be bound down under this section he must refer the whole case to a superior Magistrate under section 349 without passing any sentence himself—*Rohimuddi v Emp* 35 Cal 1093 The second or third class Magistrate when referring a case under sec 349 cannot even *commit* the accused Section 106 contemplates that before an order requiring security can be passed under it the accused shall have been convicted by the Court or Magistrate specified who is not inferior to a Magistrate of the first class Reading sections 106 and 349 together it follows that the conviction and order under section 106 must be passed by one and the same officer and when a second or third class Magistrate refers a case to a superior Magistrate for an order under section 106 the conviction and sentence must be passed by the superior Magistrate and not by the Magistrate of the 2nd or 3rd class Therefore where a third class Magistrate *convicted* the accused and then submitted the case to the District Magistrate with a recommendation that the accused should be bound over to keep the peace and the District Magistrate ordered security under this section the order was *ultra vires* and illegal—*Mahmudi v Ali Sheikh* 21 Cal 622

A second class Magistrate ought not to pass *any* sentence at all if he refers the case to a superior Magistrate for an order under section 106 Where a second class Magistrate convicted the accused under sections 147 and 325 I P C and sentenced the accused under section 147 I P C but passed no sentence under sec 325 I P C and forwarded the proceedings to the Subdivisional Magistrate in order that the accused should be bound down under sec 106 of this Code *held* that the action of the 2nd class Magistrate was wrong If he thought that the binding down was necessary he should have forwarded the whole case to the Subdivisional Magistrate without passing *any part* of the sentence (*viz* the sentence under sec 147 I P C) himself—*Rohimuddi v Emp* 35 Cal 1093

An order for recognizance or for security under this section must be passed at the time of deciding the original case If no such order is then made the only procedure open to the Magistrate is to take subsequent

proceedings under section 107—*Ram Adhin v Emp* 21 A L J 839 25 Cr L J 965 *In re Gobind* 15 W R 56 If a Magistrate omits to order the accused to furnish security under this section at the time of passing the sentence he cannot afterwards upon receiving some further information (other than that which he derived from the previous trial) that the parties are likely to commit a breach of the peace pass an order under this section—*Q v Powell* 3 N W P H C R 96

An appellate Court can pass an order for security on confirmation of the sentence passed by the original Court. If the Appellate Court sets aside the sentence passed by the original Court but passes no sentence itself and makes an order for security the order is illegal—*Crown v Nira* 1901 P R 22 *Reg v Bhaslar* 3 B H C R 1

225 Order for security.—An order under this section can only be made in the presence of the accused. An order made at the instance of the prosecutor behind the back of the accused is bad in law—*Reg v Dhaslar* 3 B H C R 1

The security ordered under this section must be for *keeping the peace*. An order for furnishing security for *good behaviour* under this section is bad in law—*Malabar v Emp* 16 A L J 780 19 Cr L J 439

The security must be in addition to an award of punishment therefore a Magistrate cannot order security *in lieu* of other punishment—*Crown v Nira* 1901 P R 22

Who can be bound down.—Only the accused person can be asked to give security. Under this section a Magistrate is not authorised to demand security from the complainant (in a case under sec 323 I P C). If he considers it necessary to demand security from the complainant he must record a separate proceeding and give the complainant an opportunity to be heard under secs 117 and 118—*Crown v Hallu* 1907 P R 3. The Magistrate is not competent to take security from a witness for the defence on the ground that his evidence in the trial proved that he was one of the rioters—*Q v Kadar Khan* 5 Mad 380

Proportionate to his means.—The provision for taking security being a preventive measure intended to preserve future good conduct it should not be made an instrument of punishment by demanding excessive security disproportionate to the means of the person and thus making him undergo further imprisonment—*Q E v Rama* 16 Bom 37 *Emp v Dedar*, 2 Cal 384 *In re Juggut* 2 Cal 110 *Emp v Kala Chand* 6 Cal 14 *Hasya v Emp* 1901 P R 28 *Ata v Emp* 1900 P R 17 *Ram Singh v Emp* 1883 P R 1 *Jayara v Emp* 1890 P R 30 See Note 293 under sec 118

226 Cases when order should not be made.—An order for security should not be made when a sentence of transportation or imprisonment

for a long time is passed—*Kyaw Wa v K E* 5 L B R 34 10 Cr L J 69 or where such an order would prevent the party bound down from exercising his lawful rights—*Nanda Kumar v Emp* 11 C W N 1128 thus where upon the complainant trying to take possession of the land in the possession of the accused the latter used more force than was necessary to prevent the complainant from taking possession and the accused was punished for rioting it was held that he should not be bound down under this section as such order would have the effect of preventing him from resisting any further attempt by the complainant to take possession of his land—*Nahar v Emp* 11 C W N 840 6 Cr L J 40 In *Bepin v Pranukul* 11 C W N 176 it has been held that if it is necessary in order to prevent a breach of the peace to bind down the party entitled to possession and if the effect of such order is to prevent him from taking possession of the property it is desirable that the other party should also be bound down under sec 107

227 Sub section (3)—Power of Appellate Court to direct security — The words including a Court hearing appeals under sec 407 recently added in this sub section by the Amendment Act of 1923 have removed the conflict of opinion which existed between the several High Courts as to whether an Appellate Court could direct security where the original Court (e g a 2nd or 3rd class Magistrate) was not empowered to pass the order It has been held in some cases that an Appellate Court can not pass an order under sub section (3) unless the person convicted has been sentenced by a Court not inferior to that of a first class Magistrate This result does not appear to have been intended and it is proposed to remove the restriction —*Statement of Objects and Reasons* (1914)

Thus it has been held by the Madras Bombay Allahabad and Patna High Courts as well as in Oudh C P and Burma that an Appellate Court can pass an order under this section although the original Court was not competent (being a 2nd or 3rd class Magistrate) to pass the order —*In re Solai Gounden* 37 Mad 153 14 Cr L J 574 (over ruling 29 Mad 190 and 30 Mad 48) *Doraisami v Emp* 30 Mad 182 *Dharam Das v K E* 33 All 48 11 Cr L J 480 *Emp v Bhansingh* 33 Bom 33 10 Bom L R 759 *Tilak Patil v Emp* 43 All 372 22 Cr L J 310 *Baclan Singl v Emp* 2 P L J 21 18 Cr L J 118 *Hasa bag v Emp* 19 N L R 154 *Lachmi Narain v Emp* 23 O C 380 22 Cr L J 276 *Blarat Singh v Emp* 16 O C 31 14 Cr L J 59 (over ruling 10 O C 287) U B R (1897—1901) Vol I page 9 (revision) The word also in sub section (3) plainly implies that the order may be independently made by an Appellate Court or by a Court of Revision in addition to those mentioned in sub section (1) and it is not implied that the power of the original Court should in any way control or limit the power of the Appellate or Revisional authority—*Emp v Bhansingh* 33 Bom 33

The Calcutta and Punjab Courts have however held that where the original Court was not competent to order security under this section the Appellate Court could not exercise such powers—*Emp v Momin Ma'ita* 35 Cal 434 12 C W N 752 *Karim Baksh v Emp* 19 Cr L J 20 (Cal) *Eusafali v Emp* 4 Cr L J 308 (Cal) *Gopal Singh v A E* 1908 P R 21 *Radha Singh v K E* 1907 P R 6 *Lalkhan v Crown* 1918 P R 5, *Karam Singh v Emp* 23 Cr L J 457 (Lah)

In view of the present Amendment the Calcutta and Punjab decisions are rendered obsolete

An Appellate Court can require the accused to furnish security even after the working out of the substantive punishment passed by the original Court and such an order would not amount to an enhancement of punishment under sec 423 (1) (b)—*Miran v A E* 1905 P R 21 *Maharaj Singh v Emp* 20 Cr L J 760 (Nag)

An Appellate Court can cancel an order of security passed by the original Court while upholding the sentence—*Abdul v Amiran* 30 Cal 101 But if the conviction and sentence are cancelled by the Appellate Court the order of security is also cancelled *ipso facto* under sub section (1) and it is not competent to the Appellate Court to order the security to be continued—*Emp v Chajji Mal* 1895 A W N 141

228 Revision.—This section gives a discretion to the Magistrate to pass an order for security and the High Court is reluctant to interfere upon a mere question of discretion unless the order is on the face of it such an improper exercise of discretion as to require interference—*Emp v Dharam Raj* 42 All 345 (346) 18 V L J 300 21 Cr L J 288 The High Court in revision set aside an order under sec 106 where the findings did not sufficiently and clearly show that the acts for which the accused were convicted necessarily involved a breach of the peace—*Abdul Ali v Emp* 43 Cal 671 20 C W N 197 17 Cr L J 241

B—Security for keeping the Peace in other Cases and Security for Good Behaviour

107 (1) Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace, or disturb the public tranquillity the Magistrate if in his opinion there is sufficient ground for proceeding may, in manner hereinafter

Security for keeping the peace in other cases

provided require such person to show cause why he should not be ordered to execute a bond with or without sureties for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix

(2) Proceedings shall not be taken under this section unless either the person informed against or the place where the breach of the peace or disturbance is apprehended, is within the local limits of such Magistrate's jurisdiction and no proceedings shall be taken before any Magistrate other than a Chief Presidency or District Magistrate unless both the person informed against and the place where the breach of the peace or disturbance is apprehended are within the local limits of the Magistrate's jurisdiction

(3) When any Magistrate not empowered to proceed under sub section (1) has reason to believe that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such person in custody such Magistrate may after recording his reasons issue a warrant for his arrest (if he is not already in custody or before the Court) and may send him before a Magistrate empowered to deal with the case together with a copy of his reasons

<p>(4) A Magistrate before whom a person is sent under this section may in his discretion detain such person in custody until the completion of the inquiry hereinafter prescribed</p>	<p>(4) A Magistrate before whom a person is sent under sub section (3) may in his discretion detain such person in custody <i>pending further action by himself under this Chapter</i></p>
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Change —The italicised words have been added by sec 16 of the Criminal Procedure Code Amendment Act (XVIII of 1923). The words "until the completion of the inquiry hereinafter prescribed" previously occurring in sub section (4) have been substituted by the words "pending

further action by himself under this Chapter." The reasons have been thus stated "We also recommend an amendment of section 107 (4), as we think that the powers conferred by the sub section as it stands are unnecessarily wide. We think that it will be sufficient that the Magistrate should have power to detain the accused in custody 'pending further action by himself under this Chapter,' and we have made this change"—*Report of the Select Committee of 1916*

The words "if in his opinion there is sufficient ground for proceeding" have been added during the debate in the Assembly adopting the phraseology of sec. 204, and the object of this amendment is to prevent the Magistrate from proceeding upon any and every information. The words "is informed" in this section are too wide and the amendment therefore makes it incumbent on Magistrates to be satisfied, by some sort of inquiry whether private or public, or by taking evidence whether in camera or in open Court, about the correctness and veracity of that information before they take any action. See the *Legislative Assembly Debates*, January 18, 1923 pp 1246-1254.

229 Object of section.—The object of this section is the prevention and not the punishment of offences. It is intended, not to punish persons for anything that they have done in the *past*, but to prevent them from doing in the *future* something that may probably occasion a breach of the peace. Therefore where offences *have been* committed, the proper procedure is to institute regular trials for those offences, and not to take proceedings under this section—*Srikanta v. Emp.*, 9 C. W. N. 898, *Emp. v. Manu*, 25 Cr. L. J. 1226.

230. Information.—There should be *reliable* information as to the probability of a breach of the peace—*Malik Sultan v. Bano*, 1903 P. L. R. 115. The information must be of a *clear* and definite kind, directly affecting the person against whom process is issued, and should disclose tangible facts and details, so that it may afford notice to such person of what he is to come forward to meet—*In re Jas. Prakash*, 6 All. 26; *Prankrishna v. Emp.*, 8 C. W. N. 180, *Ainuddin v. Emp.*, 24 Cr. L. J. 230 (Cal.).

When a Magistrate receives verbal communication from certain persons, it is proper that he should order the institution of some inquiry into the truth of the matter before he proceeds to take action thereupon. It is not open to a Magistrate to draw up proceedings under this section upon vague and general statements which do not amount to any direct accusation or allegation—*Grant v. Emp.*, 2 P. L. T. 669, 22 Cr. L. J. 745, *Nurizund v. Crown*, 3 Lah. L. J. 480.

A Magistrate ought not to act under this section upon the following informations.—A statement by a private person not upon oath or solemn

provided, require such person to show cause why he should not be ordered to execute a bond with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix

(2) Proceedings shall not be taken under this section unless either the person informed against or the place where the breach of the peace or disturbance is apprehended, is within the local limits of such Magistrate's jurisdiction, and no proceedings shall be taken before any Magistrate, other than a Chief Presidency or District Magistrate unless both the person informed against and the place where the breach of the peace or disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction

(3) When any Magistrate not empowered to proceed under sub-section (1) has reason to believe that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity, and that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such person in custody, such Magistrate may, after recording his reasons, issue a warrant for his arrest (if he is not already in custody or before the Court), and may send him before a Magistrate empowered to deal with the case, together with a copy of his reasons

(4) A Magistrate before whom a person is sent under this section, may in his discretion detain such person in custody until the completion of the inquiry hereinafter prescribed

(4) A Magistrate before whom a person is sent under sub-section (3) may in his discretion detain such person in custody *pending further action by himself under this Chapter*

Change —The italicised words have been added by sec 16 of the Criminal Procedure Code Amendment Act (LVIII of 1923) The words "until the completion of the inquiry hereinafter prescribed previously occurring in sub section (4) have been substituted by the words pending

further action by himself under this Chapter " The reasons have been thus stated : "We also recommend an amendment of section 107 (4), as we think that the powers conferred by the sub section as it stands are unnecessarily wide We think that it will be sufficient that the Magistrate should have power to detain the accused in custody 'pending further action by himself under this Chapter ' and we have made this change "—*Report of the Select Committee of 1916*

The words "*if in his opinion there is sufficient ground for proceeding*" have been added during the debate in the Assembly adopting the phraseology of sec. 204, and the object of this amendment is to prevent the Magistrate from proceeding upon any and every information The words 'is informed' in this section are too wide and the amendment therefore makes it incumbent on Magistrates to be satisfied, by some sort of inquiry whether private or public, or by taking evidence whether in camera or in open Court, about the correctness and veracity of that information before they take any action. See the *Legislative Assembly Debates*, January 18, 1923, pp 1246 1254.

229 Object of section :—The object of this section is the prevention and not the punishment of offences It is intended, not to punish persons for anything that they have done in the *past*, but to prevent them from doing in the *future* something that may probably occasion a breach of the peace. Therefore where offences *have been* committed, the proper procedure is to institute regular trials for those offences, and not to take proceedings under this section—*Srikanta v Emp*, 9 C. W. N. 898; *Emp. v. Mann*, 25 Cr. L. J. 1216.

230. Information.—There should be *reliable* information as to the probability of a breach of the peace—*Malik Sullan v Bano*, 1903 P. L. R. 115 The information must be of a *clear* and definite kind, directly affecting the person against whom process is issued, and should disclose tangible facts and details, so that it may afford notice to such person of what he is to come forward to meet—*In re Jai Prakash*, 6 All. 26; *Pranākrishna v. Emp*, 8 C. W. N. 180; *Ainuddin v. Emp*, 24 Cr. L. J. 230 (Cal.).

When a Magistrate receives verbal communication from certain persons, it is proper that he should order the institution of some inquiry into the truth of the matter before he proceeds to take action thereupon. It is not open to a Magistrate to draw up proceedings under this section upon vague and general statements which do not amount to any direct accusation or allegation—*Grant v. Emp*, 2 P. L. T. 669. 22 Cr. L. J. 745; *Nitigunnd v. Crown*, 3 Lah. L. J. 480

A Magistrate ought not to act under this section upon the following informations.—A statement by a private person not upon oath or so

affirmation—*Reg v Jwanji* 6 B H C R 1 *Chamaro v Kashi Chunder* 8 W R 85 hearsay evidence—*Mohan v Emp* 21 Cr L J 560 (Nag) conversation out of Court with persons however respectable—*Emp v Babua* 6 All 132 personal knowledge of certain facts which he obtains from sources outside the record—*Mathura v Emp* 14 A L J 769 17 Cr L J 484

A *police report* is in itself a sufficient information on which a Magistrate may issue a summons but it is in no sense evidence upon which he can determine under section 118 whether it is necessary to take a bond to keep the peace or for good behaviour—*Behari v Mahomed* 12 W R 60 *In re Brindaban* 10 W R 41 When it appears that any person is likely to commit a breach of the peace etc it is the duty of the police to lay information before the Magistrate having jurisdiction In laying such information the police should set out carefully the evidence on which they rely or the circumstances leading to the information—*C P Pol Man* 1 page 53

A *statement of the complainant* in the absence of the persons charged may be accepted by the Magistrate as credible information and may enable him to act upon it by issuing summons to show cause but it is not competent for the Magistrate on the appearance of the persons so charged to act upon his previous information and to pass final order without taking further evidence—*Q v Nuseerodeen* 2 N W P H C R 461 *Q v Kristendra* 7 W R 30 Similarly a *report of a subordinate Magistrate* is credible information to authorise a Magistrate to pass a preliminary order under this section—*Egambara v Murugappa* 2 Weir 51 *Ex parte Nelli Kel* 2 M H C R 240 but if unsupported by other evidence it cannot form a sufficient ground for final adjudication under section 118—*Reg v Jwanji* 6 B H C R 1 *Reg v Dalpatram* 5 B H C R 105

But the Magistrate is not entitled to initiate proceedings upon facts and information which had already been the subject of inquiry under Sec 107, or in connection with charges under the Penal Code brought against the same persons and which had ended in favour of the accused Thus where there have been a number of cases and proceedings going on for a long time between the parties and in all these cases the persons accused of the offences were either discharged or acquitted and the proceedings under section 107 fell through the Magistrate cannot initiate fresh proceedings under sec 107 upon the same facts and information when there are no fresh materials of any importance available in which fresh apprehension can arise of a breach of the peace The same facts cannot form the subject of repeated proceedings either under the Penal Code or under the Cr P Code—*Konda Reddy v A L* 41 Mad 240 18 Cr L J 878

231 Likely to commit breach of the peace.—The information must contain evidence of some specific conduct on the part of the accused from which a reasonable and immediate inference can be drawn that the accused is likely to commit a breach of the peace and it is only on information of this character that the Magistrate should initiate proceedings under this section—*Run Bahadur v. Tslessuree* 22 W R 79 *Q v. Har Kumari* 24 W R 10 *Huree Mohar v. Kali Nath* 25 W R 15 *Q v. Abdul Haq* 20 W R 57 *Emp v. Shumbhu* 1888 P R 21 The mere finding that the accused is a bad character and that it is not right in any way to leave him without a guarantee is wholly insufficient to justify an order under this section—*Emp v. Shumbhu* 1888 P R 21 Where the evidence on the record disclosed reliable statements that persons who were ordered to furnish security to keep the peace were men who had shown by their acts and general behaviour that their object was to disturb the public tranquillity (e.g. by wounding the religious feelings of the Muhammadans of a certain locality) it was held that the Magistrate was justified in making such order—*Chunni Lal v. Emp* 14 A L J 430 17 Cr L J 301

The information must shew that there is a strong and reasonable probability of a breach of the peace and not merely a bare possibility—*Q v. Abdul Haq*, 20 W R 57 *Malik Sultan v. Baso* 1903 P L R 115 *Emp v. Chanbasawa*, 6 Bom L R 862 The act likely to cause a breach of the peace must be an impending one and not one likely to happen at some future time it must be shewn to be in contemplation at the time of the information given and the fact that a person has done a wrongful act in the past should not give rise to the inference that he is likely to do the same again—*In re Shivaram* 6 Bom L R 663 *In re Pasdeo* 26 All 190 *Q v. Hedarnath* 7 N W P H C R 233 U B R (1897—1901) Cr P C 15 Thus the mere fact that certain persons had made preparations for disturbing the public tranquillity on the occasion of the last Muharram festival would afford no ground, after the festival had passed without the public tranquillity having been disturbed for inferring that they would be likely to commit a breach of the peace or disturb the public tranquillity at the next Mohurram and would not be a sufficient ground for binding them over—*In re Basdeo* 26 All 190 But security should be taken in a case where though the occasion on which the ill feeling between the parties (Hindus and Mussalmans) first came to a head had passed without any actual disturbances there still remained the probability of a recurrence of it in the near future in fact at any moment—*Ajitha Prasad v. A. E. S. A. L. J.* 1080 12 Cr L J 423

232 Wrongful acts that may occasion breach of the peace.—There are two distinct sets of circumstances in which a Magistrate may

take action under Sec 107; *first*, where it appears that a person is likely himself to commit a breach of the peace or to disturb the public tranquillity, that is to say, by a direct act, *e g*., by committing an assault; and *secondly*, where a person may be the indirect cause of a breach of the peace or the disturbance of the public tranquillity by doing a certain act, but in the latter case the Magistrate may only take action where the act anticipated is a *wrongful* act. This section does not authorise action against a person who is expected to do an act which may cause a breach of the peace or disturb the public tranquillity unless that act is *wrongful*, and the mere fact that the doing of a lawful act by certain persons may lead to the commission of a breach of the peace by other persons does not authorise the Magistrate to take action against the persons intending to do the lawful act, unless they are themselves likely to commit a breach of the peace or to disturb the public tranquillity—*Nga Ti v Maung Kyaw*, 11 Bur L T 59 18 Cr L J 512

Threats of violence are sufficient to indicate an intention to commit a breach of the peace and justify an order under this section—*Surya Kanta v Emp*, 31 Cal 350, *Emp v Kallu*, 27 All 92. Illegal collection of tolls accompanied with acts of violence and threats of violence in case of non-payment of tolls is a wrongful act likely to cause a breach of the peace—*Bepin Behari v Emp* 21 Cr L J 651 (Cal). An abetment by instigation of the offence of voluntarily causing hurt in a public place is a wrongful act justifying an order under this section—*Barnes v Emp*, 23 Cr L J, 394 (Nag)

The words 'wrongful act' mean an act forbidden or declared to be penal or wrongful by the criminal law, and not a mere improper act. The killing of a dedicated bull for the sake of its meat is not a 'wrongful' act—*Pir Ali v Emp*, 21 Cr L J 453 (Pat).

The following are not wrongful acts within the meaning of this section:—(a) Singing of ballads in open streets, although leading to an obstruction in the street by crowds collecting to hear the same is not a wrongful act—*Ghulam Nabi v Emp*, 1889 P. R. 13. (b) the grant of leases to tenants by the owner who is entitled to possession but is wrongfully kept out of possession, and the taking of possession by the lessee peacefully and without using violence, are not wrongful acts—*Driver v. Q. E*, 25 Cal. 798, (c) use of the word 'Amin' in a loud voice in prayers in a mosque—*Khuda Baksh v. Emp*, 1902 P. R. 15, *Q. E v Ramtan*, 7 All 461; *Ataulla v Azimulla*, 12 All 494, *Jangu v. Amanulla*, 13 All 419, *Abdur Rahman v. Emp*, 8 O L J. 282. 22 Cr. L J 590 (Oudh), (d) stopping the services of village barber and washerman being rendered to the complainant—*Sh Jinuat v. Sh Rakesh*, 7 C W. N. 32, (e) the opening of a cattle market by persons on their own land not far from an already existing cattle market—*Mahu v Emp*, 16 A L J 279: 19 Cr. L. J 437:

(f) mere use of idle threats and bombast—*In re Chinnathambi*, 9 M L T. 271 12 Cr L J 104

The Magistrate should have tangible evidence that some definite wrongful act is contemplated which act if committed is likely to occasion a breach of the peace therefore the fact that the accused had attempted to get up false cases and that he would probably continue to do so is not a ground of action under this section—*Emp v Budhawa* 1837 P R 64 So also merely being on bad terms with others (*Emp v Balajee* 7 C P L R 9) or being a quarrelsome head strong and contumacious person (*Emp v Shimbhu* 1883 P R 21) is neither a definite wrongful act nor likely to cause a breach of the peace So also, the mere fact that enmity exists between two parties does not entitle the Magistrate to bind down either party—*Sher Khan v Emp* 12 Cr L J 186 1911 P L R 126, *Narendra v Emp*, 1 A L J 418

233 Acts which amount to an exercise of lawful rights are not to be treated as wrongful acts necessitating an order under this section—*Din Dayal v Emp*, 34 Cal 935, *In re Kashichandra* 19 W R 47, *Bepin v Emp* 21 Cr L J 651 (Cal) The preventive jurisdiction of a Magistrate under this section must be exercised with caution Where its exercise may undoubtedly lead to the infringement of an undoubted civil right and where the breach of the peace apprehended by the Magistrate is a likely result of the enforcement of his legal right by a party in a legal way the Magistrate ought not to bind down the party who has the legal right in him—*Din Dayal v Emp* 34 Cal 935, *Nga Ti v Maung Kyau*, 11 Bur L J 59 18 Cr L J 512

Thus the right of protection of lawful possession is a lawful right which may properly be exercised not only to resist any unlawful attempt to interfere with the possession but also to defend oneself if it becomes necessary in the process Where therefore the lawful possession of the accused had more than once been threatened by a show of armed force, and he had collected a body of men armed with *lathis* and posted them on the property to resist any violence or interference with his possession, it was held that as the intention was to maintain an existing right, the accused was justified in adopting measures for the defence of his possession and that as there was no likelihood of a breach of the peace from his side, there was no reason either for punishing him or binding him over to security—*Janki Prasad v Emp* 18 A L J 157 21 Cr L J 337 Where a party has the right to take a procession along a particular road he cannot be bound down under this section because other persons object to his doing so and he insists on taking the procession along that road The proper course is to bind down the other persons—*Feroze Ali v Emp*, 12 C. W. N. 703 Where one of several co-sharer landlords sought to make a measure-

take action under Sec 107 *first* where it appears that a person is likely himself to commit a breach of the peace or to disturb the public tranquillity, that is to say by a direct act *e g* by committing an assault and *secondly* where a person may be the indirect cause of a breach of the peace or the disturbance of the public tranquillity by doing a certain act but in the latter case the Magistrate may only take action where the act anticipated is a *wrongful* act. This section does not authorise action against a person who is expected to do an act which may cause a breach of the peace or disturb the public tranquillity unless that act is *wrongful* and the mere fact that the doing of a lawful act by certain persons may lead to the commission of a breach of the peace by other persons does not authorise the Magistrate to take action against the persons intending to do the lawful act unless they are themselves likely to commit a breach of the peace or to disturb the public tranquillity—*Nga Ti v Maung Kyaw* 11 Bur L T 59 18 Cr L J 512

Threats of violence are sufficient to indicate an intention to commit a breach of the peace and justify an order under this section—*Surya Kanta v Emp* 31 Cal 350 *Emp v Kallu* 27 All 92 Illegal collection of tolls accompanied with acts of violence and threats of violence in case of non payment of tolls is a wrongful act likely to cause a breach of the peace—*Bepin Behari v Emp* 21 Cr L J 651 (Cal) An abetment by instigation of the offence of voluntarily causing hurt in a public place is a wrongful act justifying an order under this section—*Barnes v Emp* 23 Cr L J 394 (Nag)

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Thus the right of protection of lawful possession is a lawful right which may properly be exercised not only to resist any unlawful attempt to interfere with the possession but also to defend oneself if it becomes necessary in the process Where, therefore, the lawful possession of the accused had more than once been threatened by a show of armed force, and he had collected a body of men armed with *lathis* and posted them on the property to resist any violence or interference with his possession it was held that as the intention was to maintain an existing right, the accused was justified in adopting measures for the defence of his possession, and that as there was no likelihood of a breach of the peace from his side, there was no reason either for punishing him or binding him over in security—*Janki Prasad v Emp* 18 A L J 157. 21 Cr L J 337 Where a party has the right to take a procession along a particular road he cannot be bound down under this section because other persons object to his doing so and he insists on taking the procession along that road The proper course is to bind down the other persons—*Feroze Ali v Emp*, 12 C. 703 Where one of several co-sharer landlords sought to make a

ment of lands contrary to the provisions of Secs 90 and 188 of the Bengal Tenancy Act, the other co sharer landlords, would be justified in objecting to the survey and where no force was used by them they ought not to be bound down to keep the peace—*Bhabataran v Banhutesh*, 9 C W N 618 Where a Zemindar village was in the possession of the Mokhassadar and the tenants had been paying rents to him, and the Zemindar came to the village with the express purpose of ousting him and incited the tenants not to pay rents to the Mokhassadar, whereupon the Mokhassadar protested and asked the Zemindar in a threatening manner to leave the village, it was held that in as much as the Zemindar was acting illegally, the Mokhassadar protesting against such illegal act was acting within his rights and could not be bound down under this section—*Chandrasekhara v Emp*, 14 M L J 491 Where a Magistrate found that persons who attempted to do *basti puja* on a waste land were not entitled to perform it it was held that if the persons opposing it acted properly and within their rights there was no reason to suppose that any breach of the peace was likely to be committed—*Bijoy Singha v Emp*, 3 C W N 463. Where there was already a cattle market and certain persons intended to open another cattle market on their own land, not far from the old market, and the Magistrate apprehending that there would be a breach of the peace consequent thereon bound over those persons to keep the peace, the order of the Magistrate was illegal—*Mahu v Emp*, 16 A L J 279 19 Cr L J 437

But where there are doubts as to the existence of the respective rights and obligations of the parties (i.e. as to who is acting legally in the exercise of his rights and who is not) the proper procedure is to bind down both parties, so that the order of the Magistrate may not be detrimental to either. Where, however, no doubt exists, the party in the wrong should be bound down. An attempt to ascertain legal rights of parties should always be made by the Magistrate before he binds down one or the other party under this section—*Din Dayal v. Emp*, 34 Cal 935, *Ghasi Ram v Emp*, 20 Cr L J 194 (Pat)

234 Disputes relating to immoveable property —Proceedings under this section are only intended for the security of the public peace and not for the purpose of enabling one of two contending parties to help themselves in obtaining or retaining possession of immoveable property and having their adversaries' hands tied down by an order under this section. The proper procedure in such cases is to take proceedings under sec 145—*Driver v Q E*, 25 Cal 798 Where the apprehension of a breach of the peace arises out of a dispute regarding possession of immoveable property, the Magistrate can undoubtedly proceed under Sec. 145, but this fact will not preclude the Magistrate from taking proceedings under this section. In such cases the Magistrate is not bound to act

only under Secs 144 and 145 but has a discretion to proceed either under those sections or under section 107—*Shree Raj v Chatter* 3 Cal 966 *In re Muthia* 36 Mad 315 *Thakur Panday v K E* 34 All 449 *Emp v Abbas* 39 Cal 150 16 C W N 83 (F B) *Dhuna v Emp* 23 Cr L J 567 (Nag) *K E v Basiruddin* 7 C W N 746 *Amulya v Amrita Lal* 24 C W N 1075 22 Cr L J 223 *Abdus Sayeed v Emp* 23 Cr L J 123 (Cal) *Ramachariu v Emp* 26 Mad 471 *Sindama v Zemindar* 2 Weir 50 *Balmukund v Crown* 1 S L R 50 8 Cr L J 170

Where parties are clearly in the wrong they can be bound down under Section 107 to prevent a breach of the peace or a party threatening to usurp the rights of another can be restrained by a temporary order under Section 144 but where the dispute relates to lands and there is an apprehension of a breach of the peace as both the contending parties urge their claim to possession the proceedings should be under Section 145 of the Code—*Gaurinath v Gobind Singh* 1 P L T 44 20 Cr L J 829

Sections 107 144 and 145 all give summary jurisdiction to Magistrates to take action in order to prevent a breach of the peace when such a breach is imminent There is a very thin line of demarcation between these sections When there is a *bona fide* dispute as to the right of possession between two rival parties the proper procedure is to take action under Sec 145 and not under Sec 107 because the former section is not only effective to prevent a breach of the peace but also is the one which causes the least prejudice to the contending parties—*Himmat v Emp*, 19 Cr L J 712 (Pat) *Balajit v Bhoju* 35 Cal 117, *Mahadeo v Bishu* 25 All 337 *Baishnab Das v Emp* 12 C W N 606 *Emp v Debendra* 1 C L J 632 *Kals Pershad v Dhodhas* 22 Cr L J 574 (Pat), *Abdus Sayeed v Emp* 23 Cr L J 123 (Cal) whereas the effect of an order under this section would have the effect of binding down one of the parties, leaving the other party free without any adjudication upon the question as to which of the parties is in possession—*Dolegobint v Dahuu* 25 Cal 559 *Bidhubhusau v Annoda* 6 C W N 883 *Baishnab Das v Emp* 12 C W N 606 *Driver v Q E* 25 Cal 793, *Shama Churn v Emp* 6 P L T 766 26 Cr L J 1562 It should be noted that while section 107 leaves it to the Magistrate to demand security or not in the exercise of his discretion section 145 makes it obligatory upon him to institute proceedings if he is satisfied as to the existence of a dispute relating to immoveable property—*Balajit v Bhoju* 35 Cal 117 Proceedings under section 107 are intended only for the security of the public peace and not for the purpose of enabling one of the two contending parties to help himself in recovering possession of immoveable property after having his adversary's hands tied down by an order under this section In such a case the necessary action must be taken under Section 145 of the Code—*Jalal v Crown*, 1917 P L R 144 15 Cr L J 446 Even if the Magi

trate proceeds at all under section 107, the proper order is to bind down both the parties—*Baishnab Das v Emp*, 12 C W N 606 as for instance where both parties are equally dangerous—*Bindrabun v Emp*, 22 Cr L J 701 (All)

But if the dispute is not *bona fide* : *e* if one party is clearly in possession of property and another party wrongfully and without any claim to possession seeks to eject him by force from the possession of the land and breach of the peace is imminent there cannot be said to be a *bona fide* dispute about possession within the meaning of Sec 145 and the Magistrate is justified in taking action under section 107—*Emp v Rambaran*, 28 All 406 *Lachmi v Emp* 1 P L T 681 22 Cr L J 86 *Shama Churn v Emp* 6 P L T 766 26 Cr L J 1562 If one of the parties threatens to use violence to the other party if the latter should go upon the land of which the latter is in possession an order under section 107 binding down the former would be proper—*Jafar v Jaribulla*, 9 C W N 551

Where the dispute between the parties is not one concerning land and does not involve any question of actual possession but concerns the rights of the respective parties to carry on boring operations for coal over a specified area, the Magistrate has no jurisdiction to enter into the intricate questions of title and possession which arise between the parties. If in such a case there is any likelihood of a breach of the peace proceedings which are simpler in nature and which summarily and expediently dispose of the matter should be adopted That is proceedings under sec 107 would be more appropriate in such a case than proceedings under sec 145—*Indian Iron and Steel Co v Bansa Gopal*, 32 C L J 54 : 22 Cr L J 99

An order under sec 107 is no bar to a subsequent proceeding under Chapter XII—*Baisnab v Gatinath* 39 Cal 469 16 C W N 384, *Ram Lochun v K E*, 36 All 143 12 A L J 162, *Nasiruddin v Gofuruddin*, 21 C W N 160

Similarly an order under Sec 145 is no bar to the passing of an order under Sec 107, on the same facts if the Magistrate is satisfied that notwithstanding the order under Sec 145 one of the parties is likely to take the law into his own hands—*In re Mulhia*, 36 Mad 315. *K E v Dandi*, 24 O C 21 22 Cr L J 384

But it is illegal to institute proceedings under one section and to pass an order under another Thus where the Magistrate instituted proceedings under Sec 145 and apprehending a disturbance of the peace ordered a party to furnish security under Sec 107, it was held that the order was illegal and without jurisdiction—*Emp v Sai Deo*, 14 A L J 794 17 Cr L J 527 Similarly where a Magistrate proceeded under section 107 and concluded the proceedings thereunder but subsequently passed

an order under Section 145 *held* that the order of the Magistrate was *ultra vires* as he failed to take written statements from the parties and receive evidence under the latter section—*Sahdeb v Jumon* 19 Cr L J 320 (Pat)

If, owing to a dispute relating to immoveable property proceedings are taken under sec 107 instead of under sec 145 the Magistrate cannot pass an order of *attachment of property* (which order can be passed only under sec 146)—*Ram Sirup v A E v I R* (1924) Oudh 345 25 Cr L J 350

235 Who can be bound down —Only the person who is himself likely to cause a breach of the peace (and no other) can be bound down under this section it is illegal and contrary to the provisions of this section to take recognisance from one person in order to prevent another from committing a breach of the peace—17 W R 47, 19 W R 54 Thus the mere fact that a dispute exists between two rival Zemindars would not justify proceedings being taken against all their officers and servants unless there are materials to show that they are all likely to commit a breach of the peace It may be that they are all interested in the dispute between their masters—and in one sense all the members of the Zemindar's family are interested in a dispute relating to a property comprised in the Zemindary—but that by itself would be no ground for taking proceedings against them all—*Ainuddin v Emp*, 24 Cr L J 230 (Cal) Where there were old standing feuds between the parties but the Magistrate finding no evidence against them, discharged them but bound down their servants *held* that the order was illegal and without jurisdiction—*Din Dayal v Emp*, 23 A L J 300 26 Cr L J 981

A non resident Zemindar cannot be bound over to keep the peace merely because his local agents are committing acts likely to cause a breach of the peace—10 C L R 430 The mere fact that the patwarl threatened to use violence does not justify the Magistrate in starting proceedings against the proprietor and manager on the presumption that the latter must have acquiesced in the action of the patwarl—*Grant v Emp*, 2 P L T 669 22 Cr L J 745 But the master would be liable if he actually acquiesced in the servant's acts. Thus, where the master, a *panda* of Gaya, used to send his servant always armed with a lathi to the Railway station for procuring pilgrims, and this led to a contest with a rival *panda* resulting in disturbance of the public peace, it was held that this was sufficient to make the master liable under this section The fact that the master himself did not go to the Railway station but always remained in his house was no bar to the application of this section—*Balalal v A E*, 1 P L J 361 18 Cr L J 374

So also, where it was found that the petitioner was not himself

to commit a breach of the peace he should not be ordered under this section merely because his act of attaching the crops of his raiyats would lead to a riot resulting from the resistance of the cultivators to the attachment—*In re Sheo Surn* 3 C L R 280

Joint trial of several persons —See Note 290 under sec 117

236 Evidence —A Magistrate dealing with proceedings under this section must base his judgment upon evidence relevant to the case. He should not rely upon his knowledge of certain facts which he obtains from sources outside the record—*Mathura v Emp* 14 A L J 769 17 Cr L J 484. Where the order is passed against more persons than one there must be definite evidence in the case of any and every person that there is a danger of a breach of the peace by him. The mere fact that a collective body of persons are indulging in feelings of hostility against another body of persons is insufficient—*Shambhu v Emp* 38 All 468 14 A L J 656 17 Cr L J 400

Consent of accused to be bound down —The fact of likelihood of a breach of the peace must be established by independent evidence. In the absence of evidence to prove that the accused was likely to commit a breach of the peace the accused's own statement before the Magistrate that he is willing to give security would not justify an order being passed under this section—*Jagdat v Emp* 21 Cr L J 176 (All) *Crown v Shrodan* 1915 P R 24 16 Cr L J 784 1917 P R 27 *Joti v Emp* 25 Cr L J 710 (Lah) 20 Cr L J 105 21 Cr L J 656 (Nag) *Karam v Emp* 23 Cr L J 175 (Lah) *Ram Chandra v Emp* 35 Cal 674 *Chandra Sekhar v Emp* 21 Cr L J 59 (All). In a recent Allahabad case it has been held (dissenting from the above rulings) that where the persons called upon to furnish security appeared in Court and expressed their willingness to be bound over whereupon the trial Court took no evidence and passed an order against them the consent of the accused must be taken to be a plea of guilty and the order for security was rightly passed—*Ghariba v K L* 46 All 109 21 A L J 881 25 Cr L J 750 A J R (1924) All 269

237 Subsection (2) —In order to give the Magistrate jurisdiction over a person it is not necessary that such person should permanently or habitually live within his jurisdiction. It is sufficient if at the time when the Magistrate receives information and takes proceedings under this section the person temporarily resides within his jurisdiction—*Shama Churn v Kals Mardal* 24 Cal 344 22 Cr L J 109 (All). The terms of this subsection do not authorise a Magistrate to bind over a person residing outside the limits of his district concerning whom he has received information that such person is likely to commit a breach of the peace within his district—*In re Jasprakash* 6 All 26 (F B) *In re Abdul Aziz* 14 All 49 *In re Rajendra* 11 Cal 737 *Dionath v Giriya* 12 Cal 133

23 Bom 32 The proper course in such a case is to cause information to be given to the Magistrate within whose district that person resides in order that proceedings might be taken by that Magistrate—11 Cal 737

Special powers of Chief Presidency and District Magistrates Sub-section (2) gives special powers to Chief Presidency and District Magistrates to proceed against persons *outside* jurisdiction. Therefore where a District Magistrate is satisfied that a breach of the peace is apprehended within the local limits of his district the fact that the accused is living outside such limits in a Native State does not take away his jurisdiction to pass an order under this section—*Sheo Baran v Emp*, 20 A L J 523, 23 Cr L J 396. But the District Magistrate cannot delegate this special power to a subordinate Magistrate. Thus a Subdivisional Magistrate cannot, on the direction of a District Magistrate draw up proceedings under this section against a person residing in another jurisdiction in such a case the proceedings must take place and be brought to a conclusion before the District Magistrate himself—*Nirbeekar v Emp*, 13 C W N 580. A District Magistrate is not competent to make over the initiation of proceedings under this section to a first class Magistrate who has no local jurisdiction over the matter—*Konda Reddy v. A E* 41 Mad 246. But after proceedings have been initiated by a District Magistrate against persons residing outside jurisdiction he can transfer the proceedings to a subordinate Magistrate otherwise competent to deal with the matter. This section only restricts the initiation of the proceedings against persons living outside the jurisdiction of the District Magistrate, but does not prevent him from transferring such proceedings after initiation to a subordinate Magistrate, though such Magistrate had no jurisdiction to initiate the proceedings—*Surja Kanta v Emp*, 31 Cal 350. *A F v Munna*, 24 All 151. *Rakhal Mandal v Emp* 27 C L J 314. But the District Magistrate cannot make over the case to a Magistrate incompetent to try the case, e.g. a 2nd class Magistrate—*Gobind v A F* 37 All 20 12 A I J 1136.

238 Sub-section (3)—*'Has reason to believe'*—The use of this expression, as compared with as informed in subsection (1), shows that the Magistrate's discretion under this sub-section is very limited. The Magistrate should act when he has reason to believe, i.e., when he has reasonable grounds to believe and not merely to suspect. See *Emp v Rango*, 6 Bom 407.

239 Sub-section (4)—*Power to detain in custody*—Only in the special circumstances referred to in clauses (3) and (4) does the law empower the Magistrate to detain a person against whom proceedings have been instituted under this section—*Raghunandin v Emp*, 32 Cal 80. Therefore, where an accused was not sent before a District Magistrate by

another Magistrate acting under clause (3) so as to bring the case under clause (4) such District Magistrate's order detaining the accused in custody was illegal—*Chidambara v Emp*, 31 Mad 315 (F B)

240 Bail —Even when the person has been arrested under clause (3), unless there are special circumstances, he should be admitted to bail. When a Magistrate on the report of the D S P directed the re-arrest of persons (whom he had previously admitted to bail on their appearance) and remanded them to custody, it was held that the re-arrest and remand were illegal as none of the special circumstances mentioned in clause (3) existed in the case and the Magistrate was bound under sec 496 to release them on bail—*Raghunandan v Emp*, 32 Cal 80. But the Madras High Court holds that the Magistrate may in his discretion detain such persons in custody according to the clear words of sub-section (4) these words cannot be qualified by sec 496 that section does not give an absolute right of bail but must be read along with any other provision giving to the Court a special power of detention, and sub-section (4) of this section gives such power—*Narayanawami v Emp*, 36 Mad 474

Further inquiry —See notes under sec 119

240A Revision —See note 294 under sec 118

An order of a Magistrate refusing to take action under sec 107 cannot be set aside by the superior Court in revision. The object of this section is rather administrative than judicial. If the Magistrate who is responsible for the administration of a subdivision is not satisfied that there is any need to take proceedings under this chapter, a superior judicial tribunal cannot interfere with the exercise of his discretion—*Ram Lal v Bankateshar* 28 O C 44 1 O W N 359 25 Cr L J 1149 *Phani Bhusan v Kunja*, 25 Cr L J 679 (Cal) A I R (1925) Cal 262

241 Nature of proceedings under this chapter —There is no unanimity of opinion among the various Courts as to whether proceedings under this Chapter are of a criminal nature, or as to whether the persons proceeded against under this Chapter are 'accused' persons. In *Wajid Ali v H E*, 41 Cal 719, *In re Ramasami* 27 Mad 510 *Desikachari v Emp*, 39 Mad 539 *Lalit Mohan v Suryakanta* 28 Cal 709 3 O C 247 and 41 All 503 it is held that proceedings under this chapter are of a criminal nature therefore a person who brings a proceeding under sec 107 from malicious motives is liable to an action for malicious prosecution if the proceeding terminates in favour of the person against whom the allegation is made—*Md Niaz Khan v Jal Ram* 41 All 503, *Chiranjit v Dharam Singh* 43 All 402, whereas in 1914 P R 5 and 1916 P L R 78 it has been held that proceedings under sec 110 are not criminal proceedings, and the Chief Court has no power to direct the transfer of such

proceedings under sec 526 from one Magistrate & Court to another (But the word 'criminal' has now been omitted from sec 526)

In the following cases it has been held that persons proceeded against under this chapter are in the position of accused persons—*Hopcroft v Emp* 36 Cal 163 *Q E v Mutsaddi* 21 All 107 *Golha Singh v Chetu* 1905 P R 33 *Crown v Ida* 1900 P R 15 *Nakhi Lal v Q E*, 27 Cal 656 *Jhokha Singh v Q E*, 23 Cal 493 *Q E v Mona Puna* 16 Bom 661 4 C L R 454 *In re Venkataswinnaya* 43 Mad 511 (Γ B) and further inquiry can be ordered in case of such persons under Sec 437 (now Sec 436)—*Q E v Mutsaddi*, 21 All 107 *K E v Fyazuddin* 24 All 148 *Gokha v Chetu*, 1905 P R 33 (But see sec 436 as now amended in 1923)

But in *K E v Rameshwar*, 36 All 262, 5 Bom L R 27, *Raghunandan v Emp*, 32 Cal 80, it has been held that such persons are not accused persons within the meaning of Sec 167 nor are they accused persons within the meaning of sec 437 (now 436) of the Code—*Md Akhan v Emp*, 1905 P R 42 *Q E v Iman Mandal*, 27 Cal 662 33 Cal 8 *Velu v Chidambara*, 33 Mad 85 1911 P R 6 An application to take proceedings under this chapter is not an accusation of an offence—1905 P R 42 *Natha Singh v Pala Singh*, 1896 P R 4, and therefore compensation cannot be awarded under Sec 250 to the person against whom proceedings under this chapter have been dropped, such proceedings not being proceedings in a case in which a person is accused of an offence—*In re Gound*, 25 Bom 48, 1893 P R 16 *Crown v Laura* 1902 P R 33 15 All 365 *Mannu Khan v Chandi* 20 A L J 624 23 Cr L J 474 *Ram Badan v Janki* 45 All 363 21 A L J 207 24 Cr L J 228 *Ram Sukh v Mahadeo*, 7 A L J 743 *Bindhachal v Lal Behari*, 36 All 382 *Natha Singh v Pala Singh*, 1896 P R 4 *Jay Singh v Kanhya*, 1884 P R 37 A person called upon to give security is not an accused within the meaning of sec. 342 nor is he guilty of any offence, therefore omission to examine him under that section is not an illegality—*Benode Behari v Emp*, 50 Cal 985

There are certain indications to show that it is not the intention of the Legislature to treat the persons proceeded against under this chapter as accused persons or as persons guilty of an offence—First the Legislature has studiously avoided the use of the word 'accused' in sections 107 126, and has deliberately used such expressions as 'the person,' 'such person' 'the person informed against' (sec 107), 'the person called upon to show cause' (Sec 116) etc, whereas in the chapters relating to inquiries and trials (chapters XVIII, XX—XXIII) the word 'accused' has been used throughout And during the debate in the Legislative Assembly, the Law Member stated that the word 'accused' was really a misnomer in security cases (*Leg Ass Debates*, 18 & 23 p 1253) Secondly, in the

similar case of a proceeding under chapter XXXVI, the word accused has now been replaced by the words any person' This is significant *Thirdly*, in Sec 340, the words against whom proceedings are instituted under this Code have now been added in order to make it clear that the words 'a person accused of an offence occurring in that section do not include a person proceeded against under Chapter VIII *Fourthly*, in section 436 the words person accused of an offence' have been substituted for the words accused person this shows that the person proceeded against under the present chapter is not a person accused of an offence, and that sec 436 does not apply to such person

108 Whenever a Chief Presidency or District Magistrate,

Security for good or a Presidency Magistrate or Magistrate
behaviour from per- of the first class specially empowered by
sons disseminating the Local Government in this behalf, has
seditious matter information that there is within the limits of his jurisdiction
any person who, within or without such limits, either orally or
in writing or in any other manner, intentionally disseminates or
attempts to disseminate, or in anywise abets the dissemination
of,—

- (a) any seditious matter, that is to say, any matter the publication of which is punishable under section 124A of the Indian Penal Code, or
- (b) any matter the publication of which is punishable under section 153A of the Indian Penal Code, or
- (c) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code,

such Magistrate, if in his opinion there is sufficient ground for proceeding, may (in manner hereinafter provided) require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix

No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, and edited, printed and published in conformity,

with the rules laid down in the Press and Registration of Books Act, 1867 [XXV of 1867] *with reference to any matter contained in such publication* except by the order or under the authority of the Governor General in Council or the Local Government or some officer empowered by the Governor General in Council in this behalf

Change —The italicised words have been added by Sec. 17 of the Criminal Procedure Code Amendment Act (XVIII of 1933)

Or in any other manner — This amendment is to provide for the contingency where the matters covered by section 108 have been disseminated by other means than either orally or in writing e.g. by gramophone records —*Statement of Objects and Reasons* (1914)

Intentionally —This word has been added during the debate in the Assembly on the motion of Mr Rangachariar so that innocent agents may not be proceeded against for instance, boys who handle newspapers without knowing the contents and such other persons who are merely ignorant tools in the hands of other persons should not be proceeded against —*Legislative Assembly Debates*, January 18, 1923 page 1279.

If proceeding —For reason of the addition of these words see notes to sec. 107, under heading **Change**

And edited — In view of the recent amendments made in the Press and Registration of Books Act, 1867, regulating the editing of newspapers, we have made a consequential amendment here. We also think that the protection given by the last clause of section 108 should only extend to newspapers which are edited, printed and published in conformity with that Act —*Report of the Joint Committee* (1922)

With reference publication — This amendment is merely designed to make the intention of the Legislature clearer as regards the proceedings which require sanction prior to their institution" —*Statement of Objects and Reasons* (1914)

242 **Essentials of the section** —In a proceeding under this section it must be shown that the accused was connected with the dissemination of the seditious matter. Thus the mere writing of a seditious matter is not a sufficient ground for proceeding against the author under this section unless it is shown that he was connected with the publication or the subsequent dissemination thereof. So also in the case of a printer, although it must be assumed that by printing the seditious matter he abets the dissemination thereof, still in order to make him liable under this section it must be shown that he had a knowledge of the contents of the matter printed, especially in case of a big press which is

managed by an independent staff such as manager, clerks and others, where it is not possible for the owner of the press to scrutinize personally every detail of the concern. As regards the publisher, he is liable under this section because as publisher he must be presumed to have knowledge of the contents of the matter and he therefore 'disseminated' or at least abetted the dissemination of the matter within the meaning of this section—*Emp v Pitre* 47 Bom 438 25 Bom L R 97

243 Seditious matter.—The test under this section is whether the person proceeded against has been disseminating seditious matter, and whether there is a fear of the repetition of such offence. In every case it is a question of fact which will have to be determined with reference to the antecedents of the person and other surrounding circumstances—*Emp v Vaman* 11 Bom L R 743 16 Cr L J 379. The preaching of *swara*, which means nothing more than Home-rule under the present Government by constitutional means, does not amount to dissemination of seditious matter and does not therefore justify an order under this section—*Ven* *Bhushan v Emp*, 34 Cal 991 *Emp v Bal Gangadhar Tilak*, 19 Bom L R 211 18 Cr L J 567. It is essential under clause (a) of this section that the matter disseminated must be *seditious*—19 Bom L R 211

244 Promoting enmity between classes.—To sustain an order under sec 108, it is not sufficient that the language used was highly offensive to one community; it must also be shown that the accused intended to provoke feelings of hatred or enmity between two communities. But it is not necessary that he should have succeeded in provoking such feelings if deliberate intention to do so can be inferred—*Dharmaloka v Emp*, 4 Bur L T 84. In *Sital Prosad v Emperor*, 43 Cal 591 20 C W N 199, on the other hand, it has been held that to justify an order under sec 108, one has only got to find that the words used in the leaflet or the matters complained of are likely to promote feelings of hatred or enmity, and there is no necessity under this section of finding *intention*, such as would be necessary if the person were placed on his trial under sec 153A, I P C. This decision seems to be no longer correct because the word *intentionally* has been newly added.

109 Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class receives information—
Security for good behaviour from vagrants and suspected persons

(a) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that

such person is taking such precautions with a view to committing any offence or

- (b) that there is within such limits a person who has no ostensible means of subsistence or who cannot give a satisfactory account of himself

such Magistrate may in manner hereinafter provided require such person to show cause why he should not be ordered to execute a bond, with sureties for his good behaviour for such period not exceeding one year as the Magistrate thinks fit to fix

245 Scope and object —This section provides for taking security not from persons suspected of a *particular offence* but from persons lurking within the Magistrate's jurisdiction who have no ostensible means of subsistence or cannot give a satisfactory account of themselves Ratanlal 63

This section aims at summarily disposing of cases of vagabondism where sturdy rogues are found to be lurking about—1 O S C No 73

Magistrates are empowered to put in force the provisions of this section whenever they have credible information that the accused has no ostensible means of livelihood or is unable to give a satisfactory account of himself and is within the local limits of his jurisdiction—*Emp v Madho Dhobi*, 31 Cal 557 *Mahadeo v R* 6 A L J 253 Honorary Magistrate can act under this section—31 Cal 557

246 Within the Magistrate's jurisdiction —It is not necessary that the accused person should have a residence within the local limits of the Magistrate's jurisdiction—*In re Narasimappa v Weir* 53 The fact that the accused was arrested from a place outside the Magistrate's jurisdiction and that the arrest was illegal would not oust the Magistrate's jurisdiction to proceed under this section—31 Cal 557 (following *Emp v Ravalu* 26 Mad 124)

When a person gives a satisfactory account of his presence within the limits of the Magistrate's jurisdiction he cannot be called upon by such Magistrate to give an account of his presence in any other jurisdiction—*Satish Chandra v Emp* 39 Cal 456 16 C W N 499 13 Cr L J 161

247 Concealing presence with a view to commit offence —Where a person's presence or residence within the Magistrate's jurisdiction was well known and there was no attempt to conceal the same his mere attempt to conceal his presence at a particular spot at a particular time

or his inability to give a satisfactory explanation of what he was doing at a particular place at a particular time does not bring his case within Sec 109, and he cannot be ordered to give security for good behaviour. This section refers to a *continuous* act and does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest—*Reshu Kabiraj v Emp*, 22 C W N 163 18 Cr L J 825 *Sheikh Piru v Emp* 41 C L J 142 26 Cr L J 842 See also *Lattu v Emp*, 17 A L J 891 10 Cr L J 572

The concealment referred to must be with a view to committing some offence. Therefore a person cannot be called upon to furnish security under this section in respect of an alleged temporary concealment in his father's house merely to avoid observation of police (owing to a warrant being issued against him) unconnected with any intent to commit an offence or with any previous concealment outside the Magistrate's jurisdiction—*Satish Chandra v Emp* 39 Cal 456 An old offender attempting, on seeing a constable to conceal himself to avoid observation does not bring himself within the mischief of sec 109—*Sheikh Piru v Emp*, 41 C L J 142 26 Cr L J 842

A person who gives a false name and delivers letters secretly containing incitement to commit crimes or demanding money for the means of committing crimes comes within the provisions of clause (a)—*Preo Nath v Emp*, 15 Cr L J 235 (Cal) But where a person on being asked by the police gives a false name and then corrects it, and there is nothing else to show that he was taking precautions to conceal his presence, an action under this section is not justified—*Sheo Prosad v Emperor*, 21 A I J 847

248 Want of ostensible means of subsistence—Mere proof of want of ostensible means of subsistence is not of itself a sufficient reason for passing an order for furnishing security. Otherwise jails would be quite full especially in times of famine and scarcity. A Magistrate is bound to consider whether the order is really necessary in order to secure good behaviour, which is a matter for the Magistrate's judicial discretion, and he ought not to send people to jail simply because the opinions of Police witnesses are unfavourable to them—*Q I v Kala, Ratanlal* 723

A young man, out of employment, staying in the house of his father who is a man of substance and able if necessary to support him, cannot be held to be without ostensible means of subsistence within the meaning of this section. Clause (b) is directed only against suspicious strangers lurking within the Magistrate's jurisdiction—39 Cal 456 *Abdul Rashid v Emp*, 22 Cr L J 749 (Lah) The accused's explanation that he came to Calcutta 2 months ago and that he worked as a cooly but had no fixed abode, is a satisfactory account of himself. If a cooly could not show any immediate work, it does not mean that he has no ostensible means

of livelihood—*Sheshk Piru v Emp* 41 C L J 142 So also the mere fact that a man is doing no work at present and was previously convicted for bad livelihood (5 C W N 8 41 C L J 142 26 Cr L J 842) or the mere fact that he belongs to a wandering tribe (*In re Yerukala v West* 53) or to a gang which frequented *melas* and carried on illegal games (*Mahadeo v A L* 6 A I J 253) or the mere fact that he is a gambler or opium smoker (1 Bur S R 46) or has no other means of subsistence except through play of ring game which is a game of skill and not an offence under the Gaming Act (*Bangoli v P* 40 Cal 702 14 Cr I J 457) is not a sufficient ground for requiring him to give security.

249 Cannot give a satisfactory account of himself —Cl (b) of this section applies not only to vagrants or vagabonds but also covers suspected persons of any class who cannot give a satisfactory account of themselves—*Narendra v Imp* 13 C I J 239 (Cal) A person who gives a false name or address (*Abdur Fashid v Imp*, 22 Cr I J 749) or gives a false account or cannot give a satisfactory account of his association with persons who are dangerous political conspirators (13 Cr L J 239) is included in this section.

The words cannot give a satisfactory account of himself do not mean failure to satisfy the Magistrate that he spends his time or at least his leisure hours in a satisfactory manner and therefore the fact that a person (a Municipal peon) whose residence and occupation were well known was seen to prowling about at night in the company of scoundrels and was armed with a lathi and used the lathi was not a sufficient ground for calling upon him to furnish security—*Sharif Ahmad v King Imp*, 9 A I J 1097 12 Cr I J 536

Where it was proved that the accused were residents of another district where they had their houses that they had money with them that they were dealers in cattle and that they had money in deposit with bankers, it could not be said that they had not been able to give a satisfactory account of themselves. And the mere fact that they were camping in an open ground in a city while on their way home would not justify the Magistrate in passing an order under this section—*Vanka v Imp*, 18 A L J 325 11 Cr L J 366

With sureties —Compare this expression with the words with or without sureties in the preceding sections. The requirement of surety in this section is obligatory and not optional.

250 Evidence —Mere proof of want of a feasible means of livelihood is not a sufficient reason for passing an order under this section—*Ratanlal*, 3 the Magistrate should take evidence as to the general character of the person charged with bad livelihood and not convict him on the mere report of Police officers—5 W R 2

The fact that the accused had previously been connected with a criminal conspiracy or might still be in correspondence with criminals, is not relevant under this section though it might form the basis of a substantive proceeding under Sec 110—39 Cal 456

An order under this section passed more on suspicion than on any good basis of fact must be set aside Where three respectable residents of Delhi came to Meerut by a night train and were found on the road between the station and the city near to a place where a burglar's jemmy was found, an order calling upon them to furnish security for good behaviour was illegal—*Ghulam Jilani v Emp* 17 A L J 432 20 Cr L J 401

110 Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or a Magistrate of the first class specially empowered in this behalf by the Local Government receives information that any person within the local limits of his jurisdiction—

Security for good behaviour from habitual offenders

- (a) is by habit a robber, house-breaker, thief or forger or
- (b) is by habit a receiver of stolen property knowing the same to have been stolen or
- (c) habitually protects or harbours thieves or aids in the concealment or disposal of stolen property, or
- (d) habitually commits or attempts to commit, or abets the commission of, the offence of kidnapping abduction extortion or cheating or mischief or any offence punishable under Chapter XII of the Indian Penal Code or under Section 489A, Section 489B Section 489C or Section 489D of that Code or
- (e) habitually commits or attempts to commit, or abets the commission of, offences involving a breach of the peace, or
- (f) is so desperate and dangerous as to render his being at large without security hazardous to the community

such Magistrate may in manner hereinafter provided require such person to show cause why he should not be ordered to execute a bond, with surties for his good behaviour for such

period not exceeding three years as the Magistrate thinks fit to fix

Change—The amendment of this section as shown by the italicised words has been effected by sec 18 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

‘We agree that habitual kidnappers should be brought under this section but doubt the necessity of any reference to abduction. We think that it is desirable to include all offences under Chapter XII of the Indian Penal Code and also habitual forgers. We have included forger in section 110 (a) and have rearranged clause (d) in accordance with this note—*Report of the Select Committee of 1916*

251 Object and Scope of Section—The object of this section is to afford protection to the public against a repetition of crimes in which the safety of property is menaced as well as the security of person is jeopardised—*Erip v Nawab* 2 All 835 *Mamundra v Emp*, 46 Cal 215 *Rajendra v K E*, 17 C. W. N 238 14 Cr L J 5

Again, the object of this section is the prevention and not the punishment of offences and with that object it authorises the Magistrate to take security for good behaviour. But it is solely for the purpose of securing future good behaviour that the section can be used. Any attempt to use it for the purpose of punishing *past offences* is wrong and not sanctioned by law—*In re Umbica*, 1 C L R, 268 *In re Juggat*, 2 Cal 110 *In re Raja Valad* 10 Bom 174 *Q E v Handhaya* 7 All 67, *Jagat Singh v Crown*, 2 Lah L J 237. Therefore where the accused have committed *definite acts* of extortion for which they are liable to be prosecuted under the I P Code, an order for furnishing security under this section should not be passed, because such order would seriously prejudice them in their trial for those offences—*Anookool v Q E*, 27 Cal 781. So also, where a man is alleged to have habitually committed robbery with 4 or more others, it means that he is a member of a gang of dacoits, and thereby commits a *definite* and *specific* offence for which he ought to be punished under sec 400 of the I P Code, and no action should be taken under the preventive section of the Crim Pro Code. It is for this reason that section 110 deliberately omits dacoity out of its purview—*Ram Prasad v Emp*, 23 A L J 18 26 Cr L J 746 A I R (1925) All 250. But evidence going to show that a substantive offence has been committed or evidence which might possibly form the basis of a charge of substantive offence is not necessarily to be excluded from proceedings under sec 110, and can form the basis of an order for security—*Budhan v Emp*, 23 A I J 507 47 All 733 26 Cr L J 1130 (distinguishing 23 A L J 18)

Moreover, this section is not intended to afford the police a means of keeping a suspected person under detention until they are able to work out a case against him—*King Emp v Paimal*, 10 A L J 351

252 Application of Section—This section arms the Magistrate with a powerful means of securing the interest of the community from injury at the hands of hardened offenders of the most dangerous classes. Therefore the power given by this section should be exercised sparingly and with much discretion by the Magistrate and only in those cases where the evidence is very clear and precise—*Rajendra v K E*, 17 C W N 238 *Jagat Singh v Crown*, 21 Cal L J 237 *Yaghi v Emp*, 1892 P R 53 Mad 236 nor, on the other hand should its exercise be confined only to cases in which positive evidence is forthcoming of the commission of offences—*In re Peddanna Reddi*, 3 Mad 238

This section is preventive and not punitive. Its object is to protect society against persons who are so likely to commit offences that it is not advisable to leave them at large unchecked. It is very undesirable to proceed under this section against a person who is trying to reform himself and to live an honest life—*In re Billa Appaya*, 10 M I T 333 12 Cr 1 J 328

Moreover, Magistrates should be cautious in making sure that the provisions intended for securing the peace of the community are not utilized for taking private vengeance under the aegis of a Crown prosecution—38 Cal 156. It is to be feared that this section is often resorted to by the Magistrates for the purpose of ensuring the punishment of the persons suspected but not proved to have committed offences such as theft, etc. and it is notorious that accusations of bad livelihood are constantly made with the object of blackening an enemy's character, and satisfying feelings of spite and hatred. So it is incumbent on the Magistrates to see that this section is not resorted to unnecessarily and to annoy individuals—*Sulha v Emp*, 1898 P R 4. The Courts must not make use of this section in order to secure a conviction of persons against whom a substantive charge has broken down—23 O C 371 22 Cr L J 273 24 O C 317, *Shiam Lal v K F*, 6 A L J 487. When proceedings are taken under this section against a man soon after a discharge or acquittal from a charge of an offence of which he was suspected, it is always necessary to make it clear that the proceedings were not taken as a means of punishing in an indirect way a man whom the police suspected to be guilty—*Shiam Lal v K F*, 6 A L J 487 9 Cr L J 528

This section has been made applicable to Burma Habitual Offenders Restriction Act by section 4 of that Act and section 3 of that Act permits an order of restriction to be passed in any case in which security can be required under sec. 110 of this Code—*San Dun v K L*, 2 Rang 641 (642) A L R. (1925) Rang 112

253 Secs 108 and 110 —The mere fact that Sec 108 may have been applicable does not necessarily make Sec 110 inapplicable—*Manindra v Emperor*, 46 Cal 215 (234)

254 Secs 109 and 110 —The two sections overlap each other. They must be carefully worked and great care should be taken not to abuse them. The proceedings taken must clearly specify whether the accusation which the accused is to meet is one under section 109 or under sec 110—*Mad Pol Man* p 89. Therefore where the preliminary order passed by the Magistrate under sec 112 was not clear in that the accused did not know whether the accusation he had to meet was under section 109 or 110 the order was set aside—*Q E v Iswari Chandra* 11 Cr 13. An order under Sec 110 is not valid during the continuance of an order under Sec 109 the two sections having the same object and the evidence required to secure an order under either section being of the same nature—*Ghulam Ali v Emp*, 8 C W N 543. A person cannot be bound down under both the sections (109 and 110)—*In re Rangaswami*, 38 Mad 555 16 Cr I J 631. *In re Kosakumaran*, 38 Mad 556 16 Cr I J 626.

255 Secs 107 and 110 —When the information set forth in the order of the Magistrate refers to an apprehended breach of the peace, sec 110 is not applicable, but proceedings should be instituted under sec 107. A Magistrate has no authority whatever under the law, upon information that suggests the likelihood of an assault being committed and the peace endangered to resort to sec 110 and it is altogether *ultra vires* for him to proceed thereunder—*Emp v Babua*, 6 All 132. *Emp v Kallu*, 27 All 92. When a Magistrate at first issued notice with reference to sec 110 but subsequently found that the case was under sec 107, he ought not to deal with the case as one under sec 107, without issuing a fresh notice with reference to the altered view of the circumstances. The notice issued with reference to sec 110 cannot be held sufficient to comply with the requirements of law, because the facts necessary to be proved to make the accused liable under sec 110 are different from those under sec 107, and the accused should have notice of the facts on which the Magistrate proposes to proceed against him—*Krishna Suman v Lanamamalai*, 30 Mad 28.

Similarly, where notice was issued to show cause why the accused should not be bound down to keep the peace under sec 107, he cannot be directed in the final order to execute a bond for good behaviour under Sec 110—*Driver v Q E*, 25 Cr 798. But where the evidence was recorded at length and the parties had opportunity to cross-examine the witnesses and were not prejudiced, it was held that the irregularity was cured by sec 537—14 Cr L J 65 (Mad).

256 Magistrates empowered —This section only permits the par-

cular Magistrates mentioned herein to deal with the cases falling under it Orders in such cases made by other Magistrates are invalid and without jurisdiction—17 Cr L J 141 (All) In the Punjab, all first class Magistrates have been empowered to act under this section—*Punjab Gazette*, 32 1882, Part I, p 32 In Madras according to Madras Act III of 1888, Sec 7, the Commissioner of Police can act as a Magistrate under this section

The special power must be conferred by the Local Government only, it cannot be conferred by the District Magistrate—*Q E v Khandu*, Ratanlal 838 Therefore a first class Magistrate not specially empowered under this section cannot exercise jurisdiction in a case arising under it upon a transfer thereof to him by the District Magistrate—*Ibid Satish v Rajendra*, 22 Cal 898

257 Information —A Magistrate cannot proceed under this section unless he has the necessary information And there must be some information to work upon before a person can be arrested This section is not intended to empower the Police to arrest a person without any information and then to work out a case against him and give information to the Magistrate—*K E v Paimal*, 10 A L J 351 13 Cr L J 827 A Magistrate has no jurisdiction to act under this section until he has such information before him as will suffice for his making an order in writing setting forth its substance and the further particulars required by sec 112—*K E v Ganesh*, 12 A L J 336 15 Cr L J 696 *Rajbansi v Emp*, 18 A L J 673 42 All 646

Nature and source of information.—There is no limit to the nature and source of information on which a Magistrate may initiate proceedings under this section—27 All 172 But the information cannot be proceeded upon unless it comes from a trustworthy source—*Punj Civ* p 165

The Magistrate is not bound to reveal the source of the information to the person concerned, for the information is not any evidence against the accused, moreover, if a Magistrate is to set out before the accused the names of the persons from whom he receives information and the nature of the information given, very few well respecting persons would dream of placing any information at the disposal of the Magistrate—*In re Mithu Khan*, 27 All 171

The words 'receives information' in this section include information howsoever obtained The law does not limit the method in which the Magistrate who is empowered by the Local Government is to receive the information He may receive the information through some other Magistrate. Therefore where the police made a report to the senior Deputy Magistrate that certain persons were in the habit of committing mischief, extortion, and other offences, and that Magistrate forwarded the report

to another Magistrate of the first class held that the latter had jurisdiction to institute a proceeding under this section on that report—*Hiranand v Emp* 1 Pat 621 A I R (1922) Pat 586

As to what is or is not credible information see notes under sec 107

The information to be required by a Magistrate may be to some extent of a hearsay and general description but when the party to whom the order is directed appears in Court in obedience to such order the inquiry must be conducted on the lines laid down in section 117 of the Code—*Emp v Babua* 6 All 132

Conversations out of Court with persons however respectable are not legal or proper materials upon which to adopt proceedings under this section—6 All 132 It is incumbent on Magistrates to exercise the greatest caution and impartiality and to be careful not to be influenced by outside gossip and vague rumours—1898 P R 4

Magistrates are not competent to base their orders on their local and personal knowledge of the accused and witnesses—29 Cal 392 22 W R. 79 *Wals Md v Emp* 25 Cr L J 808 A I R (1925) Lah 166 No doubt a Magistrate is compelled in the performance of his duties to make private inquiries as to the character of his neighbourhood and as to the persons reputed to be of bad character and likely to cause trouble These inquiries are necessary to an executive officer having to inform himself of the nature of the population committed to his charge but where it is shown that the Magistrate has allowed the actual information obtained in such inquiries against certain individuals to influence his judgment in a judicial decision against those individuals brought before him by process of law, his order would be quashed as being vitiated by the admission of such information—*Ashiq Ali v Emperor*, 21 A L J 513 The proper procedure, where it is important to utilize the personal knowledge of a Magistrate is for the case to be tried by another Magistrate and for the former Magistrate to give evidence as a witness—29 Cal 392 1903 P R 27

A local inquiry is most appropriate before instituting proceedings under sec. 110, but once the accused are before the Court, the case must be decided on the evidence alone and not on the basis of the local inquiry But it is not illegal for a Magistrate to use his inquiries to confirm the result at which he has arrived on a consideration of the evidence—*Fam Pargat v Emp*, 12 O L J 341 20 W N 350 26 Cr L J 1149

But although the private information possessed by a Magistrate concerning the accused person cannot be used as if it was evidence in the case yet such information is a form of check which the trial Court may legitimately use in order to test the nature of the evidence with which it has to deal and negative for example, a suggestion that the police investigation has been unfair—*Emp v Dattari Singh*, 45 All 749 (751)

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to another Magistrate of the first class *held* that the latter had jurisdiction to institute a proceeding under this section on that report—*Hiranand v Emp*, 1 Pat 621 A I R (192) Pat 586

As to what is or is not credible information see notes under sec 107

The information to be required by a Magistrate may be to some extent of a hearsay and general description but when the party to whom the order is directed appears in Court in disobedience to such order the inquiry must be conducted on the lines laid down in section 117 of the Code—*Emp v Babua* 6 All 132

Conversations out of Court with persons however respectable are not legal or proper materials upon which to adopt proceedings under this section—6 All 132 It is incumbent on Magistrates to exercise the greatest caution and impartiality and to be careful not to be influenced by outside gossip and vague rumours—1898 P R 4

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A local inquiry is most appropriate before instituting proceedings under sec 110 but once the accused are before the Court, the case must be decided on the evidence alone, and not on the basis of the local inquiry. But it is not illegal for a Magistrate to use his inquiries to confirm the result at which he has arrived on a consideration of the evidence—*Pam Pargat v Emp*, 12 O L J 341 2 O W N 350 26 Cr L J 1149

But although the private information possessed by a Magistrate concerning the accused person cannot be used as if it was evidence in the case, yet such information is a form of check which the trial Court may legitimately use in order to test the nature of the evidence with which it has to deal, and negative, for example, a suggestion that the police investigation has been unfair—*Emp v Darbari Singh*, 45 All 749 (751)

260 Clause (c)—*Aid in concealment of stolen property*—This clause is designed to meet only the case of professional receivers of stolen property who assist the thief by protecting him from discovery and arrest and by helping him to dispose of such property—(1910) U B R CR P C 4

Harbouring thief—The harbouring must be to screen the offender from punishment. A person giving food or shelter or medical assistance to a starving or invalid criminal, from mere motives of humanity and not with the intention of enabling him to escape justice does not come within the purview of this section—*Ibid*

261 Clause (d)—*Habitually committing extortion*—Sec 110 is not applicable to the case of persons who commit acts of extortion in a certain capacity (e.g. the *burkundazes* of Zemindars who commit acts of extortion on tenants) in the performance of their duties as it cannot be said that they are in the habit of committing extortion as individual members of the community because, if it so happens that they cease to be in the employ of the Zemindars they would no longer commit those acts of extortion. The proper course of dealing with the case is to prosecute them, or their masters under whose orders they act, for specific acts of oppression—*Anookool v. Q. E.*, 27 Cal 781 /

It was formerly held that persons in the habit of bringing false claims by forged entries (1884 P R 25) or obtaining decrees by means of forged documents (1914 P R 21) did not come under this section as they could not be said to be habitually committing extortion. But these rulings are no longer good law in view of the word *forger* added to clause (a) by the Amendment Act of 1923.

A person who brings a claim in the Civil Court which he knows to be false commits an offence under sec 209 I P C., but he does not by so doing commit an offence of extortion, if he succeeds in the claim, or an offence of attempting to commit extortion, if he fails in his claim, and he cannot be bound down under this section—20 O C. 129, *Bappuji v. Emp.*, 19 Cr L. J. 885 (Nag)

Committing mischief—This clause applies to persons who habitually commit mischief where the evidence shows the man to be of an excellent character one unsupported charge of mischief by fire does not bring him within the purview of this clause—4 W R. 37

262 Clause (e)—*Offences involving breach of the peace*—See Note 221 under sec 106

Where the accused, who was found by the Magistrate to be addicted to acts of immorality in attempting to seduce married women and behaving indecently and immodestly to them, was bound over to give security for good behaviour under clause (e) of section 110, held that although the

actions of the accused were certainly offences under the law and it might be desirable to control them still the offences were not such as involved a breach of the peace within the meaning of this section and of section 106 and the order for security was illegal—*Arun Samant v Emp*, 30 Cal 366 The words offences peace in this clause are to bear the same interpretation as in section 106—*Ibid* (at p 368)

263 Clause (f) —*Desperate and dangerous character* —A man of desperate and dangerous character in clause (f) means a man who has a reckless disregard of the safety of the person and of the property of his neighbours—*Manindra v K E*, 46 Cal 215 *Wahed Ali v Emp*, 11 C W N 789 Evidence of acts of extortion committed by a person, unless those acts were accompanied by acts causing danger to life and property is not sufficient to bring the case under this clause—*Wahid Ali v Emp*, 11 C W N 789

But where it was found that the accused persons were associated for the purpose of spreading disloyal doctrines among school boys and besides being engaged in preparing the young for the future revolution, were connected with an organisation for the collection of money by dacoity, it was held that the facts were sufficient to bring the case within the clause—*Manindra v K E*, 46 Cal 215 23 C W N 193 19 Cr L J 696

The following persons though they are undoubtedly persons of bad character, do not come under this clause as they cannot be said to be men of desperate and dangerous character —

A person who had been arrested on suspicion of the commission of a dacoity and released—11 C W N 129 *Gulab Chand v Emp*, 17 Cr L J 184 (Oudh) 1 Bur S R 422 a person who is known to be a bad character and is earning his living by prostituting one of his wives—*Yaghi v Emp*, 189 P R 5 a person who had been annoying the neighbours in various ways by knocking at their doors at night or throwing brickbats over their roofs or who had been annoying respectable women—5 C W N 249 a person who attempts to seduce married women and behaves indecently and immodestly to them—*Arun Samant v Emp*, 30 Cal 366, a person who is a nuisance to his neighbours declines to pay debts, abuses his neighbours and makes indecent overtures to school boys who pass by his shop—*Id Asghar v Emp*, 16 Cr L J 382 (All.) a person of a violent or turbulent character—*In re Narain* 6 W R 6 a person who promotes litigation and is said to have had considerable influence with *patris*—*Iskhar Dutt v Emp*, 16 A L J 776 19 Cr L J 781

Where the evidence shows that there is an apprehension of the accused committing a breach of the peace by using violence towards a particular person or persons he ought not to be bound over under this

section. He may be hazardous to the particular person or persons, but cannot be said to be hazardous to the community. He may be proceeded against under section 107 but not under sec 110.—*Emp v Kallu* 27 All 92 *Emp v Babua* 6 All 132

Evidence which was regarded as unreliable and insufficient to convict a person of the charge of dacoity should not be treated as reliable evidence to show that such person is a dangerous and desperate character who ought to be called upon to furnish security for good behaviour.—17 Cr I J 184 (Oulh)

270 Joint trial of several persons.—See Note 290 under sec 117 (5)

It is not advisable to take proceedings under this section against several persons jointly unless such persons are confederates or partners as against whom all the evidence is equally applicable.—*Emp v Angnu Singh* 45 All 109 20 A L J 881 Ordinarily under this section every person has to be tried separately for the offences enumerated herein. A joint trial is only permissible when two or more persons have been associated for the purpose of committing the offences mentioned in clauses (a) to (f) of this section. Unless this circumstance is established, a joint trial is illegal and the conviction would be set aside.—*Jai Kuo v Emp* 3 P I T 538 23 Cr I J 100 But if in a joint trial the evidence against each is separated and considered distinctly there is no prejudice and the order will not be upset.—*Shamsuddin v Emp* 26 Cr I J 1114 (Nag)

The joint trial of several persons who were habitually associating together for committing the offences mentioned in this section is not illegal merely because they did not belong to the same village.—*Rahim Bux v Emp* 23 Cr I J 58 (Cal)

271 Evidence under this section.—The evidence that is required to justify an order under this section is not necessarily evidence that the accused has committed definite criminal offences but it must be proved by evidence of general repute or otherwise that he comes within the category of one of the clauses (a) to (f)—*Shir Zamrin v Emp* 1899 P R 10 The mere fact that a man has a bad character does not necessarily make him liable to be called upon to furnish security for good behaviour. There must be satisfactory evidence that he answers to one of the descriptions mentioned in the section.—6 All 132, 4 A W P 117, 6 Cal 14 14 All 45, *In re Karuppanan* 8 W I T 246 11 Cr L J 638 *Haku v Emp* 1891 P R 12 *Sohan v Emp* 26 Cr I J 1377 The mere fact that a person has a record of several previous convictions does not satisfy the requirements of this section and he cannot be ordered to give security on that fact alone.—*In re Raja* 10 Bom 174 (175), 13 C W N 318 The evidence must be of such a character that it will reasonably support the inference that it is necessary in the interests of public security to send

the man to prison or to bind him down—*Ahmuddi v Emp* 22 A L J 678 25 Cr L J 117. The evidence that a certain person is of bad character is not sufficient to put him on security under this section. There should be clear evidence on the record to show what exactly he had been doing and how he had been living. Where there is strong evidence of apparently respectable men on the record to show that a person has not in recent times lived a disreputable life, and such evidence has not been rebutted security under this section ought not to be demanded—1916 P L R 30 *Siam Lal v K L* 6 A L J 487 9 Cr L J 528. The mere fact that sixteen years ago the accused had on three occasions been bound over is no ground for considering that he is still a bad character and has not reformed himself, and is not a ground of action under this section against him—*Jagat Singh v Emp* 23 Cr L J 507. A Magistrate should not pass an order under this section where the witnesses for the prosecution are mostly enemies of the accused—*Shakur v Emp* 24 Cr L J 565 26 O C 242 *Wali Md v Emp* 25 Cr L J 808 (Lah) *Gur Datt v Emp* 26 Cr L J 99 (Oudh).

In a trial under this section the Magistrate must act on evidence duly recorded in the presence of the accused and it is not open to him to take into consideration any information obtained otherwise than from such evidence. He must not act on anything extraneous to the evidence on the record e.g. an information obtained from local inquiries—*San Dun v A L* 2 Rang 641 (612).

Police evidence—In proceedings under this section the evidence of official and Police witnesses should as far as possible be eschewed. Though there is no rule of law which prohibits a Magistrate from admitting Police evidence it should if not wholly discarded influence his judgment as little as possible. Where the evidence of the police witnesses consists only of rumours and hearsay which they have recorded in their note books and diaries it is wholly inadmissible—*In re Panga Reddi* 35 M L J 97 43 Mad 450. Entries in the Thana Village Crime Note Book are in themselves no evidence to support an order under this section—22 Cr L J 486 (Cal). A Magistrate should not act on information not given in evidence but obtained from a perusal of the police-diary—*Jhanda v A L* 25 Cr L J 45 (All).

The history sheets kept by the Police of persons proceeded against under this section cannot be taken into consideration by the Court. A Magistrate should not delegate his judicial functions to the Police—*Jigendra v Emp* 21 Cr L J 700 (Cal). A list of cases in which the accused was suspected of having been concerned is inadmissible in evidence—11 O C 132 *Raghunir v K L* 10 O C 108 6 Cr L J 256.

Mere suspicion is not evidence—The powers under this section are to be exercised very sparingly and only in those cases when the evidence

section He may be hazardous to the particular person or persons, but cannot be said to be hazardous to the community He may be proceeded against under section 107 but not under sec 110—*Emp v Kallu* 27 All 92 *Emp v Babua* 6 All 132

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the man to prison or to bind him down—*Ahmuddi v Emp* 22 A L J 678 25 Cr L J 1172 The evidence that a certain person is of bad character is not sufficient to put him on security under this section There should be clear evidence on the record to show what exactly he had been doing and how he had been living Where there is strong evidence of apparently respectable men on the record to show that a person has not in recent times lived a disreputable life, and such evidence has not been rebutted security under this section ought not to be demanded—1916 P L R 30 *Shiam Lal v K L* 6 A L J 487 9 Cr L J 528 The mere fact that sixteen years ago the accused had on three occasions been bound over is no ground for considering that he is still a bad character and has not reformed himself, and is not a ground of action under this section against him—*Jagat Singh v Emp* 23 Cr L J 507 A Magistrate should not pass an order under this section where the witnesses for the prosecution are mostly enemies of the accused—*Shakur v Emp* 24 Cr L J 565 26 O C 742 *Wali Ali v Emp* 25 Cr L J 808 (Lah) *Gur Dayal v Emp* 26 Cr L J 99 (Oudh)

In a trial under this section the Magistrate must act on evidence duly recorded in the presence of the accused and it is not open to him to take into consideration any information obtained otherwise than from such evidence He must not act on anything extraneous to the evidence on the record e.g. an information obtained from local inquiries—*San Dun v A L* 2 Rang 641 (647)

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The history sheets kept by the Police of persons proceeded against under this section cannot be taken into consideration by the Court A Magistrate should not delegate his judicial functions to the Police—*Jyendra v Emp* 21 Cr L J 700 (Cal) A list of cases in which the accused was suspected of having been concerned is inadmissible in evidence—21 O C 132 *Raghunir v A L* 10 O C 105 6 Cr L J 756

Mere suspicion is not evidence —The powers under this section are to be exercised very sparingly and only in those cases where the evidence

is very clear and precise Where, beyond the mere *suspicion* that the accused are habitual thieves nothing substantial has been established an action under this section is not justified—*Jagat Singh v Emp* 13 Cr L J 507 *Amjad Ali v Emp* 5 P L T 129 Where the only evidence against the accused was that he was a man of bad character and was suspected on many occasions by the Police an order under this section could not be sustained—*Emp v Husain Ahmed* 1905 A W N 34 A person ought not to be bound down on the mere statement of witnesses that they suspect the accused to be a thief or a dacoit—11 C W N 413 11 C W N 129 The fact that he was once convicted of theft and his house was searched on several occasions (but no stolen property was found) and he was said to have associated with two or three persons of bad character does not justify an order under this section—*Kashim v Crown* 1907 P L R 23 5 Cr L J 24

Where the only thing appearing against the accused was that he was on a previous occasion arrested in connection with a dacoity, but the police considered the evidence against him of so little value that he was released under sec 169 without even being placed before the Court *held* that this fact was insufficient for binding over the accused under this section—*Jhandoo v A E* 15 Cr L J 45 A I R (1924) All 124 *Sital Din v Emp* 15 Cr L J 366 (Oudh) A I R (1925) Oudh 49 But if the evidence in support of the charge under section 110 is antecedent to the charge for the substantive offence (dacoity) and is wholly independent of it the proceedings under section 110 are not illegal—*Sital Din v Emp* (*supra*)

When the evidence is good and equally balanced on both sides no order for security shall be made—*Raham Ali v K E* 11 A L J 461 *Ganga Singh v A E* 10 A L J 383 13 Cr L J 772 *Angnu Singh v Emp* 20 A L J 881 45 All 109 (113) 20 Cr L J 716 (All) 4 Lah L J 531 Thus where there is a large volume of evidence in favour of the accused which is as good as if not better than that of the prosecution there is no ground for making an order under this section—*Krishna v Crown* 4 Lah L J 531 *Baladur v Emp* 27 O C 377 16 Cr L J 530 A I R (1925) Oudh 501 *Gir Dayal v Emp* 26 Cr L J 99 (Oudh)

The burden of proving the bad character of an accused is on the prosecution and therefore when the evidence on both sides is of an indifferent and interested character the prosecution must fail—1903 P R 27 *Sukha v Empress* 1898 P R 4

Evidence of habit—The persons mentioned in this section are those who are *habitual* criminals and the *habit* is to be proved by an aggregate of acts—6 M H C R 120 The word *habitually* must be taken to mean repeatedly or persistently The word *habit* means persistence in doing an act a fact which is capable of proof by adducing evidence

of the commission of a number of similar acts—*Government v Hanman Rao* 25 Cr L J 60 (Nag) The fact that a person was on only one occasion suspected of theft is no evidence that he is a *habitual* thief—*Ishay Singh v Emp* 1880 P R 32 The fact that a person has been convicted on a former occasion is not sufficient to justify the finding that he is an *habitual* offender unless there is some additional evidence to show that he has again done some acts that indicate an intention on his part to return to his former course of life—2 All 835 Oudh S C No 70 and to constitute as habitual offender it is necessary that the subsequent offences charged should have been committed by the accused after his previous conviction—*Q E v Appa Ratanlal* 143

Evidence of acts of misconduct committed by a person years ago is admissible as indicating formation of habit But such evidence unless supplemented by evidence of misconduct committed by such person within a year or so, cannot justify the making of an order under Sec 118—*Haid Ali v Emp* 11 C W N 789 6 Cr L J 1

Proof of previous convictions —Whenever it is required to prove previous convictions against a man in a proceeding under this chapter such previous convictions must be proved strictly and in accordance with law, unless they are so proved no Court can properly take such previous convictions into consideration against an accused person—*K E v Sheikh Abdul* 43 Cal 1128 20 C W N 725 17 Cr L J 185 See sec 311

272 Evidence of general repute —Under Sec 117 (4) the fact that a person is a habitual offender or a desperate and dangerous character may be proved by evidence of general repute

A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen, and if it is proved that a man who lives in a particular place is looked upon by his fellow townsmen whether they happen to know him or not as a man of good repute, that is strong evidence that he is a man of good character On the other hand if the state of things is that the body of his fellow townsmen who know him look upon him as a dangerous man and a man of bad habits that is strong evidence that he is a man of bad character—3 Cal 621 *Jogendra v A E* 25 C W N 334 22 Cr L J 377, 1 L B R 90, *Raghubir v A E* 10 O C 168 5 O C 203, 10 O C 132, *Emp v Jagar Nath* 1903 A W N 181 *Kewal Kishore v Emp*, 12 O L J 413 26 Cr L J 1283

Where in a proceeding under this section the accused person is able to produce witnesses on his behalf to speak of his good character the Court ought to pay particular attention to such evidence and to give substantial reason for not believing such evidence before it makes an order under section 118—*Kamilagan v Emp* 5 P L T 166 25 Cr

J 985 *Amjad Ali v Emp* 5 P L T 129 25 Cr L J 35, *Halim Singh v Emp*, 13 A L J 1055 Where the accused who was a *Zenundar* and money lender produced a large number of witnesses consisting of his own caste fellows and tenants to depose to his good character, but the Magistrate disbelieved the evidence simply on the ground that the accused by virtue of his position could produce a large number of witnesses, and assigned no other legitimate reason *held* that the case had not been approached from a proper point of view, and the High Court could interfere in revision—*Miharban v Emp* 13 A L J 1046 16 Cr L J 805

Nature of the evidence—Evidence of general repute may be either the evidence as to the *general* opinion of the community or neighbourhood or the *personal* opinion of the witnesses who are examined But the opinion need not necessarily be the opinion of the *entire* community but at least the opinion of a *considerable* number of persons—*Bechan v A I* 12 A L J 937 15 Cr L J 705 43 Mad 450 *Hewil Hishore v Emp* 12 O L J 413 26 Cr L J 1283 *Duma Singh v A I*, 5 O C 703

The persons who testify to the character of the accused must be *respectable* persons who are acquainted with the accused (43 Mad 450) and should not ordinarily be officials—*Nga Han v K I*, 8 Bar L T 53 16 Cr L J 353 Thus when a large body of respectable persons testified to the character of the accused against the evidence of Police officers the opinion of the former should be accepted, and an order under this section should not be made—1910 P W R 37

Evidence of accused's own caste fellows and neighbours is certainly the best sort of evidence available—*Gur Balsh v Emp* 12 Cr L J 542 (Oudh) Where witnesses voluntarily come forward as friends or relatives or caste-fellows of the accused to give evidence about the good character of the accused they must not be brushed aside unless they are discredited as regards their good faith and honesty—*Emp v Angnu Singh* 45 All 109 (113) 24 Cr L J 257, *Emp v Rahu* 43 All 186 (190) 18 A L J 1114 *Hawal Hishore v A I*, 12 O L J 413 26 Cr L J 1283 In fact when the caste-fellows of the accused voluntarily come forward and say that they regard the accused as the head of their brotherhood and they consider it a slur upon their community that the accused should be treated as a habitual robber or dacoit it shows the good faith of the witnesses and their honest and emphatic belief that the accused is a respectable person enjoying the confidence of his community The Magistrate ought not to discredit the evidence of these witnesses—*Emp v Rahu* 43 All 186 (190) 18 A L J 1114 22 Cr L J 115

But it is not always necessary that the persons who testify to the character of the accused should live in the immediate neighbourhood of the

accused—11 C W N 789 Thus a series of dacoities having taken place in a certain village the evidence of general reputation of the accused coming from the people of the village where the dacoities took place is certainly to be treated as evidence of general repute although the accused did not live among those people—35 Cal 243 It is not right to discard the evidence of witnesses who speak to the reputation of the accused merely because they are not his immediate neighbours A man's general reputation in the place in which he lives among the inhabitants of that place is not always conclusive because it is quite possible for a cunning rogue to conceal his real character from his immediate neighbours What the Court has to do is to satisfy itself that the evidence of the witnesses is true, and if it is satisfied on this point then it is entitled to accept the evidence Where a witness lives at a considerable distance from the person of whose reputation he speaks the Court should of course inquire how he came by that knowledge and should take his answer into consideration in framing its estimate of the value of the evidence—A L v Po Yan 2 Rang 686 4 Bur L J 6 26 Cr L J 528

Moreover the persons testifying to the character of the accused must speak from their *personal knowledge* A vague and general statement that a man is a habitual offender is not sufficient Evidence of repute in respect of an accused person must be evidence of persons who are speaking to matters within their own personal knowledge and not from mere *hearsay*—Rup Singh v A F 1 A L J 616 Kallu v Emp 19 A L J 39 22 Cr L J 314 Lmp v Angnu Singh 45 All 109 (113) San Dun v A 1 2 Rang 641 (643) Deodhar v Emp 6 P L T 810 26 Cr L J 738

Mere *rumour* is not repute evidence of rumour is mere hearsay evidence of a particular fact evidence of repute is a totally different thing Rumours in a particular place that a man had done particular acts or his characteristics of a certain kind are not evidence of general repute—3 Cal 61 Rajendra v A L 1 A L J 611 1918 M W N 731 Ramlogan v Lmp 5 P L T 166 Evidence of a association with bad characters is evidence of reputation but such reputation can only be based upon association with proved bad characters and not with reputed bad characters—13 C W N 318

The witnesses must give their own opinion and their statements must not be mere *repetitions* of what other persons said to them about the accused and when they give their own opinion they may be asked to give the grounds of their opinion and to give names of the persons whom they have heard speak against the character of the accused—Tetlat v A L 12 A L J 937 15 Cr L J 705 Hewel Kashore v Lmp 12 O L J 413 Mere repetitions unaccompanied by direct evidence personally affecting each accused is insufficient in a case under this section—Lmp

v Angnu Singh 45 All 109 24 Cr L J 257 The evidence must relate to particular instances which have come to the knowledge of the witness and must be specific Evidence relating to mere beliefs and opinions without reference to acts or instances which have induced the witnesses to form an opinion cannot be regarded as evidence of repute The test of the admissibility of the evidence of general opinion is whether it shows the general reputation of the accused and it should at least be the opinion of a considerable number of persons It must not be the repetition of what certain persons have said to the witnesses It should be the evidence of respectable persons acquainted with the accused who live in the neighbourhood and are aware of his reputation—43 Mad 450 *Ramlagan v Emp* 5 P L T 166

The repute must be universal and there should be no doubt about it—*Jhandu Ram v Crown* 1915 P L R 15 16 Cr L J 106 *Masti Khan v Emp* 1897 P R 2 1898 P R 2 *Wali Muhammad v Emp* 25 Cr L J 808 (Lah) i.e. the evidence must be so general and overwhelming as to leave no doubt that the accused has been in the habit of committing the offences imputed—Ratanlal 639 Where as many good witnesses come forward to state that the man's reputation is good as those who state the contrary it can hardly be held safely that the man's general reputation is bad unless there is something to corroborate the evidence of witnesses against him—*Ajmal Shah v Emp* 1898 P R 2 *Rajendra Prasad v A C* 1 A L J 611

Mere suspicion against the accused is not evidence of general repute Statements of witnesses each of whom says that he suspected the accused to be implicated in this or that isolated offence do not amount to evidence of general repute—*Dechar v A C*, 12 A L J 937 15 Cr L J 705, *Amyad Ali v Emp* 5 P L T 179 So also, evidence of cases in which the accused was suspected is not evidence of general repute—*Raham Ali v A C* 11 A L J 461 14 Cr L J 407 12 A L J 937 20 Cr L J 689 (All) Where in a proceeding under this section the prosecution witnesses giving evidence of general repute say that they suspect the accused to be a thief or dacoit because his house was searched and he was arrested on several occasions such a suspicion is not sufficient evidence against the accused Where there is positive evidence for the defence that the accused is a good man it is not a sufficient reason for casting it a file to say that proof of malice against the accused on the part of the prosecution is wanting—21 Cr L J 170 (Cal)

But an evidence that a person had been suspected and named in a large number of cases extending over a considerable interval may be very useful corroboration of general evidence against him Conversely in a doubtful case the fact that a person has never been suspected of any offence

may weaken the general evidence of reputation that is given against him—22 Cr L J 273 (Oudh)

The fact that an accused person has been acquitted of a particular charge may diminish and will diminish in many cases and many even destroy wholly, the value of the evidence* but does not render it inadmissible—*Budhan v Emp* 23 A L J 507 47 All 733 26 Cr L J 1130

In order to establish general repute for the purposes of section 117, the evidence of the investigating police officer is inadmissible and irrelevant—*Rameshwar v Emp* 1 P L T 632 21 Cr L J 321

273 Duty of Court to test the evidence —The fact that a man is a habitual offender may not always be proved by actual previous convictions and it is necessary to prove it by evidence of general repute. But the Magistrate should take great care where no previous conviction is proved to test the evidence for the prosecution and assure himself beyond reasonable doubt that the accused is really a habitual offender of the class named. The Magistrate cannot convict a person on mere vague evidence of bad repute—*Q E v Talakchand* 2 Bom L R 57 1 Bur S R 542. Where the evidence for the prosecution is of a vague character, and when a case has to be established merely upon evidence of bad repute the Court should take into consideration the value and weight of evidence tendered on behalf of the prosecution as compared with that for the defence—*Gur Baksh v Emp* 12 Cr L J 542 (Oudh)

The Court (whether original or appellate) must show by its judgment that it has duly weighed and examined the evidence for and against the accused in the case. Where therefore in a proceeding started under Sec 110 Crim Pro Code the judgment ran. It is obvious that if one quarter of the evidence for the prosecution is true—and I see no reason to doubt that it is—the appellant is a most proper person to be bound over under S 110 Crim Pro Code. *held* that the judgment was bad and must be set aside and the case sent back for retrial—18 Cr L J 649 (Oudh). Where the Appellate Court in a case under this section wrote a judgment of four lines without giving even an indication of the fact that he had weighed the evidence for and against the accused *held* that there had not been a proper trial of the case and that it should be retried—*Sarwan v Emp* 14 A L J 279 17 Cr L J 167

Evidence should be tested by its quality rather than by its quantity. When the evidence on the side of the prosecution and the defence is found to be of an indifferent character the prosecution must fail. If the quality of evidence is good on both sides the case must also fail if the evidence for the defence over balances that for the prosecution—*Sulka v Emp*, 158 P R 4 27 Cal 751 11 A L J 461. Where as many as 10 reliable persons come forward and testify to the good character of the accused the

Magistrate should not reject their evidence and pass an order under this section merely because the prosecution produces a larger number of witnesses—*Bahadur v Emp* 27 O C 377 26 Cr L J 530 *Gur Dayal v Emp* 26 Cr L J 99 (Oudh) On the other hand the accused is not entitled to be acquitted merely because the defence witnesses are as numerous as or more numerous than the prosecution witnesses but it is the weight of the evidence and not the number of the witnesses which the Court has to consider—*Kamal Kishore v Emp* 12 O L J 413 26 Cr L J 1283 A I R (1935) Oudh 473 *Gur Din v A E* 24 O C 225 22 Cr L J 647

274. Examination of witnesses.—In a proceeding under this section the Magistrate is bound to examine all the witnesses produced by the accused. Where the trying Magistrate declined to examine on behalf of the defence more than the same number of witnesses as were examined for the prosecution *held* that it was not open to the trying Magistrate to put such an arbitrary limit on the witnesses whose evidence the defence desired to adduce—*Azurulla v King Emp* 22 C W N 408 Where witnesses are cited for the defence in proceedings under this section time and opportunity should be given to have them produced and then only should order be passed—*Pauliram v Emp* 38 C L J 285

Magistrates should be careful not to allow an unnecessarily large number of witnesses to be examined which would amount to a scandalous waste of public time and Magisterial energy—*Emp v Angun Singh* 45 All 109 (112) 20 A I J 881 In this case the Police produced as many as 76 witnesses to prove the bad character of the accused (which took more than two months to examine them) and the total number of witnesses produced in the case was 40 the examination of which occupied 6 months. The High Court severely condemned the procedure observing It seems to me monstrous and to amount to something like persecution that each individual (accused) should be condemned to submit to and to employ counsel for the examination and cross examination of a number like 76 witnesses during a proceeding lasting over two months. If the police cannot satisfy an experienced Magistrate with less than 76 witnesses or in less than two months that a man is a *badmash* the sooner they surrender the task at its inception, the better for the interests of public justice. It is the duty of the District Magistrate if he thinks that 10 or 12 witnesses are as a rule sufficient for a case of this kind and he finds one of his subordinate officers permitting 76 to lay down some rule of common sense to guide his subordinates in the exercise of their discretion not a cast iron rule like the section of a Code but something to enable them to guide their own proceedings within reasonable limits—*per Walsh J* (at p. 111)

Further Inquiry.—See Note 295 under sec 110. Section 436 as now amended does not apply to cases under this chapter and therefore further inquiry cannot be directed in a case of discharge under sec 110.

275 Order for security.—The provision of law which requires sureties for the bond is made not with a view to obtain money for the Crown by the forfeiture of recognizances but to ensure that the particular accused person shall be of good behaviour for the time mentioned in the order—*Q. E. v Rahim Baksh* 20 All 206 10 Bom 174 Therefore, an order under this section requiring persons to deposit cash in lieu of entering into a bond for their future good behaviour is bad in law—*Emp v Kala Chand* 6 Cal 14

Under this section, the Magistrate can pass an order directing the person to give security. But an order directing that the person must leave the town at once or he will be prosecuted as a bad character" is illegal and *ultra vires*—*Ram Prasad v Emp*, 19 A L J 951 23 Cr L J 122

An order should not be made under this section, where a previous proceeding against the same accused had resulted in his discharge and only a short interval had elapsed between the previous proceeding and the institution of the present proceedings—*Shakur v Emp*, 26 O C 242

It is illegal for a Magistrate to call upon a person to furnish security soon after the expiry of the term of imprisonment to which he was sentenced for past offences. Before passing such an order the accused should be questioned as to his means and intention of earning an honest livelihood, and he should not be subjected to penalties unless it is shown that there is no reasonable prospect of his future good behaviour—*In re Raja*, 10 Bom 174 (175)

Fresh security after expiry of term of bond,—Where a bond for good behaviour expired on the 13th of June 1905, and on the 20th June fresh proceedings were started against him, it was held that the order was illegal in as much as the accused was not given a sufficient opportunity of showing that he was willing to adopt an honest livelihood, and the interval was not long enough to see whether the accused has reformed his course of life or not—28 All 306

A person who was previously bound over to be of good behaviour under this section cannot soon after his release, be handed up again on vague evidence of suspicion without any tangible evidence to show that he has been leading a life of crime. A convict should be given sufficient opportunity to reform himself before he is handed up again—*Ikkara v Emperor*, 18 Cr L J 710 (Oudh). Where the accused was imprisoned for one year for failure to furnish security, and several months afterwards fresh proceedings were instituted against him as a result of which he was ordered to execute a bond for good behaviour, it was held that the order was bad, that the accused has not had a sufficient *locus penitentie*, and that the evil reputation which he had before his imprisonment still followed him and permeated the evidence of many of the witnesses—31 Cal.

783. 43 Cal 1128 (1915) U B R 3rd Qr 86 But if upon being set at liberty, he returns to his former course of life, a further order may be passed requiring him to furnish fresh security—*In re Juswant*, 6 W R 18

Error in form of bond —Where a bond required under section 110 was, under a mistake executed in the form of bonds required to be entered into under section 107 It was held that the bond was void and the error could not be rectified under section 537—*Wadhawa v Emp*, 1903 P R 32

Order should state on which clause it is based —On the conclusion of the inquiry if the Magistrate considers that the accused is a person falling within any of the descriptions stated in this section he should record a distinct finding of the specific description which he considers proved If the finding be insufficient the final order based upon it will be open to reversal The same will be the case if the finding be that he is a habitual thief (or dacoit) but the finding is not supported by evidence that the misconduct is habitual—*Punj Circ* p 167 When a person is sought to be proceeded against under this section, it must be made clear to him as to which subsection he is charged with coming under Mere assertion that he is a man of criminal tendency or is suspected of having committed crimes is insufficient—*Sohan v Emp* 26 Cr L J 1377 A I R (1916) Lah 45

Remand to custody —Where proceedings are instituted under this section the Magistrate can remand the accused person to custody See Note 526 under section 167

276 *Revision* —In questions arising under Sec 110 and Sec 107 the moment it is shown *prima facie* that there is something which the Courts below have done either in excess of their powers or by a too summary exercise of their powers or by misapplying the rules of evidence, or by not giving due effect to the evidence for the defence an application for revision should be admitted But the High Court will not generally interfere on the merits except in very exceptional cases, because it is idle to suggest that the High Court, sitting with only the paper evidence before it, should presume to differ on questions which are purely questions of fact and questions depending on the demeanour of witnesses—*Gayari v Emp*, 17 Cr I J 461 (All) The High Court is not a Court of Appeal in cases under section 110 and the duty of the High Court is not to weigh the evidence given on behalf of one side or the other, but only to see whether the Court below has approached the consideration of the case in a fair way, having regard to the interest not only of the prosecution but also of the accused—*Mikarbin v Emp*, 13 A L J 1046 16 Cr L J 805 ; *Kewal Kishore v. Emp* 12 O L J 413 26 Cr I J 1283 A I R (1925)

Oudh 473 The High Court will not interfere on the merits with proceedings under this section provided that the Lower Court or the Appellate Court shows in its judgment that it has really and not merely nominally considered the evidence on the record—*Shyam Lal v K E* 6 A L J 487 9 Cr L J 528 The High Court is not disposed to encourage revision applications in respect of proceedings under this Chapter, because so long as the cases proceed fairly and regularly the Magistrate is the best tribunal in fact the only tribunal who can satisfactorily decide them—*Emp v Darbart Singh* 45 All 749 (751) But at the same time the administration of this section has to be very carefully watched and where evidence has been misunderstood or ignored difficulties have not been seen or the rules of evidence have not been followed and the Judge has reviewed the case in a very perfunctory way without noticing the palpable defects in the evidence the grounds upon which a man has been bound down require to be carefully scrutinized—*Bisheswar v Emp* 19 A L J 668 If it is established to the satisfaction of the High Court that the proceedings under sec 110 are not *bona fide* and that in substance their continuation would mean an abuse of the statutory provisions on the subject it is not only competent to the High Court but it is its obvious duty to interfere—*Rajendra v A E* 17 C W N 238 Though the High Court finds it difficult to interfere with orders under section 110 still it has to be satisfied that the evidence is of a character which will reasonably support the inference that it is necessary in the interests of public security to bind down the accused—*Alimuddin v Emp* 22 A L J 678 25 Cr L J 1172

277 Order under Special Acts —An order restricting movements under the provisions of sec 7 of the Punjab Act V of 1918 (Restriction of Habitual Offenders Act) cannot be passed against any person from whom a security has already been taken under section 110 of the Cr P Code—*Kabir Bahsh v Emp* 1 Lah 100 *Bhana v Crown* 1919 P L R 34

A double order both under sec 110 of this Code and under section 7 of the Burma Habitual Offenders Restriction Act is illegal and the order of restriction must be set aside—*Pan Zyaw v Emp* 1 Bur L J 257 24 Cr L J 735 Where proceedings have been taken under section 110 of this Code by the Subdivisional Magistrate and a final order has been passed under sec 118 the District Magistrate (and he alone) can convert the order into an order of restriction under the Burma Habitual Offenders Restriction Act (II of 1919) where there has been a proper preliminary order under sec 11 and the District Magistrate has good reasons for the change—*Parsodan v A E* 2 Rang 54

Proceedings under this section against persons who have been registered under sec 4 of the Criminal Tribes Act (III of 1911) are not

783 43 Cal 1128 (1915) U B R 3rd Qr 86 But if upon being set at liberty he returns to his former course of life a further order may be passed requiring him to furnish fresh security—*In re Juswant* 6 W R 18

Error in form of bond —Where a bond required under section 110 was under a mistake executed in the form of bonds required to be entered into under section 107 it was held that the bond was void and the error could not be rectified under section 537—*Wadhawa v Emp* 1903 P R 32

Order should state on which clause it is based —On the conclusion of the inquiry if the Magistrate considers that the accused is a person falling within any of the descriptions stated in this section he should record a distinct finding of the specific description which he considers proved. If the finding be insufficient the final order based upon it will be open to reversal. The same will be the case if the finding be that he is a habitual thief (or dacoit) but the finding is not supported by evidence that the misconduct is habitual—*Puri* Circ p 167 When a person is sought to be proceeded against under this section it must be made clear to him as to which subsection he is charged with coming under. Mere assertion that he is a man of criminal tendency or is suspected of having committed crimes is insufficient—*Sohan v Emp* 26 Cr L J 1377 A I R (1926) Lah 45

Remand to custody —Where proceedings are instituted under this section the Magistrate can remand the accused person to custody. See Note 526 under section 167

276 *Revision* —In questions arising under Sec 110 and Sec 107 the moment it is shown *prima facie* that there is something which the Courts below have done either in excess of their powers or by a too summary exercise of their powers or by misapplying the rules of evidence or by not giving due effect to the evidence for the defence an application for revision should be admitted. But the High Court will not generally interfere on the merits except in very exceptional cases because it is idle to suggest that the High Court sitting with only the paper evidence before it should presume to differ on questions which are purely questions of fact and questions depending on the demeanour of witnesses—*Gajani v Emp* 17 Cr L J 461 (All) The High Court is not a Court of Appeal in cases under section 110 and the duty of the High Court is not to weigh the evidence given on behalf of one side or the other but only to see whether the Court below has approached the consideration of the case in a fair way having regard to the interest not only of the prosecution but also of the accused—*Misharban v Emp* 13 A L J 1046 16 Cr L J 805 *Kewal Ashore v. E* p 12 O L J 413 26 Cr L J 1283 A I R (1925)

Oudh 473 The High Court will not interfere on the merits with proceedings under this section provided that the Lower Court or the Appellate Court shows in its judgment that it has really and not merely nominally considered the evidence on the record—*Shiam Lal v A E 6 A L J 487 9 Cr L J 58* The High Court is not disposed to encourage revision applications in respect of proceedings under this Chapter, because so long as the cases proceed fairly and regularly the Magistrate is the best tribunal in fact the only tribunal who can satisfactorily decide them—*Emp v Darbari Singh 45 All 749 (751)* But at the same time the administration of this section has to be very carefully watched and where evidence has been misunderstood or ignored difficulties have not been seen or the rules of evidence have not been followed and the Judge has reviewed the case in a very perfunctory way without noticing the palpable defects in the evidence the grounds upon which a man has been bound down require to be carefully scrutinized—*Bisheswar v Emp 19 A L J 668* If it is established to the satisfaction of the High Court that the proceedings under sec 110 are not *bona fide* and that in substance their continuation would mean an abuse of the statutory provisions on the subject it is not only competent to the High Court but it is its obvious duty to interfere—*Rajendra v K E 17 C W N 238* Though the High Court finds it difficult to interfere with orders under section 110 still it has to be satisfied that the evidence is of a character which will reasonably support the inference that it is necessary in the interests of public security to bind down the accused—*Alimuddin v Emp 22 A L J 678 25 Cr L J 1172*

277 Order under Special Acts —An order restricting movements under the provisions of sec 7 of the Punjab Act V of 1918 (Restriction of Habitual Offenders Act) cannot be passed against any person from whom a security has already been taken under section 110 of the Cr P Code—*Kabir Baksh v Emp 1 Lah 100 Bhana v Crown 1919 P L R 34*

A double order both under sec 110 of this Code and under section 7 of the Burma Habitual Offenders Restriction Act is illegal and the order of restriction must be set aside—*Pat Zjaw v Emp 1 Bur L J 257 24 Cr L J 735* Where proceedings have been taken under section 110 of this Code by the Subdivisional Magistrate and a final order has been passed under sec 118 the District Magistrate (and he alone) can convert the order into an order of restriction under the Burma Habitual Offenders Restriction Act (II of 1919) where there has been a proper preliminary order under sec 112 and the District Magistrate has good reasons for the change—*Parsojan v A E 2 Rang 54*

Proceedings under this section against persons who have been registered under sec 4 of the Criminal Tribes Act (III of 1911) are not

783 43 Cal 111 (1915) U R R and C 31. If a person being set at liberty he returns to his former residence. If a further order may be passed requiring him to remain there a month. *In re Justant* 6 W R 18

Error in form of order—Where a final order under section 110 was under a mistake entered in the form of final required to be entered into under section 101 it was held that the order was valid and the error could not be recalled under section 101—*Malhotra v Emp*, 1903 P R 3

Order of finding of criminal tendency—On the conclusion of the inquiry if the Magistrate concludes that the accused is a person falling within any of the descriptions stated in this section he should record a distinct finding of the specific description which he considers proved. If the finding be insufficient the final order based upon it will be open to reversal. The same will be the case if the finding be that he is a habitual thief (or dacoit) but the finding is not supported by evidence that the misconduct is habitual—*Puri Circ* p 167. When a person is sought to be proceeded against under this section it must be made clear to him as to which subsection he is charged with coming under. Mere assertion that he is a man of criminal tendency or is suspected of having committed crimes is insufficient—*Sohan v Emp* 26 Cr L J 1377 A I R (1906) Lah 45

Remand to custody—Where proceedings are instituted under this section the Magistrate can remand the accused person to custody. See Note 526 under section 167

276 *Revision*—In questions arising under Sec 110 and Sec 107 the moment it is shown *prima facie* that there is something which the Courts below have done either in excess of their powers or by a too summary exercise of their powers or by misapplying the rules of evidence or by not giving due effect to the evidence for the defence an application for revision should be admitted. But the High Court will not generally interfere on the merits except in very exceptional cases because it is idle to suggest that the High Court sitting with only the primary evidence before it should presume to differ on questions which are purely questions of fact and questions depending on the demeanour of witnesses—*Gayani v Emp* 17 Cr L J 461 (All). The High Court is not a Court of Appeal in cases under section 110 and the duty of the High Court is not to weigh the evidence given on behalf of one side or the other but only to see whether the Court below has approached the consideration of the case in a fair way having regard to the interest not only of the prosecution but also of the accused—*Mishra v Emp* 13 A L J 1046 16 Cr L J 805. *Kewal Kishore v Emp* 12 O L J 413 26 Cr L J 1283 A I R (1925)

Oudh 473 The High Court will not interfere on the merits with proceedings under this section, provided that the Lower Court or the Appellate Court shows in its judgment that it has really and not merely nominally considered the evidence on the record—*Shyam Lal v K E* 6 A L J 487 9 Cr L J 528 The High Court is not disposed to encourage revision applications in respect of proceedings under this Chapter, because so long as the cases proceed fairly and regularly, the Magistrate is the best tribunal in fact the only tribunal who can satisfactorily decide them—*Emp v Darbari Singh*, 45 All 749 (751) But at the same time the administration of this section has to be very carefully watched, and where evidence has been misunderstood or ignored difficulties have not been seen or the rules of evidence have not been followed and the Judge has reviewed the case in a very perfunctory way without noticing the palpable defects in the evidence the grounds upon which a man has been bound down require to be carefully scrutinized—*Bisheswar v Emp*, 19 A L J 668 If it is established to the satisfaction of the High Court that the proceedings under sec 110 are not *bona fide*, and that in substance their continuation would mean an abuse of the statutory provisions on the subject, it is not only competent to the High Court but it is its obvious duty to interfere—*Rajendra v K E*, 17 C W N 238 Though the High Court finds it difficult to interfere with orders under section 110, still it has to be satisfied that the evidence is of a character which will reasonably support the inference that it is necessary in the interests of public security to bind down the accused—*Alimuddin v Emp*, 22 A L J 678 25 Cr L J 1172

277 Order under Special Acts —An order restricting movements under the provisions of sec 7 of the Punjab Act V of 1918 (Restriction of Habitual Offenders Act) cannot be passed against any person from whom a security has already been taken under section 110 of the Cr P. Code—*Kabir Baksh v Emp*, 1 Lah 100, *Bhana v Crown*, 1919 P L R 34

A double order both under sec 110 of this Code and under section 7 of the Burma Habitual Offenders Restriction Act is illegal and the order of restriction must be set aside—*Pan Zyaw v Emp*, 1 Bur L J 257 24 Cr L J 735 Where proceedings have been taken under section 110 of this Code by the Subdivisional Magistrate, and a final order has been passed under sec 118 the District Magistrate (and he alone) can convert the order into an order of restriction under the Burma Habitual Offenders Restriction Act (II of 1919) where there has been a proper preliminary order under sec 112 and the District Magistrate has good reasons for the change—*Parsodan v K E* 2 Rang 524

Proceedings under this section against persons who have registered under sec. 4 of the Criminal Tribes Act (III of 1911)

illegal But such proceedings though not illegal are inexpedient and the fact that the persons proceeded against are already registered under the Criminal Tribes Act may be a factor and an important factor which the Magistrate should take into consideration before he makes any order against them under section 110 of this Code—*Ghulam Rasul v Emp* 20 Cr L J 30 (Cal)

111 [Repealed]

This section has been repealed by section 8 of the Criminal Law Amendment Act (XII of 1913) It ran as follows —

‘111 The provisions of sections 109 and 110 do not apply to European British subjects in cases where they may be dealt with under the European Vagrancy Act 1874

We consider that section 111 should be repealed and that sections 109 and 110 should apply equally to Europeans and Indians —*Report of the Racial Distinctions Committee* para 16

112 When a Magistrate acting under section 107, section 108, section 109 or section 110 deems it necessary to require any person to show cause under such section he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed the term for which it is to be in force, and the number character and class of sureties (if any) required

278 Scope —The provisions of this section must be complied with by a Magistrate passing a preliminary order under the Burma Habitual Offenders Restriction Act (II of 1919) and if that order does not set forth the substance of the information received and the term during which the order of restriction shall be in force the entire proceeding is irregular and orders passed therein must be set aside—*Parsodan v A C 2 Rang* 524

279 Order in writing —A Magistrate acting under this Chapter has no power to act until he has recorded an order in writing under this section —*Rameshwar v A C 36 All 262 12 A L J 365* The issue of a warrant under Sec 115 without recording an order under this section is illegal—*2 Weir* 55 So also where the accused persons were arrested as suspected habitual thieves and the Magistrate fixed a date for the production of evidence with the object of issuing a notice under section 112 but on the date fixed after hearing the prosecution evidence he at once called upon the accused to enter upon his defence to a charge under section 110 held that the procedure was illegal and the proceeding must be set aside It

is only after the Magistrate has recorded an order under sec 112 that the actual hearing can by law take place at all—*Rajbansi v Emp* 42 All 646 22 Cr L J 228 In 10 O C 365 however it has been held that the provisions of this section are purely directory and a failure to record the order is a mere irregularity In *In re Kavallam* 26 M L T 385 20 Cr L J 763 it was held that the omission to draw up a proceeding under this section or to serve a copy of the order on the accused under section 115 did not vitiate the proceedings if the order was drawn up later and read out and explained to the accused who appeared in Court in pursuance of a summons

280 Contents of the order —The Magistrate should be very careful in drawing up the preliminary order bearing in mind the provisions of Sec 118 which lays down that the final order shall not be at variance with the preliminary order passed under section 112

(a) *Substance of the information*—This should be stated with sufficient fulness for the accused person to have a clear understanding of the matter that he has to meet in his defence—*Punj Cir Chap XLIV* p 166 Under this section the substance of the report made to the Magistrate should be clearly disclosed to the accused so that he may be informed of the charges or of the nature of the evidence which he is to rebut Thus a notice under section 110 must contain something more than a mere reproduction of the clauses of the section There should be sufficient indication of the time and place of the acts charged and sufficient details which enable the accused to know what facts he is to meet—43 Mad 450 *Aripa-mudhu v Emp* 19 Cr L J 905 1918 M W N 751 The parties are entitled to something more than a mere assertion in writing by the Magistrate that he has been informed that an offence (e.g a breach of the peace) is likely to be committed in order to enable them to bring evidence to rebut the truth of such information—6 All 114 11 Cal 13 The parties are entitled to know the nature of the accusation they have to meet and to a reasonable opportunity within which to prepare themselves to meet the accusation and to cite witnesses—11 Cal 13 6 All 214, 43 Mad 450 The accused is entitled to be told the nature and extent of the information on which the Magistrate intends to base the action against him It is that communication which is expected to enable the accused to summon witnesses on his side Therefore if the substance of the report made to the Magistrate is not clearly disclosed and the accused is not informed of the charges and of the nature of the evidence that he is to rebut the proceedings cannot be regarded as legal—*Punga Pradhi v K E* 43 Mad 450 38 M L J 97 21 Cr L J 3541 *Maung Tun v Emp* 4 Bur L J 17 Where a notice under sec 107 did not at all state when the threats complained of were uttered who were the persons who were threatened

and when the apprehension of a breach of the peace arose *held* that the notice was vague and bad in law—*Konda Reddi v K E*, 41 Mad 246 18 Cr L J 878 A notice which is very meagre and does not contain sufficient details regarding the charges brought against the persons must be held not to comply with the provisions of the Code and this defect cannot be remedied by any explanation given by the Prosecuting Inspector at the commencement of the trial—*In re Kuthi Goundan*, 47 M L J 689 A I R (1915) Mad 189 26 Cr L J 673

Merely informing an accused person that he is suspected to be a habitual thief is not a sufficient notice There must be something in the nature of an indictment or charge containing substantial particulars indicating the grounds upon which the police have given information to the Magistrate—*Rajbansi v Emp* 18 A L J 678 42 All 646

In a proceeding under section 107 the Magistrate may give only the substance of the information received and it is not necessary to specify the definite acts which the accused intends to commit—16 A L J 567 In proceedings under sect on 110 an order by the Magistrate stating that he has received some reliable information (though not definite) that the accused is a habitual cattle thief and a receiver of stolen goods is a sufficient compliance with the provisions of this section—*In re Kala* 1896 A W N 73

But a Magistrate is not bound to give the source of the information —*In re Mithu* 27 All 172 29 Cal 392 It is also not necessary to give a list of the prosecution witnesses in the order—35 Cal 243

The omission to set forth the substance of the information will not of itself be sufficient to render the proceeding and the final order null and void unless the accused has been prejudiced by the omission and a failure of justice has been occasioned—15 W R 43 3 All 545 8 Cal 724 1891 A W N 140 *Tanwar v Emp* 26 Cr L J 1398 (Sind) the omission in the notice to give detailed information as to the nature of the evidence for the prosecution is not an irregularity sufficient to vitiate the proceedings especially if the accused had cross examined at great length the witnesses for the prosecution—20 Cr L J 436 (Pat) or if as a matter of fact the accused had clear notice of the case made against them and had ample time and opportunity to let in evidence—*Jai Singh v Emp* 23 Cr L J 42 (Pat)

(b) *The amount of bond* —The summons (i.e. the order in writing which is to accompany the summons under section 115) should strictly specify the amount and nature of the security required and the time for which the security is to run—20 W R 36 Omission to specify the amount of the recognizance and the surety is a mere irregularity which does not vitiate further proceedings—8 Cal 724

(c) *The term of the bond* —The order should set forth a definite period for which security is to be demanded—3 Mad 238 But this term should not be unnecessarily lengthy Thus where a disturbance of the peace was apprehended in a fair which was to last for a fortnight an order demanding security for a period of one year is unnecessary and excessive—6 All 214

(d) *Number character and class of sureties* —The Magistrate in setting forth the number, character and class of sureties should not place undue and unnecessary difficulties in the way of finding them—*Rahmatulla v Emp.* 22 Cr L J 395 (All) The Magistrate should not impose impossible restrictions, as the provisions of this chapter are preventive and not penal—1 S L R 46

1 Therefore a Magistrate has no right to impose a condition requiring the accused to find sureties residing within certain geographical limits (e.g. within one mile or five miles) or residing in a certain locality—22 W R 37 1880 P R 38, *Bhagwan v K E.* 7 A I J 993 11 Cr L J 536, 10 A L J 354, *Raghunandan v Emp.* 20 A L J 520 23 Cr L J 400, 6 O C 199 or to impose a condition that the sureties must be inhabitants of one village—1915 U B R 3rd Qr 86 In 24 All 471 it has been held that the Magistrate is entitled to prescribe certain geographical limits for the residence of sureties, but it must not be too narrow; and therefore where an order was passed by a Magistrate requiring the sureties to be "residing within the Municipality of Mirzapore" the High Court added the words "or in the immediate neighbourhood"

But of course it is reasonable to expect and require that the sureties must not live at such a distance as would make it unlikely for them to exercise any control over the accused—20 All 206, and so where the sureties lived at a distance of 13 miles, they were rejected—*Emp v Babu* 1898 A. W. N. 199, 1895 A. W. N. 143 A condition requiring that the sureties should be neighbours of the accused is reasonable—*Id Ibrahim v Crown* 8 S L R 322 16 Cr L J 479, *Allahdad v Emp.* 17 S I R 160 See Note 302 under Sec 122

Lastly, as regards the class of sureties Since section 112 gives the Magistrate power to define the character and class of sureties, it is open to him to require that they must be *landholders* or persons having a certain pecuniary status—20 All 206, 16 Bom I R 138, *Allahdad v Emp.* 17 S I R 460, 8 S L R 229. (but see *Wasa v Emp.* 1901 P R 28); or that they should be of respectable character and should not be of inferior standing to suspects—8 S I R 173 But a condition that the sureties must not be *landbaridars*, *namdars* and *Chowkidars* (1906 P R 18) or that they must not come from *Kakrahi* and must not be *kunbi* by caste (*Q F v Bawa* 1 Bom L R 520) is too restrictive and illegal

As regards inquiry into the fitness of sureties and the grounds for the rejection see section 122

113 If the person in respect of whom such order is made is present in Court it shall be read over to him or if he so desires the substance thereof shall be explained to him

Procedure in respect of person present in Court

Is present in Court —Even if persons are illegally arrested and brought into Court the Magistrate is justified in treating the persons as present in Court and may proceed to initiate proceedings—*Emp v Ghulam Husain* 12 Cr L J 533 (Bom)

114 If such person is not present in Court the Magistrate shall issue a summons requiring him to appear or when such person is in custody a warrant directing the officer in whose custody he is to bring him before the Court

Summons or warrant in case of person not so present

Provided that whenever it appears to such Magistrate, upon the report of a police-officer or upon other information (the substance of which report or information shall be recorded by the Magistrate) that there is reason to fear the commission of a breach of the peace and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person the Magistrate may at any time issue a warrant for his arrest

281 Issue of summons —Where a charge of criminal trespass and mischief was dismissed and thereupon the Magistrate recorded an order in the presence of both parties calling on them to show cause on a day fixed why they should not furnish security for keeping the peace it was held that it was not necessary to issue a summons to them—2 B L R App 26

Where a Magistrate issued a notice with reference to section 110 but at the time of inquiry passed an order demanding security under section 107 it was held that the Magistrate ought to have issued a fresh notice with reference to section 107 to enable the party to know the facts on which the Magistrate intended to proceed against him—30 Mad 282

The notice issued to the accused to appear and show cause must give him sufficient time to produce his evidence So where notice was served on the 7th requiring the accused to appear on the 9th it was held that

sufficient time was not given and the order for security was set aside—
22 W R 70

282 Issue of Warrant—Section 114 contains two stringent elements obviously directed against all considered precipitancy on the part of the Magistrate in making an order for immediate arrest. He must be of opinion that the only way of preventing a breach of the peace is to commit the person to custody and he must put on record the substance of the Police report or other information by which he is influenced—*Mamruddin v Emp* 5 P L T 95 24 Cr L J 829

To justify an arrest under this section the Magistrate must act upon information that has been recorded. It is not enough for him to merely express a belief that such a course is necessary. Not only must he have reason to fear the commission of a breach of the peace but it must also be shown that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person—*Emp v Babua* 6 All 132

283 Bail—A Magistrate has no jurisdiction to refuse bail to an accused person arrested under a warrant issued under this section—*En-Mahomed v Crown* 9 S L R 158 17 Cr L J 77. When a man who is arrested is not accused of a non bailable offence no needless impediments should be placed in the way of his being admitted to bail. The intention of the law undoubtedly is that in such cases the man is ordinarily to be at liberty, and it is only if he is unable to furnish such moderate security if any is required of him, as is suitable for the purpose of securing his appearance before a Court pending inquiry that he should remain in detention—*Emp v Mir Hashamali* 20 Bom L R 121 19 Cr L J 329

284 Person outside jurisdiction—A Magistrate cannot legally issue a warrant under this section for the arrest of a person who has already left the local limits of his jurisdiction. The person proceeded against must be actually and physically present in the district in which the Magistrate exercises jurisdiction—*In re Ramjiban* 14 Bom L R 889 13 Cr L J 706. But see *Manindra v Emp* 16 Cal 215 (236) where it is held that section 114 is not limited to arrest within the local limits of the Magistrate's jurisdiction but applies to an accused arrested outside the jurisdiction and brought in custody within the jurisdiction for the purpose of proceeding under this chapter. See Note 259 under section 110.

115. Every summons or warrant issued under Section 114 shall be accompanied by a copy of the order made under Section 112 and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same.

Copy of order under Sec. 112 to accompany summons or warrant

285 *Omission to send copy of order* —When the summons was not accompanied by a copy of the order passed under section 112 the whole proceedings were invalid and the order for security must be set aside—17 M L J 438 2 Weir 55 U B R (1897—1901) 16 *Contra*—11 Bom L R 740 and *Narain v Lmp* 25 Cr L J 682 (Nag) where such omission was held to be a mere irregularity cured by Sec 537 See also *In re Kavatham* 26 M L T 385 6 Cr L J 763 1 P L T 632 and *Bajirao v Lmp*, 5 Cr L J 13 (Nag) where it has been held that an order for security is not liable to be set aside merely because no preliminary order was drawn up and served on the accused provided that the preliminary order was drawn up later and read out and explained to the accused when they were brought into Court in pursuance of summonses

116. The Magistrate may if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace and may permit him to appear by a pleader

Where the person against whom proceedings were taken lived at a distance and there was no special circumstance making his personal attendance necessary it would be a very unwise exercise of jurisdiction to require him to appear personally, since the Magistrate could under this section allow him to appear by a pleader—12 Cal 133

The words bond for keeping the peace imply that this section applies only to a case under Sec 107

117. (1) When the order under Section 112 has been read or explained under Section 113 to a person present in Court or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary

(2) Such inquiry shall be made, as nearly as may be practicable, where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases, and where the order requires security for good behaviour, in the manner hereinafter

prescribed for conducting trials and recording evidence in warrant-cases except that no charge need be framed

(3) *Pending the completion of the inquiry under subsection (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety may for reasons to be recorded in writing direct the person in respect of whom the order under Section 112 has been made to execute a bond with or without sureties for keeping the peace or maintaining good behaviour until the conclusion of the inquiry and may detain him in custody until such bond is executed or in default of execution until the inquiry is concluded*

Provided that—

(a) *no person against whom proceedings are not being taken under Section 108 Section 109 or Section 110 shall be directed to execute a bond for maintaining good behaviour and*

(b) *the conditions of such bond whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability shall not be more onerous than those specified in the order under Section 112*

(4) *For the purposes of this section the fact that a person is a habitual offender or is so desperate or dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise*

(5) *Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.*

Change—Subsection (3) and the italicised words in subsection (4) have been added by sec 19 of the Criminal Procedure Code Amendment Act (VIII of 1923) The reasons are stated below Subsections (3) and (4) have been renumbered as (4) and (5)

286 Subsec (1)—**Inquiry into truth of information**—Under this section a Magistrate is bound to inquire into the truth of the information notwithstanding that the accused admits the allegations against him

285 Omission to send copy of order—When the summons was not accompanied by a copy of the order passed under section 112 the whole proceedings were invalid and the order for security must be set aside—17 M L J 438 2 Weir 55 U B R (1897—1901) 16 *Contra*—11 Bom L R 740 and *Nayain v Lish* 5 Cr I J 682 (Nag) where such omission was held to be a mere irregularity cured by Sec 537 See also *In re Kavatham* 26 M L T 385 20 Cr L J 763 1 P L T 632 and *Bajirao v Emp*, 5 Cr L J 132 (Nag) where it has been held that an order for security is not liable to be set aside merely because no preliminary order was drawn up and served on the accused provided that the preliminary order was drawn up later and read out and explained to the accused when they were brought into Court in pursuance of summonses

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117. (1) When the order under Section 112 has been read or explained under Section 113 to a person present in Court or when any person appears or is brought before a Magistrate in compliance with or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary

(2) Such inquiry shall be made, as nearly as may be practicable, where the order requires security for keeping the peace in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases, and where the order requires security for good behaviour, in the manner hereinafter

prescribed for conducting trials and recording evidence in warrant-cases except that no charge need be framed

(3) *Pending the completion of the inquiry under subsection (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety may for reasons to be recorded in writing direct the person in respect of whom the order under Section 112 has been made to execute a bond with or without sureties for keeping the peace or maintaining good behaviour until the conclusion of the inquiry and may detain him in custody until such bond is executed or in default of execution until the inquiry is concluded*

Provided that—

(a) *no person against whom proceedings are not being taken under Section 108 Section 109 or Section 110 shall be directed to execute a bond for maintaining good behaviour and*

(b) *the conditions of such bond whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability shall not be more onerous than those specified in the order under Section 112*

(4) *For the purposes of this section the fact that a person is a habitual offender or is so desperate or dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise*

(5) *Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.*

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286 Subsec (1)—*Inquiry into truth of information —Under this section a Magistrate is bound to inquire into the truth of the information notwithstanding that the accused admits the allegations against him and*

consents to furnish security—U B R (1902—3) 1 *Allahditta v Emp* 26 Cr L J 1041 (Sind) Where the Magistrate initiates proceedings on the strength of a police report he is bound under this section to make an inquiry into the truth of the police report—*Mulchand v Emperor* 37 All 30. If however the accused admits the truth of the information the Magistrate need not proceed with the inquiry—11 W R 50

The inquiry to be held under this section is a full judicial inquiry It must be conducted judicially and becomes a judicial proceeding All the formalities of a judicial proceeding have to be observed in the inquiry—*Sher Zeman v Emperor* 1899 P R 10 18 W R 2 The object of the inquiry is that the accused should have an opportunity to exculpate himself—20 W R 18⁴ M H C R App 22

Place of inquiry—The inquiry should wherever possible be held in the village where the parties reside so as to avoid witnesses being needlessly harassed and to enable the accused without difficulty to procure the attendance of persons willing to speak in his favour—1 Bur S R 346. The inquiry should not be held in a place which is outside the local limits of the Magistrate's jurisdiction and where he has no power to conduct any proceedings if he does so the order passed thereon is void—*Sonaram v A E* 3 C L J 195 3 Cr L J 246

Summoning witnesses—It is quite clear that the accused person when appearing to show cause must be ready with his evidence If he has been unable to bring the witnesses with him on account of the shortness of the notice or other reasonable cause it is his duty when he appears to apply at once for summons to the witnesses he proposes to call—*Emp v Narayan* 9 Bom L R 1385 23 W R 9 A Magistrate is bound to assist both parties in bringing their witnesses by issuing summons to attend—27 W R 70

When a Magistrate is of opinion that the expenses for calling witnesses should be charged from parties he should realise the expenses before issuing the summons—*Govind Sahai v King Emp* 12 A L J 262 15 Cr L J 363

The accused person must be given sufficient time to bring his witnesses and have their evidence recorded Where the accused has not had this opportunity the order against him must be set aside—*Akramuddin v Emp* 41 Cal 806, 22 W R 70, *Q L v Nathu* 6 All 214 *Ponthiram v Emp* 38 C L J 285 25 Cr L J 293

The inquiry ought to be conducted with attention to the ordinary form of justice The defendant should have every opportunity of cross-examining the witnesses produced against him of making his own statement and of calling witnesses on his behalf—4 M H C R App 22

Defence by Pleader—The person against whom proceedings have been initiated under this Chapter has a right to be defended by a pleader—23 Cal 493, 25 All 375 See notes under sec 340

287. Further evidence—The words "further evidence" indicate that some evidence may be taken by the Magistrate even before drawing up the preliminary order under section 112—U. B. R. (1905) Cr P C 29

The Magistrate trying a case is bound by law to hear those witnesses only whose list is sent up by the Police along with the case, and as soon as the witnesses produced in support of the case have been heard, the Magistrate is then to ascertain the names of the persons likely to be acquainted with the facts of the case, and shall summon to give evidence only such of them as he thinks necessary. He is not bound by law to and should not save in very exceptional cases call the other witnesses that the police or any one else may from time to time choose to produce—*Govind Sahai v Emp* 12 A L J 262 15 Cr L J 363

In a proceeding under this section it is erroneous on the part of the Magistrate to admit fresh evidence for the prosecution after the close of the defence case. No further evidence can be admitted except under Sec 540 for which valid reasons must be recorded—*Ganga Singh v A E*, 10 A L J. 383 13 Cr L J 772

288 Subsection (2)—Nature of procedure—An inquiry in a proceeding for security to keep the peace must be made in the same way as in a trial of a summons case—*Emp v Bidyapati* 25 All 273 See also *Cal G. R. & C O* page 82. If it is tried as a warrant case the proceedings would be vitiated—*Uttam Chand v A L A I R* (1924) All 695 26 Cr L J 430. The Magistrate must proceed as nearly as practicable in the same way as under Sec 247. He must state to the accused the particulars of the matter against him and ask him if he can show cause why he should not be required to execute bonds. The question are you willing to execute the bond? answered by a statement that the accused would execute a bond, is not a sufficient compliance with the requirements of this section—*In re Piliampappa* 31 Mal 139. In an inquiry under sec 107, the deposition need not be read over to the witness in the presence of the accused. Sec 52 Cal 668 cited in Note 105 under sec 360.

An inquiry in a good behaviour case must be conducted as if it were a warrant case, and the procedure in Secs 251-250 must be followed. According to those sections an accused person cannot be called upon to enter on his defence until the prosecution closes its case (Sec 256)—*Ganga Singh v King Emp* 10 A L J 383 13 Cr L J 77. The Calcutta and the Punjab High Courts are of opinion that the procedure prescribed for warrant cases is not to be followed strictly but as nearly as practicable to be observed, therefore the accused cannot invoke the aid of sec 250 and is not entitled to ask the Court to recall the witnesses who have given evidence against him for further cross-examination—*Crown v Ahmed Datt* 1916 P R 1, *Chintamon v Emperor* 35 Cal 243

consents to furnish security—U B R (1902—3) 1 *Allahditta v Emp* 26 Cr L J 1041 (Sind) Where the Magistrate initiates proceedings on the strength of a police report he is bound under this section to make an inquiry into the truth of the police report—*Mulchand v Emperor* 37 All 30 If however the accused admits the truth of the information the Magistrate need not proceed with the inquiry—11 W R 50

The inquiry to be held under this section is a full judicial inquiry. It must be conducted judicially and becomes a judicial proceeding. All the formalities of a judicial proceeding have to be observed in the inquiry—*Ster Zeman v Emperor* 1899 P R 10 18 W R 2 The object of the inquiry is that the accused should have an opportunity to exculpate himself—20 W R 18 * 4 M H C R App 22

Place of inquiry—The inquiry should wherever possible be held in the village where the parties reside so as to avoid witnesses being needlessly harassed and to enable the accused without difficulty to procure the attendance of persons willing to speak in his favour—1 Bur S R 346 The inquiry should not be held in a place which is outside the local limits of the Magistrate's jurisdiction and where he has no power to conduct any proceedings, if he does so the order passed thereon is void—*Sonaram v A E* 3 C L J 195 3 Cr L J 246

Summoning witnesses—It is quite clear that the accused person when appearing to show cause must be ready with his evidence. If he has been unable to bring the witnesses with him on account of the shortness of the notice or other reasonable cause it is his duty when he appears to apply at once for summons to the witnesses he proposes to call—*Erip v Narayan* 9 Bom L R 1384 23 W R 9 A Magistrate is bound to assist both parties in bringing their witnesses by issuing summons to attend—2 W R 70

When a Magistrate is of opinion that the expenses for calling witnesses should be charged from parties he should realise the expenses before issuing the summons—*Govind Sahas v King Emp* 12 A L J 262 15 Cr L J 363

The accused person must be given sufficient time to bring his witnesses and have their evidence recorded. Where the accused has not had this opportunity the order against him must be set aside—*Keramuddin v Emp* 41 Cal 806 22 W R 70 *Q E v Nathu* 6 All 214 *Ponthiram v Emp* 38 C L J 285 25 Cr L J 293

The inquiry ought to be conducted with attention to the ordinary form of justice. The defendant should have every opportunity of cross-examining the witnesses produced against him of making his own statement and of calling witnesses on his behalf—4 M H C R App 22 *

Defence by Pleader—The person against whom proceedings have been initiated under this Chapter has a right to be defended by a pleader—23 Cal 493 25 All 375 See notes under sec 340

287. Further evidence —The words 'further evidence' indicate that some evidence may be taken by the Magistrate even before drawing up the preliminary order under section 112—U. B. R. (1905) Cr P C 29

The Magistrate trying a case is bound by law to hear those witnesses only whose list is sent up by the Police along with the case, and as soon as the witnesses produced in support of the case have been heard the Magistrate is then to ascertain the names of the persons likely to be acquainted with the facts of the case, and shall summon to give evidence only such of them as he thinks necessary. He is not bound by law to, and should not, save in very exceptional cases call the other witnesses that the police or any one else may from time to time choose to produce—*Govind Sahai v Emp* 12 A L J 262 15 Cr L J 363

In a proceeding under this section it is erroneous on the part of the Magistrate to admit fresh evidence for the prosecution after the close of the defence case. No further evidence can be admitted except under Sec 340 for which valid reasons must be recorded—*Ganga Singh v A E*, 10 A L J. 383 13 Cr L J 772

288 Subsection (2)—Nature of procedure —An inquiry in a proceeding for security to keep the peace must be made in the same way as in a trial of a summons case—*Lmp v Bidyapati* 25 All 273 See also *Cal G. R & C O* page 82 If it is tried as a warrant case the proceedings would be vitiated—*Uttam Chand v A L*, 11 R (1924) All 695 26 Cr L J 430 The Magistrate must proceed as nearly as practicable in the same way as under Sec 242 He must state to the accused the particulars of the matter against him and ask him if he can show cause why he should not be required to execute bonds. The question are you willing to execute the bond? answered by a statement that the accused would execute a bond, is not a sufficient compliance with the requirements of this section—*In re Piliappappa* 34 Mad 139 In an inquiry under sec 107, the deposition need not be read over to the witness in the presence of the accused. See 5. Cal 668 cited in Note to s under sec 360

An inquiry in a *prohibition* case must be conducted as if it were a warrant case, and the procedure in Secs 251-256 must be followed. According to those sections an accused person cannot be called upon to enter on his defence until the prosecution close its case (sec 256)—*Ganga Singh v King Lmp* 10 A L J 383 13 Cr L J 77. The Calcutta and the Punjab High Courts are of opinion that the procedure prescribed for warrant cases is not to be followed strictly but is nearly as practicable. It to be observed therefore the accused cannot invoke the aid of sec 256 and is not entitled to ask the Court to recall the witnesses who have given evidence against him for further cross examination—*Crook v Ahmed Baksh*, 1910 P R 1, *Chintamon v Emperor* 35 Cal 243

Sub-section (3) —“This sub-section has been added¹ to enable the Magistrate in emergent cases to take immediate steps to preserve the public peace or for the public safety by taking security pending the detailed inquiry”—*Statement of Objects and Reasons* (1914).

289 Sub-section (4)—Evidence of general repute —See this subject fully discussed in Note 272 under section 110

Prior to the amendment of this sub section, evidence of general repute was admissible only in those cases where the person was a habitual offender within the meaning of clauses (a) to (e) of section 110. It could not be adduced to prove under clause (f) of that section that a man was a desperate and dangerous character—*Emp v Indar* 40 All 372, 19 Cr L J 871 (Nag), *In re Ranga Reddi* 43 Mad 450, 29 Cal 779, *Babu Murfaza v K L* 9 O C 69, 1905 A W N 41, *Wahid Ali v Emp*, 11 C W N 789, 5 C W N 249, *Nur Muhammad v Crown*, 1917 P W R 8. These rulings are no longer good law in view of the amendment of sub section (4) of the present section.

But the evidence of general repute is not admissible in a case where a person is called upon to furnish security under section 107 of the Code—*Emp v Bidyapati*, 25 All 273, *Banarasi Das v Emp*, 1888 P R 16.

‘Or otherwise’;—According to the general rule of interpretation the word ‘otherwise’ must be read as meaning something *ejusdem generis* with the particular or particulars alleged above it e.g. hearsay evidence. It is clear that the intention of the Legislature is that the Magistrate should use very large discretion as to the evidence which he may admit in the proceedings—*Emp v Kallu Mal* 1904 A W N 140.

The expression ‘or otherwise’ would include statements made by some of the co accused amounting to a confession of the actual commission of the offence and incriminating the other accused—*Sarju v Emperor*, 41 All 231.

290 Sub-section (5)—Joint trial —Under this section, the persons who had been associated together may be tried jointly. But there must be clear evidence to prove the association—*Deodhari v Emp*, 6 P L T 810 : 26 Cr L J 738. Where it was clearly established that the accused (who were father and his three sons) were associated together and formed a gang, and the evidence against them was all the same, held that the case was one in which the accused could be rightly dealt with together and that any minute inquiry into the complicity of each of the accused individually was not necessary—*Parasulla v K L*, 13 C W N 244. If a gang of disorderly persons join together in jointly committing acts of violence or criminal intimidation, proceedings against the whole gang in the same case are proper, and it suffices in such cases that some members of the gang committed various acts. It is not necessary that the evidence

should establish that on every occasion the whole gang were together. It is sufficient if the evidence establishes that there is a gang of persons joining together to commit such acts as the security section exists to prevent—*Bakaram v Imp* 3 Cr I J 741 (Nag). Where certain persons serving under a common master were found to have committed certain acts of extortion for the benefit of their master held that although each of the acts alleged was not done by all of them together yet they were so associated together as to justify a joint inquiry—*Srikant v Imp* J C W N 898.

The fact that persons are members of an undivided family would not by itself render each member liable for the misconduct of any other member. The test to be applied is whether there has been habitual association between the persons charged in respect of the misconduct alleged in the complaint—*Kripasindhu v Imp* 1918 M W L 751 19 Cr I J 905. Where no such association is proved a joint inquiry is improper but the trial need not be set aside unless it is shown that the accused was actually prejudiced or that the trial led to an improper order being passed—*Babu Murlara v A E* 9 O C 69 Q E v *Abdul Kadir* 9 All 452.

Even where the association of the several accused is established satisfactorily the Magistrate has a discretion to try the accused jointly or separately—*Hari Telang v Q L* 27 Cal 781 6 Cal 96 *Jai Gound v K E* 15 O C 263. Although there is no legal prohibition in jointly trying a number of persons proceeded against under sec 107 still it is highly unjust and unfair to proceed against them jointly unless it is apparent that they formed a gang. The case of each has to be considered separately and this is not likely to be effected if the trial is joint—*Muhammed Ismail v Imp* 1 A L J 841 25 Cr I J 957.

Association what is not—In the absence of any evidence to prove that the persons constituted a gang the mere fact that they belonged to one tribe and village with a bad name is not sufficient evidence of association and therefore they cannot be tried jointly in one and the same proceeding—1895 P R 1. Thus the fact that the accused persons are close neighbours and had been previously implicated in good many cases together, does not lead to the inference that they were associated together in the particular offence under inquiry, and does not justify a joint trial of them all—*Jogendra v Imp* 21 Cr L J 700 (Cal).

The word association cannot apply to such cases where the offence is purely personal to the offender. For instance the question whether the person is a habitual thief or not is personal to himself and forms a separate matter by itself. So where four persons were charged under Sec 110 (a) as being thieves by habit it was held that there was an error in law in trying them all together—4 L B R 46. So also the fact that

the accused are desperate and dangerous persons hazardous to the community, is a fact which pertains to each accused separately, and there is no such connection between them in regard to their character which may be deemed as habitual association. Consequently, proceedings should be taken separately against each of the accused persons—*Hari Telang v Q E*, 27 Cal 781. *In re Kullu Gounden*, 47 M L J. 689. A I. R. (1925) Mad 189.

Again sub section (5) does not authorise a Magistrate to deal with persons charged under *separate* sections in one and the same inquiry. Thus, a person called upon to give security under section 109 and another person called upon to give security under sec 110 cannot be tried together in the same proceeding—*A E v Mchen*, 8 O C 91. 2 Cr L J 224.

And lastly two contending parties opposed to one another and inclined to commit an offence involving a breach of the peace, cannot be said to have been associated together, and a joint trial of such contending parties is illegal—*Fran Krishna v Emp*, 8 C W N 180, 31 Mad 276. *Kamal v Emp*, 11 C W N 472, 14 A L J 268. *Kishore v Emp*, 6 P L T 768. 26 Cr L J 1248. But in 9 All 452 it has been held that such a joint trial is not *ipso facto* null and void, except where the accused has been prejudiced thereby.

Separate finding and evidence—Where proceedings are taken jointly against more persons than one under this sub section, the Magistrate must come to a *separate* finding as regards each of them *individually*—35 Cal 929. *Kalu v Emp* 37 Cal 91, 1895 P R 1. *Brijnandan v Emp*, 37 All 33. 16 Cr L J 46, and the judgment must show that the Magistrate has considered the case of each individual accused—*Kahu Mirza v Emp*, 37 Cal 91. The case of each person is to be considered on its own merits and it should not be allowed to be mixed up or prejudiced by that of the others—6 All 214. *Md Ismail v Emp*, 21 A L J 841. 25 Cr L J 952. Upon general principles every accused person is entitled to insist that his case shall be tried separately from the case of other persons similarly circumstanced—*Q E v Abdul Kadir*, 9 All 452. 1909 P. W R 25.

The Magistrate must insist upon definite evidence being given against each person charged—*Jai Goring v A E*, 15 O C 263. 13 Cr L J 760. What is evidence against one cannot be treated as evidence against all others without discriminating between the cases of the various persons implicated—9 All 452. *Emp v Angnu Singh* 45 All 109 (111). Thus where the evidence recorded by the Magistrate has bearing only on 11 out of 26 persons called upon to show cause his order binding down all the 26 persons is not valid, it is valid only as regards those against whom the evidence is relevant—10 C L R 335.

118 (1) If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly.

Provided—

first, that no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under section 112,

secondly, that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive,

and that when the person in respect of whom the bond shall be executed by him or his

proof These words show that an inquiry is required without inquiry and *proof*—
 The finding of the Magistrate is much detailed under this section—
 In general terms that the accused should be bound to keep the peace

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the accused are desperate and dangerous persons hazardous to the community is a fact which pertains to each accused separately and there is no such connection between them in regard to their character which may be deemed as habitual association. Consequently proceedings should be taken separately against each of the accused persons—*Hari Telang v Q E* 27 Cal 781 *In re Kutti Gounden* 47 M L J 689 A I R (1925) Mad 189

Again sub section (5) does not authorise a Magistrate to deal with persons charged under *separate* sections in one and the same inquiry. Thus a person called upon to give security under section 109 and another person called upon to give security under sec 110 cannot be tried together in the same proceeding—*A E v Mehen* 8 O C 91 2 Cr L J 224

And lastly two contending parties opposed to one another and inclined to commit an offence involving a breach of the peace, cannot be said to have been associated together and a joint trial of such contending parties is illegal—*Pran Krishna v Emp* 8 C W N 180 31 Mad 276 *Kamal v Emp* 11 C W N 47 14 A L J 268 *Kishore v Emp* 6 P L T 768 26 Cr L J 1248. But in 9 All 452 it has been held that such a joint trial is not *ipso facto* null and void except where the accused has been prejudiced thereby.

Separate finding and evidence—Where proceedings are taken jointly against more persons than one under this sub-section the Magistrate must come to a *separate* finding as regards each of them *individually*—35 Cal 929 *Kalu v Emp* 37 Cal 91 1895 P R 1 *Brijnandan v Emp*, 37 All 33 16 Cr L J 46 and the judgment must show that the Magistrate has considered the case of each individual accused—*Kalu Mirza v Emp* 37 Cal 91. The case of each person is to be considered on its own merits and it should not be allowed to be mixed up or prejudiced by that of the others—6 All 214 *Mid Ismail v Emp* 21 A L J 841 25 Cr L J 95. Upon general principles every accused person is entitled to insist that his case shall be tried separately from the case of other persons similarly circumstanced—*Q E v Abdul Kadir*, 9 All 452 1909 P W R 25

The Magistrate must insist upon definite evidence being given against each person charged—*Jai Gound v A F* 15 O C 263 13 Cr L J 760. What is evidence against one cannot be treated as evidence against all others without discriminating between the cases of the various persons implicated—9 All 452 *Emp v Angnu Singh* 45 All 109 (111). Thus where the evidence recorded by the Magistrate has bearing only on 11 out of 26 persons called upon to show cause his order bringing down all the 26 persons is not valid. It is valid only as regards those against whom the evidence is relevant—10 C L R 335

118 (1) If upon such inquiry it is proved that it is necessary for keeping the peace or maintaining good behaviour as the case may be that the person in respect of whom the inquiry is made should execute a bond with or without sureties the Magistrate shall make an order accordingly

Provided—

first that no person shall be ordered to give security of a nature different from or of an amount larger than, or for a period longer than that specified in the order made under section 112,

secondly, that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive,

thirdly, that, when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties

291 If it is proved etc.—**Evidence**—These words show that an order under this section cannot be made without inquiry and proof—**Ratanlal 385** The Magistrate must give his reasons for finding it proved that security is necessary—*In re Raja* 10 Bom 174 (175) The finding of the Magistrate must be based on clear and full evidence As much detail as possible should be required before making an order under this section—*Emp v Hamidulla* 1889 A W N 114 A finding in general terms that it is for the interest of the community at large that the accused should be bound down for good behaviour is not sufficient—*Nakhi Lal v Q E* 27 Cal 656

The mere fact that the accused person says that he is willing to give security to keep the peace is not the kind of proof required by this section as a condition precedent to the taking of security—*Prem Singh v Crown* 1917 P R 27 18 Cr I J 847 *Crown v Sheodan* 1915 P R 24 See Note 236 under sec 107 When the accused denied the allegations but expressed his willingness to execute a bond whereupon he was ordered to execute a bond the order was held to be illegal in as much as the accused denied every allegation on the basis of which he was considered liable to furnish security, and no evidence was taken to prove those allegations—*Emp v Rai Singh* 20 Cr L J 105

As to the nature of evidence see notes under Secs 107 110

292 Order for security—The object of this section is the prevention and not the punishment of offences and consequently a Magistrate when passing an order in terms of this section ought not to have any direct intention of inflicting punishment—*Q E v Kaudhata* 7 All 67 There fore a Magistrate ought not to impose arbitrary conditions not essential for the object in view which it would be impossible for the accused to fulfil still less impossible conditions The order must not be tantamount to saying that the prisoner shall not furnish any security at all but must go to jail It is not in the power of the Magistrate to pass such order The object of the law is that the person charged shall furnish if he can good and sufficient security—22 W R 37

According to the first proviso to this section the final order must not be at variance with the preliminary order Thus the Magistrate cannot vary the conditional order passed under Sec 117 by imposing further conditions in the final order—*Ramanand v A E*, 11 O C 267 8 Cr I J 344 1906 A W N 276 So also it is illegal to require a bond for good behaviour when the notice was to show cause with respect to keeping the peace—*Driver v Q E* 25 Cal 798 Similarly the Magistrate is not competent to demand security with reference to Sec 110 when the preliminary order was with reference to sec 109—*U B R (1897—1901)* 24 (In such a case the proper course is to institute fresh proceedings—*Ibid*) So again the Magistrate is not justified in demanding security for a larger amount than what was communicated to the accused in the preliminary order—1907 P W R 11 18 W R 61 *Emp v Debi* 1885 A W N 30 nor is he justified in demanding sureties when the summons made no mention of sureties at all—18 W R 61 In cases where heavier security is deemed necessary the Magistrate ought to issue fresh summons setting forth the amount intended to be taken—18 W R 61 *Emp v Md Ismail* 1881 A W N 152

Moreover the Magistrate cannot in the final order direct the accused to give security for a longer period than what was mentioned in the notice under section 117—*Ramchandrar v Emp* 26 Mad 471

Supplementary order for larger security—A Magistrate passed a final order directing certain persons to furnish security in certain amounts A month later he passed another order directing one of the accused to furnish security in a much bigger sum and stating that he had overlooked that this accused had been called upon in the preliminary order to furnish a larger security It was held that the second order was *ultra vires* After the Magistrate had finished his case, it was beyond his power to alter the order—*Rajkumar v Emp* 17 A I J 335

293 Amount of security—Under proviso (2) in fixing the amount of security the Magistrate should have due regard to the circumstances

of the case and the security should not be disproportionate to the ability of the accused to furnish it with reference to his means and station in life—*Q E v Rama* 11 Bom 37 *Q E v Nathu* 1 All 14 *In re Umbica* 1 C L R 18 *In re Jugut* Cal 110 *Ah v Fimp* 1900 P R 17 1890 P R 30 *Firal v Fimp* 12 Cr L J 110 5 S L R 10 *In re Nil madhub* 19 W R 1 *Q v Gholam Mahomed* 2 W R 17 4 M H C R App 46 2 Weir 5 The amount should be such as to give the accused a fair chance of complying with the conditions of the security and the Magistrate should not fix an amount for which there is a probability of the accused being unable to find security—*Ah v Fimp* 1900 P R 17 *Wasia v Fimp* 1901 P R 28 *Barkat v Crown* 1900 P R 24 2 Weir 52 4 M H C R App 46 *Fimp v Dedar* 1 Cal 384 When the accused is unable to give security for the amount required and remains in jail it is an index that the Magistrate has not exercised a proper discretion in fixing the amount—13 All 80

There is no warrant in law for taking separate bonds from the accused and his sureties individually and severally exceeding in the aggregate the amount for which the accused is liable—*Jawara v Empress* 1890 P R 30

Magistrate to state grounds—On a requisition from the High Court the Magistrate is bound to state the grounds upon which he fixed the amount of security Where the amount of security is *prima facie* unreasonable the High Court can call upon the Magistrate to state the grounds for fixing that amount—*In re Jugut* 2 Cal 110 *Ram Singh v Emp*, 1883 P R 1

House property as security—The accused was ordered under this section to furnish a bond for Rs 200 and a respectable surety Such a surety came forward and offered security in the shape of house property worth Rs 500 The Magistrate rejected the surety It was held that the surety being respectable and the house being worth Rs 500 should have been accepted though it was true that under sec 514 only moveable property could be attached and sold during the surety's lifetime for the recovery of the penalty—*Nanke v Emp* 16 A L J 503 19 Cr L J 711

293A Minor—In the case of a minor the bond shall be executed only by his sureties See proviso 3 The reason for this proviso is no doubt the incapacity of the minor to contract—4 L B R 12

294 Revision by High Court—The power to demand security from suspected persons is a power that is almost as much of an executive as of a judicial nature and the jurisdiction with which the Magistrate is invested with regard to suspected persons is a very large one It would be going counter to the spirit of the Code to give persons ordered to furnish security a remedy in the nature of an appeal to the High Court w

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294 Revision by High Court—The power to demand security from suspected persons is a power that is almost as much of an executive as of a judicial nature and the jurisdiction with which the Magistrate is invested with regard to suspected persons is a very large one. It would be going counter to the spirit of the Code to give persons ordered to furnish security a remedy in the nature of an appeal to the High Court which

has not been granted to them by the Legislature. Therefore the High Court will interfere with the orders passed by a Magistrate only on the very clearest and strongest grounds which demonstrate that there has been in the particular case a gross miscarriage of justice—*Balmukand v Emp.* 1889 P R 23

The High Court will interfere in revision where the order is based on no evidence on the record—*Sher Singh v Hari Singh* 1912 P L R 195 13 Cr L J 720 *Emp v Sukhdeo*, 14 A L J 215 17 Cr L J 157 or where the materials on which the order was passed are clearly insufficient to support the order—*Nasar Chandra v Emp* 38 C L J. 198 or where there is nothing on the record to show that an inquiry as required by sec 117 was held—*Mul Chand v K E* 12 A L J 1262 37 All 30, *Emp v Sukhdeo* 14 A L J 215 It will also interfere where the judgment of the District Judge deciding in appeal under section 110 is a very short one and does not show that evidence was all examined and carefully weighed—*Sarwan v Emp*, 14 A L J 279 17 Cr L J 167, *Babu Pershad v Emp*, 13 Cr L J 9 (All) or where the Magistrate disbelieved the evidence produced by the accused without any substantial reason—*Mishar ban v Emp*, 16 Cr L J 805 13 A L J 1046, *Hakim Singh v Emp* 13 A L J 1055 16 Cr L J 810 or where the Magistrate has not given due effect to the evidence for the defence—*Gayani v Emp* 17 Cr L J. 461 (All) or where the Lower Appellate Court in hearing the appeal has not taken the trouble to rehear the case—*Ibid*

The High Court has the power to interfere in revision where the exercise of discretion being required by law, the lower Court exercised no discretion at all or exercised its discretion in a wholly unreasonable and improper manner e.g. where the Magistrate ordered security to be furnished in an unreasonably large sum out of all proportion to the means of the accused—2 Cal 110 The High Court may interfere in revision if there is a material error in any judicial proceeding i.e. an error resulting in an unjust order for security—*Ibid*

See also Note 276 under sec 110

Appeal.—See sec. 406

110 If, on an inquiry under section 117, it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made, should execute a bond, the Magistrate shall make an entry on the record to that effect, and if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him.

295 Further inquiry —The word discharge means merely a permission to depart. It does not mean the discharge of an accused person as contemplated by Sec 437 (now 436) so as to enable further proceedings being instituted under that section against the person discharged under this section—33 Mad 85. Section 437 (now 436) does not enable a Court to direct further inquiry in a case of discharge of a person against whom security proceedings were instituted under Chapter VIII because such a person is not an 'accused' within the meaning of that section—*Q E v Iman Mandal* 27 Cal 662 *Dayanath v Emp* 33 Cal 8 1905 P R 47 *Emp v Roskan Singh* 22 A L J 129 46 All 235 *Narain v Durga* 1911 P R 6 12 Cr L J 237 1914 U B R 1st Qr 3 (But the contrary view has been taken in 24 All 148 36 All 147 1899 A W 203 1903 P R 24 16 Bom 661 35 Bom 401 and 21 All 107 where it is held that the person proceeded against under this chapter may be said to be an accused person and further inquiry may therefore be directed)

Section 436 as now amended in 1923 clearly applies only to the case of a person *accused of an offence*; further inquiry cannot therefore be directed against a person discharged under sec 119 because the person proceeded against under this chapter is not accused of an *offence*. The rulings cited above within brackets are no longer good law. See Note 1180 under sec. 436.

C—Proceedings in all Cases subsequent to Order to furnish Security

120 (1) If any person, in respect of whom an order requiring security is made under section 106 or section 118 is at the time such order is made, sentenced to or undergoing a sentence of, imprisonment the period for which such security is required shall commence on the expiration of such sentence

(2) In other cases such period shall commence on the date of such order, unless the Magistrate for sufficient reason fixes a later date

296 On the expiration of the sentence —Under this section a convict undergoing a sentence of imprisonment cannot be obliged to give security until the imprisonment ends nor can an order for imprisonment (under Sec 123) in default be made till then—*Q E v Appa Ratanlal* 765 *Emp v Rangya* 4 Bom L R 934 *Q E v Pandu Ratanlal* 774 *Kya Wa v K E* 10 Cr L J 69 3 L B R 34; 22 Cr L J 95 (All),

If in the meantime he is convicted of another offence, and sentenced to a fresh term of imprisonment the order for security should not be passed until after the expiry of both imprisonments. If before such expiry the prisoner gives the required security, the Magistrate cannot pass an order of imprisonment under sec 123—*Q E v Pandu Ratanlal* 774

The accused was convicted under sec 147 I P C but was released on bail pending an appeal against the conviction. While he was on bail proceedings were taken against him under sec 110 of this Code and he was ordered to furnish security or in default to undergo imprisonment. His appeal was afterwards dismissed and the Magistrate ordered that as he was undergoing imprisonment in default of furnishing security, the sentence under sec 147 I P C would commence after the expiry of the sentence under sec 110 Cr P C. Held that the order was illegal, being in contravention of subsection (1) of this section—*Emp v Jhabder*, 22 Cr I J 95 (All)

Subsection (2) — *Fixing later date* — The object of this sub section is to allow a Magistrate to grant time to the accused instead of at once proceeding to order imprisonment as if in default. This is shown by Sec 123 which provides that the security may be given on or before the date on which the period for such security commences—*Mad Abdul Bari v Emp* 4 C W N 121

Fresh security — A second order requiring further security from the same person to commence on the expiration of the term of security already given passed during the continuance of the first one, is not a proper order. If at the end of the period the act involving a breach of the peace is still continued, a further security can be demanded on fresh proceedings being properly taken—*Mad Abdul Bari v Emp* 4 C W N 121

121 The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond

Contents of bond

297 Breach of bond for keeping peace — A bond for keeping the peace will not be forfeited by the commission of any offence. It can be forfeited only by the commission of offences likely in their consequences to cause a breach of the peace. Thus a conviction for theft (*In re Haren Chunder* 18 W R 63), wrongful confinement or extortion (*In re Zearuddin* 19 W R 48) or for abduction (1906 P R 6) or for a secret attempt to poison a person (*Ahmad Gul v Crown* 1914 P R 22 15 Cr I. J 605) will not entail a forfeiture of the bond

In *Ananthachari v. Ananthachari* 7 Mad 169 however it has been held that it is not necessary that some actually punishable offence should be committed. All that is necessary to show is that some act was done which was likely in its consequence to provoke a breach of the peace.

A bond to keep the peace may be forfeited on the commission of any act involving a breach of the peace no matter whether the act is committed against the person at whose charge the original order was framed or against any other person—15 W. R. 14. It is also immaterial whether the accused committed the act with his own hands or instigated other persons to do it. In either case the bond is forfeited—7 Mad 169 11 W. R. 5.

If some persons (Hindus) are bound down under section 107 owing to an apprehension of a breach of the peace on account of their interference with the slaughter of cows by the Mahomedans at a particular place such persons are not debarred from instituting a civil suit to prevent the Mahomedans from slaughtering cows at that place and the institution of the suit will not amount to a breach of the bond which they were required to furnish. The filing of the civil suit may be extremely provocative to the Mahomedans and may lead to further quarrel and breach of the peace but it cannot by any stretch of language be called a wrongful act which would entail forfeiture of the bond. The bringing of the civil suit is a perfectly legal action and the Hindus were acting within their rights in doing so. It is clearly not the intention of the legislature to prevent persons even though bound down by a security bond from seeking to enforce their rights in Civil Courts otherwise, the result will be that no person so bound over would be able to institute a civil or criminal proceeding without endangering the forfeiture of his bond—*Sital v. Crown* 1 Lah 310 21 Cr L J 702.

298 Breach of bond for good behaviour.—A bond for good behaviour will be forfeited by the commission of any offence. Thus a conviction for causing grievous hurt (1915 P. R. 10) or a conviction under Sec. 13 of the Gambling Act III of 1867 (1906 A. W. N. 13) would amount to a breach of the bond.

But an actual commission of the offence is necessary for the forfeiture of the bond. Where a person bound down under Sec. 109 was found to be in possession of costly clothes for which he could not satisfactorily account, it was held that the bond should not be forfeited, since there was no proof that he had actually stolen those clothes—*In re Venkata ratnam*, 2 Weir 57. The bond is forfeited by the commission of any offence no matter wherever the offence may be committed. If the bond is entered into in one district and the accused is convicted of committing an assault in another district, the bond is forfeited and the Magis-

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the former district can proceed against the accused under this section—
2 B L R App 11

The words commission of an offence do not necessarily imply a conviction for an offence. Although it is true that a conviction is considered necessary to establish that an offence has been committed but there is no authority for the extreme view that the commission of an offence cannot be proved otherwise than by a conviction—*Mansur v Emp* 24 Cr L J 588

An offence committed in a Native State would amount to a breach of the bond—*Crown v Deua Singh* 1910 P R 28 but see contra—*Bahadur Singh v Crown* 1918 P R 26

299 Procedure on breach of bond —When a person forfeits a bond by being convicted of an offence the amount of the forfeited bond may be recovered but he cannot be forthwith imprisoned for the unexpired portion of the term for which security was taken. The Magistrate's remedy is to take fresh proceedings under this Chapter—*Emperor v Jag Deo* 28 All 629

A Magistrate is not justified in forfeiting a recognisance under this section without giving the party charged with the breach an opportunity to cross examine the witnesses upon whose evidence the rule to show cause has been issued—*Emp v Nobin* 4 Cal 865

300 Liability of surety —See notes under sec 514

It should be noted that in order to make the surety liable the conviction of the principal must be for an offence similar to that for which security was given. When men stand sureties in respect of sec 110 it is to be understood that they undertake liability for only such good conduct on the part of the principal as is indicated by the circumstances under which the security was demanded; it is unjust to hold that they should be compelled to undergo liability for any conceivable form of offence committed by the person for whom they stood as sureties. Thus where a person was required to give security for being suspected as a thief and a habitual receiver of stolen property and a resident of another village was accepted as his surety and the principal offender was subsequently convicted under sec 326 I P C it was held that the surety should always be treated in a considerate manner and he should not be held liable for sudden acts of violence committed by the principal especially when the surety was a resident of another village and had no possible opportunity of controlling the everyday life of the offender—*Udham Singh v A F* 1913 P R 15 14 Cr I J 575. In *Crown v Sher Singh* 1915 P R 10 16 Cr I J 549 under similar circumstances the sureties were not altogether exempted but were ordered to pay a reduced penalty viz Rs 500 instead of Rs 1000.

A person was put on security for Rs 1000 for one year, and two other persons stood sureties for him. The person was afterwards convicted under sec 331 P C in which offence he was found to have taken only a minor part. *Held* under the circumstances that the order of forfeiture of a reasonable sum of Rs 50 against the sureties was sufficient and that they need not be burdened—*Fatta v Crown* 1915 P R 6 16 Cr L J 37

122 A Magistrate may refuse to accept any surety offered under this Chapter, on the ground that, for reasons to be recorded by the Magistrate, such surety is an unfit person

122 (1) A Magistrate may refuse to accept any surety offered or may reject any surety previously accepted by him or his predecessor under this Chapter on the ground that such surety is an unfit person for the purposes of the bond
Provided that before so refusing to accept or rejecting any such surety he shall either himself hold an inquiry on oath into the fitness of the surety or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him

(2) Such Magistrate shall before holding the inquiry give reasonable notice to the surety and to the person by whom the surety was offered and shall in making the inquiry record the substance of the evidence adduced before him

(3) If the Magistrate is satisfied after considering the evidence so adduced either before him or before a Magistrate deputed under subsection (1) and the report of such Magistrate (if any) that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting as the case may be such surety and recording his reasons for so doing

Provided that before making an order rejecting any surety who has previously

accepted the Magistrate shall issue his summons or warrant as he thinks fit and cause the person for whom the surety is bound to appear or to be brought before him

Change—The whole section has been newly drafted by Sec. 20 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

The main changes introduced by this new section are—(1) rejection of a surety previously accepted (2) inquiry into the fitness of a surety and (3) delegation of such inquiry to a subordinate Magistrate. The reasons have been stated below in their proper places

30r Rejection of sureties—The question as to whether a particular person is fit to stand as surety or not is a matter for the decision of the Magistrate. The question in every case is one of discretion and the Magistrate's discretion in this matter is not fettered in any way—*In re Jahl* 13 C W N 80 *Bhawant v K E* 12 A L J 1004 16 Cr L J 54 *Abdul Karim v King Emp* 44 Cal 737 21 C W N 95. But this discretion to accept or reject a surety must be exercised only after a satisfactory inquiry in accordance with law—*Bhawant v K E* 12 A L J 1004 *Akbar Ali v Emp* 42 Cal 706 19 C W N 220 *Rajan v Emperor* 43 Cal 104 20 C W N 1133. The Magistrate can refuse or accept any surety only on valid and reasonable grounds and not on mere conjectures and surmises—10 C W N 1027 41 Cal 764 22 W R 37. So long as the sureties are of a satisfactory class and the security offered is good and sufficient the Magistrate is not justified in rejecting them—*Q v Ganai* 7 N W P H C R 749.

After an order is passed under section 118 demanding sureties the Magistrate cannot introduce any new qualifications while deciding on the suitability of the sureties and cannot reject them because they do not answer to those qualifications—*Allahtlo v Lmp* 26 Cr L J 1041 A I R (1925) Sind 371.

Sureties ought not to be rejected merely on the strength of reports of the Police (*Jai Govind v K L* 15 O C 463 13 Cr L J 760 10 C W N 107 *Lmp v Tota* 15 All 272 23 Cal 455 *Munshi v Lmp* 18 A L J 34 71 Cr L J 365 *Gopi v Emperor* 20 A L J 760 1906 P R 18 *Zorawar v Lmp* 13 A L J 469 16 Cr L J 445 12 A I J 1001 2 S L R 11 2 S I R 15 *Abd Ibrahim v Crown* 16 Cr L J 100 8 S I R 173) without giving them an opportunity of meeting any allegations that may be made against them—15 Cr L J 77 (All). The implicit acceptance of the opinions expressed in police reports without considering the facts upon which such opinions are based would place all persons ordered to furnish security at the mercy of the police—*In re*

Abdul Khan, 10 C W N 1027 When a Magistrate bases his orders on a police report, he abrogates the functions imposed on him by law, and allows the decision of the case to rest with the police. If he asks the police to report, it should be with a view merely of enabling them to collect and call evidence. But in every case his order must proceed on a consideration of the evidence and not of the police report—*Imp v Mahro*, 2 S L R 11. *Jai Gouind v K L*, 15 O C 263. 13 Cr L J 760 The practice of calling in a police officer for a report on the character of the surety is illegal, and the police officer should, if his evidence is necessary, be examined as a witness—*K L v Hakim Khan*, 1906 P R 18 Where a surety tendered by the accused is reported by the police to be an unreliable person, it is not for the surety to prove that he is of good character, but for the Magistrate, if he doubts it, to decide the matter upon evidence—*Munshi Singh v Emp*, 18 A L J 324 Even a Magistrate cannot rely on his own personal knowledge in rejecting a surety and dispense with an inquiry—*Crown v Piru*, 7 S L R 94. 15 Cr L J 378 When a Magistrate receives private information that the sureties are bad characters, he ought not to reject them on that information alone. He should bring the information to the notice of the sureties and give them an opportunity of controverting it—*Ela Buksh v Imp*, 14 C W. N 709

Before the amendment of this section, it was held that when a person had been once accepted as a surety, he could not be rejected subsequently as an unfit person—1 C W N 394. 1905 P R 16 But these decisions are now rendered obsolete by reason of the addition of the words "may reject any surety previously accepted" "We have adopted the suggestion that the provisions of the new section 122 should be elaborated so as to enable a Magistrate to reject a surety previously accepted by him or his predecessor"—*Report of the Joint Committee* (1922) The proviso to subsection (3) prescribes a procedure to be followed in such a case

302. Test as to fitness.—According to the Allahabad High Court the primary test is whether the surety can exercise proper control over the person who has been bound over—*Sheikh Zikri v King Emp* 8 A L J. 785. Mere pecuniary fitness is not the only test of his fitness. The object of requiring security for good behaviour is not to obtain money for the Crown by the forfeiture of recognisances, but to ensure that the accused should be of good behaviour. It is therefore reasonable to expect that the sureties should not be men residing at such a distance as would make it unlikely that they could exercise any control over the accused—*Q E v Rahim Baksh*, 20 All 206; *Emp v Tori*, 1895 A W N 143, *Emp v Babu*, 1898 A W N 199. *Mauna v Emp*, 15 A L J 848. 18 Cr. L J 1039 And this seems to be the intention of the legislature by reason of the addition of the word "for the purposes of the bond."

accepted the Magistrate shall issue his summons or warrant as he thinks fit and cause the person for whom the surety is bound to appear or to be brought before him

Change—The whole section has been newly drafted by Sec. 20 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

The main changes introduced by this new section are—(1) rejection of a surety previously accepted (2) inquiry into the fitness of a surety and (3) delegation of such inquiry to a subordinate Magistrate. The reasons have been stated below in their proper places

301 Rejection of sureties—The question as to whether a particular person is fit to stand as surety or not is a matter for the decision of the Magistrate. The question in every case is one of discretion and the Magistrate's discretion in this matter is not fettered in any way—*In re Jafil* 13 C W N 80 *Bhawani v A E* 12 A L J 1004 16 Cr L J 54 *Abdul Karim v King Emp* 44 Cal 737 21 C W N 95. But this discretion to accept or reject a surety must be exercised only after a satisfactory inquiry in accordance with law—*Bhawani v A E* 12 A L J 1004 *Akbar Ali v Emp* 42 Cal 706 19 C W N 720 *Rajan v Emperor* 43 Cal 1024 20 C W N 1133. The Magistrate can refuse or accept any surety only on valid and reasonable grounds and not on mere conjectures and surmises—10 C W N 1017 41 Cal 764 2 W R 37. So long as the sureties are of a satisfactory class and the security offered is good and sufficient the Magistrate is not justified in rejecting them—*Q v Ganni* 7 N W P H C R 249.

After an order is passed under section 118 demanding sureties the Magistrate cannot introduce any new qualifications while deciding on the suitability of the sureties and cannot reject them because they do not answer to those qualifications—*Allalitto v Emp* 26 Cr L J 1041 A I R (1925) Sind 321.

Sureties ought not to be rejected merely on the strength of reports of the Police (*Jai Gokind v A L* 15 O C 213 13 Cr I J 760 10 C W N 107 *Emp v Tola* 25 All 272 23 Cal 455 *Munshi v Emp* 18 A L J 324 11 Cr I J 315 *Gopi v Emperor* 20 A L J 760 1906 P R 18 *Zorawar v Emp* 13 A I J 469 16 Cr I J 445 1 A I J 1004 2 S L R 11 2 S I R 15 *Abd Ibrahim v Crown* 16 Cr I J 100 8 S I R 173) without giving them an opportunity of meeting any allegations that may be made against them—15 Cr I J 77 (All). The implicit acceptance of the opinions expressed in police reports without considering the facts upon which such opinions are based would place all persons ordered to furnish security at the mercy of the police—*In re*

cannot supervise or control the person bound down or that he is not a resident of the same village (*Suresh v Emp* 3 C L J 575) is not material. So also in *Kalu Mirra v Emp* 37 Cal 91 and *Rayau v Emp* 43 Cal 1024 a failure by the sureties to show that they could exercise proper control over the accused was held to be not a proper ground for their rejection. In *Jafar Ali v Emperor* 37 Cal 446, it has been held that the pecuniary test is the primary test but there may be other objections to be considered, and any such objection must be dealt with in each case as it arises. But in *Asiraddi v Emp* 41 Cal 764 and *Abdul Karim v Emp* 44 Cal 737 the fact that the sureties would not be able to exercise proper control over the accused (who was a notorious dacoit) was held to be a proper ground of unfitness of the sureties.

[In the Amendment Bill of 1914 it was expressly provided that the Magistrate would be able to reject a surety on any one of the following grounds viz (a) that he was not of good moral character or (b) that he was not of sufficient means to enable him to fulfil his pecuniary liability under the bond or (c) that he was unable to control the movements or actions of the person by whom the bond was executed. But the Select Committee of 1916 did not accept this amendment, and observed: "We think that it would be a mistake to attempt any definition of unfitness for the purpose of acceptance of a surety and we recommend that sec 172 should be left unaffected." The Joint Committee of 1922 however again added those clauses but during the debate in the Legislative Assembly (23rd January 1923) they were again deleted.]

What are not disqualifications—The fact that the sureties offered are the *relations* of the accused far from being a disqualification is a circumstance which would be an additional qualification if the sureties are in other respects suitable. A relation is more likely than any other person to keep an eye on the accused—*Emp v Shib Singh* 25 All 131. *In re Abdul Khan* 10 C W N 1027. *Makala v Crown* 1914 P R 6. *Suresh v Emp* 3 C L J 575. *Emp v Miro* 1 S L R 3 22 Cr L J 22 (All).

A Magistrate should not refuse to accept a surety on the ground that he has already stood surety for another man—*Ghisa v Emp* 24 Cr L J 517 A F R (1924) Oudh 132. So also a Magistrate cannot reject a surety simply because he is a Wanthanu member. As long as the security is ample, the Court is bound to accept the same without inquiring into the politics of the person standing surety—*Mannig Tnu v Emp* 4 Bur L J 172.

Previous conviction not a disqualification—The proposed surety is not to be considered as unfit by reason of the fact that he was on one occasion convicted of offences—22 Cr L J 483 (Cal), *Emp v Raghunath*,

In Burma it is laid down that the sureties must be persons who are in a position to influence the accused and likely to be able to restrain him—*Nga Hein v King Emp*, 8 Bur L T 53

In Sind, it has been held that it is not in itself a disqualification that a person cannot exercise active physical control over the accused, it is no doubt an advantage in a surety to be in a position to send for the accused from time to time to question and warn him and to put physical restraint on him but a man may be a satisfactory surety if he is in a position to watch the movements of the accused and to ascertain from time to time how he is behaving—*Mahomed Ibrahim v Crown*, 8 S L R 173 16 Cr L J 100 But mere solvency of the surety is not the only test of his fitness The Magistrate has also to consider the question of the ability of the surety to enforce the good conduct of the accused, as relevant to his fitness—*Imp v Mahomed Pahor*, 1 S L R 46 In another Sind case however it is held that sureties cannot be rejected on the ground that they will not be able to influence the accused The most that a Magistrate can reasonably demand is that they should be respectable men, neighbours of the accused, and solvent up to the amount of the security required—*Crown v Ahmed*, 1 S L R 14

In Oudh it has been held that a surety should not be rejected on the mere ground that he lives at a distance from the accused, but inability to control is a good ground—*Emp v Muhammad Baksh*, 26 O C 284 If the sureties undertake to keep the accused within the area of their observation or to adopt other suitable measures for securing the supervision and control needed to keep him in good behaviour, there can be no inherent objection to their being accepted as sufficient, though they reside at a place 18 miles distant from that of the accused—*King Emp v Ram eshwar*, 10 O L J 299 24 Cr L J 795

According to the Bombay High Court, the condition attached to a surety for good behaviour, demanded under sec 112 that he should be able to control the accused is not a desirable condition—*Emp. v Jiva Natha*, 16 Bom L R 138 15 Cr L J 268 It is sufficient if the sureties are solvent and respectable Therefore, where the sureties offered were solvent and respectable, the mere fact that they lived at some distance from the persons bound over and were not in a position to exercise control over those persons was not a good ground for their non acceptance—*In re Jeshu Bhatta*, 44 Bom 385 21 Cr L J 377 22 Bom L R 100

In Calcutta, however, there is a conflict of decisions as to whether the pecuniary or moral fitness is the primary test In *Ram Pershad v K. I*, 6 C. W. N. 593, *Adam Sheikh v Emperor*, 35 Cal 400 and 13 C W N cliv, it has been held that the primary test is whether the surety is a person of sufficient substance to warrant his being accepted, and the fact that he

cannot supervise or control the person bound down or that he is not a resident of the same village (*Suresh v Emp* 3 C L J 575) is not material. So also in *Kalu Mir v Emp* 37 Cal 91 and *Rajan v Emp* 43 Cal 104 a failure by the sureties to show that they could exercise proper control over the accused was held to be not a proper ground for their rejection. In *Jafar Ali v Emperor* 37 Cal 446, it has been held that the pecuniary test is the primary test, but there may be other objections to be considered and any such objection must be dealt with in each case as it arises. But in *Asiraddi v Emp* 41 Cal 764 and *Abdul Karim v Emp* 44 Cal 737 the fact that the sureties would not be able to exercise proper control over the accused (who was a notorious dacoit) was held to be a proper ground of unfitness of the sureties.

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Previous conviction not a disqualification.—The proposed surety not to be considered as unfit by reason of the fact that he was on occasion convicted of offences—22 Cr L J 483 (Cal). *Emp v*

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Previous conviction not a disqualification.—The proposed surety is not to be considered as unfit by reason of the fact that he was on one occasion convicted of offences—22 Cr L J 483 (Cal) *Emp v Raghunath*,

26 All 183 25 C W N 140 or that he was once challaned in a theft case—*Munshi Singh v Emp* 18 A L J 324

Witness not disqualified—The fact that the proposed surety has given evidence in favour of the accused in the proceeding which resulted in the order for furnishing security, does not disqualify him from standing as a surety for the accused—*Bairagi v Emp* 15 Cr I J 727 (All) So also the fact that the persons offered as sureties helped the accused in his defence is no ground for rejecting them—*Gabardhuu v Emperor*, 16 A L J 63

See also Note 280 (d) under sec 112

303 *Inquiry into the fitness of sureties*—Before the amendment of 1923 this section did not expressly provide for holding an inquiry into the fitness of a surety before accepting or rejecting him. But still in a large number of cases such an inquiry was considered as essential. See 42 Cal 706 *Rajai v Emp* 43 Cal 1024 *Bhawani v K E*, 12 A I J 1004 *Crown v Piru* 7 S I R 94 *Manna v Emp* 15 A L J 848

Under the present section the Magistrate can *delegate the inquiry* to a subordinate Magistrate. But under the old law, it was consistently held in a number of decisions that the Magistrate ought himself to make the inquiry into the sufficiency or otherwise of the sureties. he could not delegate the task to a subordinate officer—*Emp v Balwant* 27 All 293 *Emp v Tola* 25 All 272, *A I v Hakim Khan* 1906 P R 18 *Mahali v Crown* 1114 P R 6 *Emp v Prithi Pal* 1898 A W N 154. These cases should no longer be taken as authoritative. But the Magistrate cannot delegate this task to a Police Officer and act upon the report of that officer. see Note 301 *ante*; and *Kanwal v Emp* 25 Cr. I J 91 A I R (1) 4 Lah 672

A Magistrate of one district has no jurisdiction to make an inquiry into the sufficiency of a surety taken under sec 109 from a vagrant by a Magistrate of another district even if the latter authorises the former to do so as a Magistrate of one district has no power to delegate his powers to a Magistrate of another district—1916 P W R 52

Evidence—The Magistrate can refuse or accept any surety only on tangible evidence recorded and considered by him—*Munshi v Emp* 18 A L J 324. He should examine the sureties as to their fitness and take such evidence as the accused may give and base his decision on the evidence so recorded—*Crown v Piru* 7 S I R 94 *Emp v Mahto* 2 S I R 11. The inquiry is to be conducted judicially and the Magistrate has power to call for and record evidence upon oath or affirmation—*Emp v Ghulam Mustafa* 26 All 371 *Emp v Allahdino* 3 S L R 87. This is now expressly provided in the proviso to subsection (1)

304 Recording reasons.—The Magistrate in rejecting a surety must record his reasons for doing so in his own writing—*Ela Buksh v Emperor* 14 C W N 709 *Kalu Maru v Emp* 37 Cal 91 44 Bom 385 The intention of the Legislature in insisting that a Magistrate should record his reasons in refusing to accept a surety on the ground of unfitness is that the Magistrate should exercise his independent judgment and should not be guided by the opinions expressed in Police reports without considering the facts upon which such opinions are based—*In re Abdul Khan* 10 C W N 1077 When a Magistrate failed to record the reasons and in his explanation to the High Court stated that he did not remember the exact circumstances the order rejecting the sureties was set aside—13 C W N xxvii

Appeal See section 406 A

305 Interference by High Court.—The question whether a particular person is or is not a fit person to stand as surety is one for the decision of the Magistrate and is left to his discretion which is not fettered in any way—13 C W N 80 and the High Court will not lightly interfere—12 A J J 1004 *Bairagi v Emp* 15 Cr L J 747 (All) But if the discretion has not been judicially exercised as for instance where no reasons are given why a surety was rejected (13 C W N xxvii) the High Court will interfere

123 (1) If any person ordered to give security under section 106 or section 118 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned be committed to prison or if he is already in prison be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it

(2) When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall if such person does not give such security as aforesaid issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge or if such Magistrate is a Presidency Magistrate pending the orders of the High Court, and the proceedings shall be laid as soon as conveniently may be, before such Court

Imprisonment in default of security
Proceedings when to be laid before High Court or Court of Session

(3) Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit

Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years

(3A) If security has been required in the course of the same proceedings from two or more persons in respect of any one of whom the proceedings are referred to the Sessions Judge or the High Court under sub section (2) such reference shall also include the case of any other of such persons who has been ordered to give security, and the provisions of sub-sections (2) and (3) shall, in that event, apply to the case of such other person also except that the period (if any) for which he may be imprisoned shall not exceed the period for which he was ordered to give security

(3B) 1 Sessions Judge may in his discretion transfer any proceedings laid before him under sub section (2) or sub section (3A) to an Additional Sessions Judge or Assistant Sessions Judge, and upon such transfer such Additional Sessions Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings

(4) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate

(5) Imprisonment for failure to give security for keeping the peace shall be simple

(6) Imprisonment for failure to give security for good behaviour may be rigorous or simple as the Court or Magistrate in each case directs

(6) Imprisonment for failure to give security for good behaviour shall, where the proceedings have been taken under Section 108, be simple and, where the proceedings have been

taken under Section 109 or Section 110 be rigorous or simple as the Court or Magistrate in each case directs

Change —Subsections (3A) and (3B) and the italicised words in subsection (6) have been added by sec 21 of the Criminal Procedure Code Amendment Act (VIII of 1923). Subsection (6) has been further amended by the Cr P C Second Amendment Act X of 1926. The reasons are stated below.

306 Imprisonment in default of security —There must be *actual failure* to give security in order to enable the Magistrate to pass an order under this section. So, an order for imprisonment passed in *anticipation* of default in giving security was bad—*Q F v Lala*, Ratanlal 408. *High Court Registrar's Letter* Ratanlal 511. *Q F v Shivraya* Ratanlal 395. Imprisonment should follow the failure to furnish adequate security and should not *precede* a finding that the security is inadequate. It is illegal for the Magistrate to send a person to jail pending the receipt of the report from the Revenue and police officers as regards the adequacy of the security—*King Emp v Kaim Khan* 1906 P R 18.

Where a Magistrate passes an order under sec 123 no discretion is allowed to him under Sec 123 and he is bound to imprison *forthwith* a person who cannot give security on the date the order is made. If from any cause the accused has not had a reasonable opportunity of furnishing sureties the only legal method of giving him time is to postpone for such period as may be deemed necessary the making of the order under section 123 awarding imprisonment in default of security—*Punj Circ Ch XLIV* p 168.

A person was ordered to execute a bond for good behaviour for one year and find sureties on 17-12-07 but when he failed to do so he was instead of being committed to prison *at once* given time to find sureties and finally on 24-2-09 he was sentenced to imprisonment for his failure to find sureties. *held* that as the one year had already elapsed from the date of the first order, the order for imprisonment under sec 123 was illegal—*In re Muthu Gounden* 6 M L T 308 10 Cr I J 481.

Person already under imprisonment —If the person against whom an order under this section is passed is already under imprisonment as a substantive punishment for some offence the order under this section should not be passed until *after* the expiry of the term of imprisonment—*Q F v Appa* Ratanlal 765. *Emp v Rangya* 4 Bom L R 934. A sentence under this section cannot run concurrently with any other sentence.

(3) Such Court after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit

Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years

(3A) If security has been required in the course of the same proceedings from two or more persons in respect of any one of whom the proceedings are referred to the Sessions Judge or the High Court under sub-section (2) such reference shall also include the case of any other of such persons who has been ordered to give security and the provisions of sub-sections (2) and (3) shall, in that event apply to the case of such other person also except that the period (if any) for which he may be imprisoned shall not exceed the period for which he was ordered to give security

(3B) A Sessions Judge may in his discretion transfer any proceedings laid before him under sub-section (2) or sub-section (3A) to an Additional Sessions Judge or Assistant Sessions Judge, and upon such transfer such Additional Sessions Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings

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Kind of Imprisonment security for keeping the peace shall be simple

<p>(6) Imprisonment for failure to give security for good behaviour may be rigorous or simple as the Court or Magistrate in each case directs</p>	<p>(6) Imprisonment for failure to give security for good behaviour shall where the proceedings have been taken under Section 108, be simple and, where the proceedings have been</p>
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306 Imprisonment in default of security —There must be *actual failure* to give security in order to enable the Magistrate to pass an order under this section So an order for imprisonment passed in *anticipation* of default in giving security was bad—*Q F v Lahu*, Ratanlal 408 *High Court Registrar's Letter* Ratanlal 511 *Q F v Shivraya* Ratanlal 395 Imprisonment should follow the failure to furnish adequate security and should not *precede* a finding that the security is inadequate It is illegal for the Magistrate to send a person to jail pending the receipt of the report from the Revenue and police officers as regards the adequacy of the security —*King Emp v Kaim Khan* 1906 P R 18

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A person was ordered to execute a bond for good behaviour for one year and find sureties on 17-12-07 but when he failed to do so he was instead of being committed to prison *at once* given time to find sureties and finally on 24-2-09 he was sentenced to imprisonment for his failure to find sureties *held* that as the one year had already elapsed from the date of the first order, the order for imprisonment under sec 123 was illegal—*In re Muthu Gounden* 6 M L T 308 10 Cr I [481

Person already under imprisonment —If the person against whom an order under this section is passed is already under imprisonment as a substantive punishment for some offence the order under this section should not be passed until *after* the expiry of the term of imprisonment —*Q E v Appa* Ratanlal 765 *Emp v Rangya* 4 Bom L R 934 A sentence under this section cannot run concurrently with any other sentence

of imprisonment which the person is undergoing—16 Cr L J 272 (Mad)
See section 170

If a person already imprisoned is sentenced under this section he is simply ordered to be *detained in prison*. See subsection (1). No warrant for such detention is necessary.—*High Court Registrar's Letter* Ratanlal 511

Subsequent imprisonment—If the accused while undergoing an imprisonment under this section is convicted of an offence and sentenced to a term of imprisonment the sentence for the substantive offence must commence at once and should not be postponed to take effect after the expiration of the imprisonment awarded under this section—*Q E v Tulshya* Ratanlal 970 1 Bur L R 364 27 Mad 525 31 Mad 515
Emp v Ishnu 37 Bom 178 13 Cr L J 849 1893 P R 14
Emp v Kanji 5 Bom L R 26
Emp v Durga, 6 Bom L R 1098 See Note 1083 under sec 397

Period of imprisonment—The person failing to give security shall be committed to prison until such period expires i.e. the period of imprisonment in default of security should be the same as the period for which security was demanded under sec 118. It should be neither for a longer nor for a shorter term. Thus, an order requiring security for good behaviour for a period of six months, and in default awarding rigorous imprisonment for *illegis* months is wrong and bad in form—*Q E v Ganoo* Ratanlal 584 23 All 422. If the Magistrate thinks that the term of imprisonment should be shorter the proper course is to report the matter to the District Magistrate for taking action under section 124 (2)—*Q E v Mohi* Ratanlal 668. So also an order awarding imprisonment in default of security for a period longer than that for which the accused was called upon to give security is illegal—2 Weir 57

The period of imprisonment must be definite. an order directing the accused to be imprisoned *until* he gives security is bad—8 Cal 44

307 Sub section (2)—This sub section has reference only to the case where *default* is made in finding security. If the security is given the section does not apply and no reference to the Court of Session is necessary even though the term of security exceeds one year—*Rai Ishri Pershad v Q E* 23 Cal 621 (627) *Ram Kishen v Emp* 15 A L J 872 40 All 39 19 Cr I J 2

When a Magistrate passes an order for furnishing security for a period exceeding one year and default is made imprisonment for default cannot be awarded by the Magistrate. All that he is empowered to do is to detain the accused pending the order of the Sessions Judge—*A F v Myat Aung*, 4 L B R 135 7 Cr I J 412 U B R (1897 1901) 28 *Mahala*

v Crown 1914 P R 6 21 Cr L J 623 (Lah) If the Magistrate passes an order for imprisonment, it will be bad and will not be cured by the District Magistrate reducing on appeal the period of security as well as the term of imprisonment to one year—2 Weir 57. Even a Magistrate cannot pass an order of imprisonment, and then send his order for confirmation to the Sessions Judge—*Emp v Jafar*, 1899 A W N 151 because the proceedings are sent to the Sessions Judge under this section not for the purpose of confirming the order of the Magistrate but for passing his own order—*Q E v Mat Jung*, 4 L B R 135, 6 C P L R 27.

'Exceeding one year'.—A Magistrate cannot legally amalgamate secs 109 and 110, and require the execution of two bonds for good behaviour for an aggregate period of 18 months and in default of the same being furnished, commit the accused to prison for 18 months' rigorous imprisonment. At any rate, in such case the proceedings should be referred to the Sessions Judge under the provisions of sec 123 (2)—*Q E v Balya*, Ratanlal 946.

Reference by Magistrate to High Court.—If the Sessions Judge, on a reference made under this section, refuses to confirm the order of the District Magistrate passed under sec 118, and discharges the person called upon to furnish security, the Magistrate cannot refer the case to the High Court under sec 438. It would be contrary to every principle to allow the District Magistrate to report against an order of the Sessions Court to which he is subordinate. If the Magistrate, as the officer responsible for the peace of his district, is dissatisfied with the order of the Sessions Judge, his proper course is to ask the Public Prosecutor to move the High Court for revision—23 Cal 249, *Emp v Jamna Bai*, 28 All 91.

308 Sub-section (3) —*Procedure on reference* —On a reference made to him under sub-section (2) the Sessions Judge should give notice to the accused—*Emp v Girand*, 25 All 375, *Nakhi Lal v Q E*, 27 Cal 656, and allow him to be defended by a pleader—*Jhojha v Q E*, 23 Cal 493, 27 Cal 656 4 C W N 797, *Emp v Girand*, 25 All 375. Although the Code has made no provision for giving notice to the accused before disposing of references under this section, still it is the duty of the Sessions Judge to give such notice, where it was not given, the High Court condemned the procedure as amounting to a denial of justice—*Emp v Girand* 25 All 375.

This section gives power to the Sessions Judge to deal with the case on the merits and to pass such orders as the circumstances of the case may require—*E v Amir Bala* 35 Bom 271 13 Bom L R 203 12 Cr L J 257. It is his duty to consider the evidence and to pass an order after doing so and not as mere matter of course—1910 P R 20. Where there are several prisoners, the Judge in writing his order should show that

of imprisonment which the person is undergoing—16 Cr L J 272 (Mad)
See section 170

If a person already imprisoned is sentenced under this section he is simply ordered to be *detained in prison*. See subsection (1). No warrant for such detention is necessary.—*High Court Registrar's Letter* Ratanlal 511

Subsequent imprisonment —If the accused while undergoing an imprisonment under this section is convicted of an offence and sentenced to a term of imprisonment the sentence for the substantive offence must commence at once and should not be postponed to take effect after the expiration of the imprisonment awarded under this section—*Q E v Tulshya* Ratanlal 970 1 Bur L R 364 77 Mad 525 31 Mad 515 *Emp v Vishnu* 37 Bom 178 13 Cr L J 819 1895 P R 14 *Emp v Kanti*, 5 Bom L R 26 *Emp v Durga*, 6 Bom L R 1098 See Note 1083 under sec 397

Period of imprisonment —The person failing to give security shall be committed to prison until such period expires i.e. the period of imprisonment in default of security should be the *same* as the period for which security was demanded under sec 178. It should be neither for a longer nor for a shorter term. Thus, an order requiring security for good behaviour for a period of six months, and in default awarding rigorous imprisonment for *three* months is wrong and bad in form—*Q E v Ganoo* Ratanlal 584 23 All 422. If the Magistrate thinks that the term of imprisonment should be shorter the proper course is to report the matter to the District Magistrate for taking action under section 124 (2)—*Q E v Mohi* Ratanlal 668. So also an order awarding imprisonment in default of security for a period longer than that for which the accused was called upon to give security is illegal—2 Weir 57

The period of imprisonment must be definite. an order directing the accused to be imprisoned *until* he gives security is bad—8 Cal 144

307 Sub section (2) —This sub section has reference only to the case where *default* is made in finding security. If the security is given the section does not apply and no reference to the Court of Session is necessary even though the term of security exceeds one year—*Rai Ishri Pershad v Q E* 73 Cal 621 (627) *Ram Kishan v Emp* 15 A L J 822 40 All 39 19 Cr L J 7

When a Magistrate passes an order for furnishing security for a period exceeding one year and default is made imprisonment for default cannot be awarded by the Magistrate. All that he is empowered to do is to detain the accused pending the order of the Sessions Judge—*A F v Mjat* Aug, 4 L B R 135 7 Cr L J 412 U B R (1897 1901) 28, *Mahadi*

The imprisonment ordered by the Sessions Judge should begin from the date of the Magistrate's order. Where the Sessions Judge directed that the period of imprisonment ordered by him should commence from the date of his order and not from the date of the Magistrate's order held that the order in fact amounted to an enhancement of sentence and that it was undesirable that the Court should do so without special reasons though it had the power—*Allahdad v. Crown*, 17 S L R 160 A I R (1924) Sind 120

Sub-section (3A).—"We think that where security has been demanded from two or more persons, some or one of whom may be ordered to give security for more than a year all the parties from whom security is demanded should be dealt with by the Sessions Judge"—*Report of the Select Committee of 1916*

"The object of the new sub-section (3A) is to avoid differences of opinion in a single case between the Magistrate and the Sessions Judge—in as much as in a single case one accused person may appeal to the District Magistrate, while the case of another accused person will be referred to the Sessions Judge. The Bombay Government have suggested that where the case of one accused has to be referred to the Sessions Judge under section 123 the case of all should be referred, whether they have given security or not. We have adopted this suggestion"—*Report of the Joint Committee (1922)*

It should be noted in this connection that the provisions of section 406 (which provides for appeals against orders requiring security) have been made inapplicable to a case where proceedings have been laid before a Sessions Judge under this sub-section. See section 406, 2nd proviso, newly enacted in 1923

309 Sub-section (3B).—"This sub-section definitely provides for the exercise of powers under sec 123 by an Additional Sessions Judge in proceedings transferred to him"—*Statement of Objects and Reasons (1914)*

It was held in the case of *Q. E. v. Dayaram Ranchhod*, Ratanlal 830 (see this case cited under sec 193) that where a reference was made under sec 123 (2) the Sessions Judge had no power to transfer the proceedings to the Additional Sessions Judge and that even sec 193 (2) did not confer on him that power because the word 'cases' in that section did not include a reference under section 123 (2). The Calcutta High Court however held that sec 193 must be interpreted in a liberal sense and that the word 'cases' would include a reference under sec 193 (2)—*Benode Behari v. Emperor*, 50 Cal 229 39 C L J 75 25 Cr L J 573. This conflict has now been set at rest by the present amendment, which empowers the Sessions Judges to make over references under this section to the Additional and Assistant Sessions Judges

he has considered the case of each individual prisoner. Though the order need not contain all the details required by sec 367, still each prisoner has a right to have his case considered on its own merits and the order must show that this has not been lost sight of—*Kalu Mirza v Emperor*, 37 Cal 91. The Judge must pass his own order (i.e. a definite order binding over the accused) and not merely confirm the order passed by the Magistrate—1899 A W N 151. *Bahadur v Emp*, 1 O W N 773. 26 Cr L J 656. Where the order is in reference to section 110, the Sessions Judge, before he confirms the order of the Magistrate is bound to find a special ground on which the order is passed, and it is not sufficient if he merely finds in general terms that it is for the interests of the community at large that the accused should be bound over to be of good behaviour—*Nakhi Lal v Q E* 27 Cal 656.

This section does not authorise a Sessions Judge to order the rehearing of a case. He can call for further information if he desires it or he can consider the evidence on the record and pass such order as he thinks fit—*Narayan v Emp*, 25 Cr L J 1112. A I R (1925) Cal 191.

An order under this subsection is an original order and not an order confirming the order of the Magistrate. Therefore the Magistrate has no jurisdiction to decide on the fitness of sureties on a bond ordered by the Sessions Court. When the order is of the latter Court the adequacy of the security should be decided by that Court—*Imp v Allahdino* 5 S L R 87.

Bail.—The Sessions Judge can admit the accused to bail. The provisions of section 498 regarding admission to bail are particularly wide, and the Court of Session may in any case direct any person to be admitted to bail. There are no words in section 123 (2) controlling the very wide provisions of section 498. The Sessions Judge has under sec 123 (2) power to revise the order of the Magistrate passed under sec 119, and he may grant bail, just as in the analogous case of an appeal the Appellate Court can release the accused on bail—*Ahmed Ali Sardar v Imp*, 50 Cal 969. 37 C L J 592. 24 Cr L J 953.

Remand.—In 24 Cal 155 (which was decided when the 1892 Code was in force) it was held that the Sessions Judge was not competent to remand a case to the Magistrate to take further evidence. But now the words 'requiring from the Magistrate' (newly added in the 1898 Code) show that the Sessions Judge is competent to do so.

Imprisonment.—Although a Sessions Judge is competent to direct under subsection (3) that the person be imprisoned for any term not exceeding three years yet it is advisable that the term should always be the same as the period for which security was ordered to be given—23 All 422. 4 L B R 135.

The imprisonment ordered by the Sessions Judge should begin from the date of the Magistrate's order. Where the Sessions Judge directed that the period of imprisonment ordered by him should commence from the date of his order and not from the date of the Magistrate's order held that the order in fact amounted to an enhancement of sentence and that it was undesirable that the Court should do so without special reasons though it had the power—*Allahdad v. Crown*, 17 S. L. R. 160 A. I. R. (1924) Sind 120.

Sub-section (3A) — We think that where security has been demanded from two or more persons some or one of whom may be ordered to give security for more than a year all the parties from whom security is demanded should be dealt with by the Sessions Judge — *Report of the Select Committee of 1916*.

'The object of the new sub-section (3A) is to avoid differences of opinion in a single case between the Magistrate and the Sessions Judge in as much as in a single case one accused person may appeal to the District Magistrate while the case of another accused person will be referred to the Sessions Judge. The Bombay Government have suggested that where the case of one accused has to be referred to the Sessions Judge under section 123 the case of all should be referred whether they have given security or not. We have adopted this suggestion' — *Report of the Joint Committee (1922)*.

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he has considered the case of each individual prisoner. Though the order need not contain all the details required by sec 367, still each prisoner has a right to have his case considered on its own merits and the order must show that this has not been lost sight of—*Kalu Marza v Emperor*, 37 Cal 91. The Judge must pass his own order (i.e. a definite order binding over the accused) and not merely confirm the order passed by the Magistrate—1899 A W N 151 *Bahadur v Emp*, 1 O W N 773 26 Cr L J 656. Where the order is in reference to section 110, the Sessions Judge, before he confirms the order of the Magistrate is bound to find a special ground on which the order is passed, and it is not sufficient if he merely finds in general terms that it is for the interests of the community at large that the accused should be bound over to be of good behaviour—*Nakhi Lal v Q* 27 Cal 656.

This section does not authorise a Sessions Judge to order the rehearing of a case. He can call for further information if he desires it, or he can consider the evidence on the record and pass such order as he thinks fit—*Narayan v Emp*, 25 Cr L J 1112 A I R (1925) Cal 191.

An order under this subsection is an original order and not an order confirming the order of the Magistrate. Therefore the Magistrate has no jurisdiction to decide on the fitness of sureties on a bond ordered by the Sessions Court. When the order is of the latter Court the adequacy of the security should be decided by that Court—*Imp v Allahdino* 5 S L R 87.

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Imprisonment.—Although a Sessions Judge is competent to direct under subsection (3) that the person be imprisoned for any term not exceeding three years yet it is advisable that the term should always be the same as the period for which security was ordered to be given—23 All 422, 4 L B R 135.

to give security under this Chapter the Chief Presidency or District Magistrate may (unless the order has been made by some Court superior to his own) make an order reducing the amount of the security or the number of sureties or the time for which security has been required

(3) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this Chapter as ordered by the Court of Session or High Court may be released without hazard to the community such Magistrate shall make an immediate report of the case for the orders of the Court of Session or High Court as the case may be and such Court may, if it thinks fit, order such person to be discharged

(3) In order under sub section (1) may direct the discharge of such person either without conditions or upon any conditions which such person accepts

Provided that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired

(4) The Local Government may prescribe the conditions upon which a conditional discharge may be made

(5) If any condition upon which any such person has been discharged is in the opinion of the District Magistrate or Chief Presidency Magistrate by whom the order of discharge was made or of his successor not fulfilled he may cancel the same

(6) When a conditional order of discharge has been cancelled under sub section (5) such person may be arrested by any police officer without warrant and shall thereupon be produced before the District Magistrate or Chief Presidency Magistrate

Unless such person then gives security in accordance with the terms of the original order for the unexpired portion of the term for which he was in the first instance committed or ordered to be

310 Sub section (6)—*Kind of imprisonment*—Before the amendment of this sub section in 1923 imprisonment under all good behaviour cases could be simple or rigorous according to the discretion of the Magistrate. The Amendment Act of 1923 had made a slight alteration by drawing a distinction between cases under sections 108 and 109 on the one side (under which the sentence should always be simple), and cases under sec 110 on the other (under which it may be simple or rigorous)

This clause has been further amended by the Cr P C Second Amendment Act X of 1926 the effect of which is to give a discretion to Magistrates to award either simple or rigorous imprisonment in the case of proceedings under sec 109. Several Local Governments have represented that the change (i.e. the amendment made by Act XVIII of 1923) has worked injuriously as most of the persons against whom proceedings are taken under sec 109 are men for whom simple imprisonment is quite unsuitable.—*Statement of Objects and Reasons* (Gazette of India 1923 Part V p 214)

Although the imprisonment in default of furnishing security under sec 110 may be simple or rigorous still as that section is essentially a preventive rather than a punitive provision the imprisonment awarded in ordinary cases should be simple. Imprisonment of a rigorous character should not be awarded automatically as a general practice but the Magistrate has to exercise his discretion and to decide whether on the facts of each case the imprisonment should be simple or rigorous.—*Gandharp Singh v Emp* 42 All 363. In passing a sentence of rigorous imprisonment the Magistrate should give reason why the imprisonment should be of the severer kind. In the case of a man who has never been convicted of any offence an order of rigorous imprisonment is unreasonable.—1 C L R 268

Where a person who has been asked to furnish security for good behaviour fails to do so the Magistrate has no power to order *solitary confinement*.—*Hundan v Emp* 36 All 495 12 A L J 823 15 Cr L J 616

It is illegal for a Magistrate to pass a sentence of rigorous imprisonment in a case under sec 107.—*Ullam Chand v A G* 26 Cr I J 430 (All)

124 (1) Whenever the District Magistrate or a Chief
 Power to release persons imprisoned for failing to give security
 Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this Chapter, * * * may be released without hazard to the community or to any other person, he may order such person to be discharged

(2) Whenever any person has been imprisoned for failing

to give security under this Chapter the Chief Presidency or District Magistrate may (unless the order has been made by some Court superior to his own) make an order reducing the amount of the security or the number of sureties or the time for which security has been required.

(3) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this Chapter as ordered by the Court of Session or High Court may be released without hazard to the community, such Magistrate shall make an immediate report of the case for the orders of the Court of Session or High Court as the case may be, and such Court may, if it thinks fit order such person to be discharged

(3) In order under sub-section (1) may direct the discharge of such person "either without conditions or upon any conditions which such person accepts

Provided that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired

(4) The Local Government may prescribe the conditions upon which a conditional discharge may be made

(5) If any condition upon which any such person has been discharged is, in the opinion of the District Magistrate or Chief Presidency Magistrate by whom the order of discharge was made or of his successor not fulfilled he may cancel the same

(6) When a conditional order of discharge has been cancelled under sub-section (5) such person may be arrested by any police officer without warrant and shall thereupon be produced before the District Magistrate or Chief Presidency Magistrate

Unless such person then gives security in accordance with the terms of the original order for the unexpired portion of the term for which he was in the first instance committed or ordered to be

detained (such portion being deemed to be a period equal to the period between the date of the breach of the conditions of discharge and the date on which, except for such conditional discharge he would have been entitled to release) the District Magistrate or Chief Presidency Magistrate may remand such person to prison to undergo such unexpired portion

A person remanded to prison under this sub section shall, subject to the provisions of section 122, be released at any time on giving security in accordance with the terms of the original order for the unexpired portion aforesaid to the Court or Magistrate by whom such order was made, or to its or his successor

Change —In sub-section (1) the words whether by the order of such Magistrate or that of his predecessor in office or of some subordinate Magistrate which occurred after the words under this chapter have been omitted, sub section (3) has been omitted and replaced by a new sub-section and sub-sections (4) to (6) have been newly added, by sec 22 of the Cr P C Amendment Act (XVIII of 1923)

This amendment is mainly intended to enable persons committed to prison under Chapter VIII of the Code to be sent to Industrial Homes and Settlements of the Salvation Army or to other similar Homes or Settlements where it may be possible to reform them and make them accustomed to regular work of a kind which may be useful to them after the expiry of their period of detention. It is proposed to give a District Magistrate or a Chief Presidency Magistrate absolute power to release with or without conditions a person imprisoned for failure to give security, without the intervention of the Court of Session or High Court '—*Statement of Objects and Reasons* (1921)

311 It is entirely within the discretion of the District Magistrate who as the head of the district is responsible for the peace thereof to determine when and under what circumstances he should act under this section—1893 A W N 183

The order passed by a District Magistrate under this section may be of an original or of a revisional character, that is the Magistrate may release a person either on the ground that by reason of something occurring after the order for security, there is no longer any apprehension of a breach of the peace and the person may be safely released or on the ground that on the evidence taken by the Subordinate Magistrate there was no apprehension of a breach of the peace, and no order for security should have been made—*Re Mars Gould* 37 Mad 125 (141) F B 25 V L J 459 14 Cr L J 546

125 The Chief Presidency or District Magistrate may at any time for sufficient reasons to be recorded in writing cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of any Court in his district not superior to his Court

312 Scope—This section empowers the District Magistrate to cancel a bond but does not authorise him to order that the person whose bond is so cancelled should be imprisoned until a fresh security bond is given—*Baldeo Singh v Jugal Kishore* 33 All 624 *Panchu v Emp* 29 Cal 455

313 Cancellation of bond—*Ground of cancellation*—The Allahabad High Court (as well as the Oudh Court) has held that a bond can be cancelled only on the ground that it is no longer necessary—*Banarsi v Partab Singh* 35 All 103 *Emp v Shankar* 41 All 651 and that the District Magistrate in cancelling a bond is entitled to look only to the circumstances *subsequent* to the execution of a bond. He can cancel a bond only on the ground that something has supervened since the date of the first Court's order which satisfies the District Magistrate that in view of the facts since come to light there is no longer any necessity to keep the accused person under bond—*Nizamuddin v Md Ziaul* 44 All 614 20 A L J 521 he can cancel a bond for keeping the peace on the ground that there is no longer any likelihood of a breach of the peace—1905 A W N 143. But the District Magistrate is not entitled to look to the circumstances existing at the time of the bond thus the fitness or unfitness of the sureties is a matter which can be decided in reference to the circumstances existing *at the time* of execution of the bond and the District Magistrate has no power to look to those circumstances and cannot therefore cancel a bond on the ground of unfitness of sureties—8 O C 245. In other words the power conferred by this section to cancel a bond is not to be exercised *as in appeal* against an order of security to keep the peace—*Sita Ram v Emp* 39 All 466 *Nizamuddin v Md Ziaul* 44 All 614 23 Cr L J 398 24 Cr L J 204 (Oudh) *Emp v Balwant* 24 Cr L J 616 (Oudh). This section cannot be used by the Magistrate as if he were sitting in appeal and going into the merits of the case. If he thinks that the order is not maintainable on the evidence on record his duty is not to pass an order under section 125 but to refer the case to the High Court in its revisional side—*Nizamuddin v Md Ziaul*, 44 All 614 *Banarsi v Partab* 35 All 103 *Emp v Shankar* 41 All 651. Two other Allahabad cases however do not support this view. Thus in *Baldeo Singh v Jugal Kishore* 33 All 624 (625) it has been held that a District Magistrate

cancel a bond of the accused on the ground that the surety who stood for him was an unfit person. In another Allahabad case *Emperor v Lalji* 40 All 140 (virtually dissenting from 35 All 103) it is laid down that there is nothing in the words of sec 125 to prevent the District Magistrate from cancelling the bond for reasons other than that it is no longer necessary to keep the accused under their bonds, that the District Magistrate can cancel a bond under sec 125 on the ground that the accused should not have been bound over and that the District Magistrate can deal with a case under section 125 as in *revision* and no reference to the High Court is necessary.

The Patna High Court holds that the only order which a District Magistrate can pass under this section is an order cancelling the bond directed to be executed by a subordinate Magistrate, on the ground that there is no longer any likelihood of a breach of the peace. The District Magistrate is not an *appellate* or *revisional* authority, and he has no power to vacate the order of the subordinate Magistrate as *ultra vires* or to quash the proceedings—*Durga Singh v Amar Dayal* 3 P L T 103 23 Cr L J 281.

But the Calcutta High Court is of opinion that the District Magistrate can cancel the bond on *any* sufficient ground and he is not restricted to the grounds which may have arisen *subsequent* to the date of execution of the bond. The jurisdiction of the District Magistrate under this section is not merely an original jurisdiction but may be exercised as in appeal or revision. He can cancel the bond on the ground that it should never have been required—*Nabu Sardar v Emp* 34 Cal 1 F B (overruling 31 Cal 948). This decision has been followed by the Punjab Madras and C P Courts. Thus, in *Audita v Crown* 1908 P W R 12 7 Cr L J 348 it has been held that the District Magistrate has full discretion to consider the evidence and can set aside the order of security on the merits. The Madras High Court also holds that the order under sec 125 may be either of an original or of a revisional character and the District Magistrate may cancel a bond on any sufficient grounds. There is no reason to qualify or restrict the ordinary meaning of the words used. This section was intended to give the District Magistrate the right to review the evidence, and the District Magistrate can cancel a bond on the ground that the evidence before the Subordinate Magistrate was not sufficient to justify the passing of the order for security. The words at any time show that the District Magistrate can cancel the bond at any time however early; if the District Magistrate may, within a few minutes of a Subordinate Magistrate exacting the execution of a bond cancel it. It could hardly be in consequence of anything that occurred *after* the execution of the bond that is the District Magistrate is not bound to look only to the events that have happened *subsequent* to the execution of the bond but

is entitled to cancel it on the ground that on the evidence before the Subordinate Magistrate the bond ought never to have been required—*Re Mare Goud* 37 Mad 125 (F L) The same view has been taken in C P—*Emp v Dalli* 11 N L R 98 16 Cr L J 555

The words at any time show that the District Magistrate may cancel the bond at any time however late even when there is only one day left for the expiration of the period for which the bond has been executed, the delay in obtaining the material on which the bond is cancelled does not invalidate the order of cancellation—*Re Mare Goud* 37 Mad 125 (145 146) F B But an order for the cancellation of the bond cannot be passed before it has been executed—3 Cal 948

Right of applicant to be heard.—When a Magistrate is moved to exercise his powers under this section to cancel a bond the applicant or his pleader should as a matter of general practice be heard before the application is rejected—*Sita Ram v Emp*, 39 All 466 18 Cr L J 630 15 A L J 469

Effect of cancellation.—Where a bond is cancelled on the ground that it is no longer necessary or that it has been wrongly taken both the accused and the surety will be discharged from all liability—1905 1 W N 143

314 *Transfer of proceedings.*—Where the proceedings under sec 107 instituted in one district were transferred by the order of the High Court to another district, and a 1st class Magistrate of the latter district ordered security to keep the peace held that it was the District Magistrate of the latter district who had jurisdiction to pass an order under this section for the cancellation of the bond—*Guru Prasanna v Hari Aumar* 23 C W N 958 20 Cr L J 337

128 (1) Any surety for the peaceable conduct or good behaviour of another person may at any time apply to a Presidency Magistrate, District Magistrate, Sub divisional Magistrate or Magistrate of the first class to cancel any bond executed under this Chapter within the local limits of his jurisdiction

(2) On such application being made, the Magistrate shall issue his summons or warrant, as he thinks fit, requiring the person, for whom such surety is bound, to appear or to be brought before him

Sub section (3) of this section has been renumbered as section 166A with certain alterations by the Criminal Procedure Code Amendment Act (XVIII of 1923) See notes under the next section

315. This section deals with cases in which the surety wishes to withdraw and to have the bond cancelled and it lays down the procedure which is to be adopted when such security becomes useless owing to the withdrawal of the surety—*Mahabir v A E 8 O C 245 2 Cr L J 507*

When the effect of an order discharging a surety is to remit the accused to prison for a term exceeding one year, the Magistrate is bound to refer the case to the Sessions Judge (Sec 123)—*Imp v Alladino, 5 S L R 87 12 Cr L J 410*

<p>126 (3) When such person appears or is brought before the Magistrate, such Magistrate shall cancel the bond, and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security * Every such order shall, for the purposes of Sections 121 122, 123 and 124, be deemed to be an order made under section 106 or Section * 118, as the case may be.</p>	<p>126 A <i>When a person for whose appearance a warrant or summons has been issued under the proviso to sub-section (3) of section 122 or under section 126, sub section (2), appears or is brought before him, the Magistrate shall cancel the bond executed by such person and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security Every such order shall, for the purposes of Sections 121, 122, 123 and 124, be deemed to be an order made under Section 106 or Section 118, as the case may be</i></p>
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This was originally subsection (3) of section 126 It has been renumbered as section 126-A with the italicised words added by sec 23 of the Criminal Procedure Code Amendment Act (XVIII of 1923) * We think that the procedure set out in subsections (2) and (3) of section 126 should apply in the case of a surety subsequently rejected (under sec 122), and we have added a new clause which makes the necessary amendments in section 126 —*Report of the Joint Committee (1922)*

CHAPTER IX

UNLAWFUL ASSEMBLIES

127 (1) Any Magistrate or officer in charge of a police station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

(2) This section applies also to the police in the town of Calcutta

316 'Officer in charge' —An order directing the dispersal of an assembly passed by an officer (e.g. Deputy Commissioner of Police) superior in rank to the Police Officer is an order by a lawful authority within the meaning of this section—*Emp v Tucker*, 7 Bom 42

In all cases of an unlawful assembly, a riot or a disturbance of the peace having occurred or being apprehended, the police will take the initiative, but if they find themselves not strong enough for the occasion, immediate application is to be made to the nearest Magistrate, which under the terms of Act V of 1861, means all persons within the Police District exercising all or any of the powers of a Magistrate, and therefore includes the Tahsildars who are bound on requisition from the Police Inspector to appoint from the residents of the neighbourhood as many Police officers as the said Inspector may deem necessary. All revenue chaprasis and messengers of all kinds may legally be appointed special Police officers. Thus, the whole resources of the Civil Government are at once on a special occasion brought to the assistance of the Police for the purpose of restoring public order—*Punj Pol Cir*, Ch XXVII, p 318. See *Punj Cir*, 320

317. Unlawful assembly —An assembly may be for lawful purposes, e.g. a religious procession, but it may excite such opposition as to be likely to cause a breach of the peace. If so it may be called upon to disperse—*Emp v Tucker*, 7 Bom 42, *Murlikhar v Emp*, 1887 P R 22

Punishment —See Secs 145, 151 I P C

128 If upon being so commanded, any such assembly does not disperse, or if without being so commanded, it conducts itself in such a manner as to be likely to cause a breach of the peace, the members of the assembly shall be liable to be punished with imprisonment for not more than six months, or with fine, or with both, for each day on which the assembly is so conducted.

a manner as to show a determination not to disperse, any Magistrate or officer in charge of a police station, whether within or without the presidency-towns, may proceed to disperse such assembly by force and may require the assistance of any male person not being an officer or soldier in Her Majesty's Army or a volunteer enrolled under the Indian Volunteers Act, 1869 and acting as such for the purpose of dispersing such assembly, and if necessary arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law

318 Use of fire arms — Where a Magistrate or officer in charge of a Police station engaged in dispersing an unlawful assembly is compelled in the last resort to direct the Police to use fire arms he shall give the rioters the fullest warning of his intention warning them beforehand that the fire will be effective that the ball or buckshot will be used at the first round and that blank cartridges will not be used Firing shall cease the instant it is not necessary Care should be taken not to fire upon persons separated from the crowd nor to fire over the heads of crowds as thereby innocent persons may be injured Blank cartridges should never be served out to Police employed to suppress a riot' — *Dom Pol Man* p 70

On being requisitioned a squad of Police properly armed and accoutred and carrying ten rounds of buckshot ammunition per man in command of a responsible officer will proceed with all despatch to the scene The Magistrate or superior Police Officer or other subordinate officer as circumstances may permit supported by a file (who will duly come to the charge on being halted) will proceed to within speaking distance of the mob and command it to disperse and distinctly warn it that the fire will be effective and that blank cartridges will not be used If the mob shows itself aggressive and determined not to disperse the officer and file aforesaid will fall back and the squad will on due command to that effect load after which another warning to the rioters to disperse will be given, and if not obeyed within a reasonable time, fire will be opened on distinct word of command by the officer in charge of the squad either by specified number of files or by ranks of subsections or sections or he may order a volley according to the requirements of the situation The fire should be so directed as to inflict as little bodily harm as possible aim in the first instance being taken at the feet of the nearest rioters and due care being observed to avoid firing on persons separated from the rioters Firing must cease the moment it is no longer necessary i.e. on the mob showing the slightest indication of retiring or

dispersing * * * After the order cease fire and should no further apprehension exist the wounded would be sent to the nearest hospital and the senior Police officer will take account of the ammunition used and if no Magistrate is present will draw up an accurate account of all that transpired —C P Pol Man page 16

The power of using fire arms to disperse an unlawful assembly cannot be exercised by any person below the rank of an officer in charge of a police station. An officer in charge of a patrol boat whose powers are no higher than those of an officer in-charge of an outpost cannot use fire-arms under this section—*Muhammad Yunus v Emperor* 50 Cal 318 (33) A I R (19 3) Cal 517

129 If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed the Magistrate of the highest rank who is present may cause it to be dispersed by military force

130 (1) When a Magistrate determines to disperse any such assembly by military force, he may require any commissioned or non commissioned officer in command of any soldiers in Her Majesty's Army or of any volunteers enrolled under the Indian Volunteers Act, 1869 to disperse such assembly by military force, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law

(2) Every such officer shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons

131 When the public security is manifestly endangered by any such assembly and when no Magistrate can be communicated with any commissioned officer of Her Majesty's Army ... disperse such assembly by military force, and may arrest

Duty of officer commanding troops required by Magistrate to disperse assembly

Power of commissioned military officers to disperse assembly

confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law, but if while he is acting under this section, it becomes practicable for him to communicate with a Magistrate, he shall do so, and shall thenceforward obey the instructions of the Magistrate as to whether he shall or shall not continue such action

132 No prosecution against any person for any act pur-
Protection against
prosecution for acts
done under this
Chapter
Government and—
porting to be done under this Chapter
shall be instituted in any Criminal Court
except with the sanction of the Local

(a) no Magistrate or police officer acting under this Chapter in good faith,

(b) no officer acting under Section 131 in good faith,

(c) no person doing any act in good faith in compliance with a requisition under Section 128 or Section 130, and,

(d) no inferior officer, or soldier, or volunteer doing any act in obedience to any order which he was bound to obey,

shall be deemed to have thereby committed an offence

Provided that no such prosecution shall be instituted in any criminal Court against any officer or soldier in His Majesty's army except with the sanction of the Governor General in Council.

* The rules for calling out and employing the military in aid of the civil power were first enacted in the Code of 1872 and embody (according to Sir James Stephen) the principles laid down in the charge of Tindal C J to the Grand Jury of Bristol in 1832 as to the duty of soldiers in dispersing rioters. The rules in India carry the law somewhat further than it has yet been carried in England as they expressly indemnify all persons acting in good faith in compliance with the requisitions under Secs 128 and 130 and forbid prosecutions of Magistrates soldiers and Police-officers except with the sanction of the Governor General in Council —Whitely Stokes *Anglo Indian Codes* Vol II Introduction, p 11

319 Sanction —Want of *sanction* under this section will not be cured by sec 537—*In re Perumal* 31 Mad 80 17 M L J 533

The power to disperse an unlawful assembly by force is not given by this Code to any police-officer below the rank of an officer in charge of a police station. The powers of an officer in charge of a patrol boat are no higher than those of an officer in charge of an outpost therefore he has no power to act under this chapter if he so acts (*e.g.* fires on an unlawful assembly) his action is illegal and does not fall under sec 128 and no sanction of the Local Government is necessary for his prosecution for such act—*Muhammad Yunus v Emp* 50 Cal 318 324 (Bhawaf Shooting case) 25 Cr I J 467 A I R (1923) Cal 517

CHAPTER X

PUBLIC NUISANCES

133 (1) Whenever a District Magistrate, a Sub divisional Magistrate or * * * a Magistrate of the first class considers on receiving a police report or other information and on taking such evidence (if any) as he thinks fit,

that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place, or

that the conduct of any trade or occupation or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated or

that the construction of any building or the disposal of any substance, as likely to occasion conflagration or explosion, should be prevented or stopped, or

that any building, tent or structure or any tree is in such a condition that it is likely to fall and thereby cause injury persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal

or support of such building *tent or structure*, or the removal or support of such tree, is necessary, or

that any tank well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public or

that any dangerous animal should be destroyed confined or otherwise disposed of

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation or keeping any such goods or merchandise or owning possessing or controlling such building, *tent structure substance tank, well or excavation, or owning or possessing such animal or tree* within a time to be fixed in the order,

to remove such obstruction or nuisance, or

to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or

to remove such goods or merchandise, *or to regulate the keeping thereof in such manner as may be directed, or*

to prevent or stop the *erection of, or to remove, repair or support, such building, tent or structure, or*

to alter the disposal of such substance, or

to fence such tank, well or excavation, as the case may be, or

to destroy, confine or dispose of such dangerous animal in the manner provided in the said order,

or, if he objects so to do,

to appear before himself or some other Magistrate of the first or second class, at a time and place to be fixed by the order, and move to have the order set aside or modified in the manner hereinafter provided

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court

Explanation—A “public place” includes also property belonging to the State camping grounds and grounds left unoccupied for sanitary or recreative purposes

Change—The entire section has been newly drafted by sec 24 of the Criminal Procedure Code Amendment Act (XVIII of 1923). But the actual changes introduced by the re drafting are the following—(a) In subsection (1) the words 'when empowered by the Local Government in this behalf' have been omitted. Under the previous law an ordinary Magistrate of the first class could take proceedings under this section only when he was specially empowered by the Local Government. Under the present law all Magistrates of the first class are competent to deal with the case and no special empowering is necessary, (b) the words 'regulated and the keeping of goods should be regulated' have been newly added in para 3. (c) the words 'tent or structure or any tree' have been added in para 3 and (d) para 7 (relating to the disposal of dangerous animals) has been newly added. Certain consequential changes have also been made in the subsequent paras of this section.

320 Application of this Chapter—The provisions of this Chapter should be so worked as not to become themselves a nuisance to the community at large. Although every person is bound to so use his property that it may not work legal damage or harm to his neighbour yet on the other hand no one has a right to interfere with the free and full enjoyment by such person of his property except on clear and absolute proof that such use of it by him is producing such legal damage or harm and therefore a lawful and necessary trade (e.g. tanning) ought not to be interfered with unless it is proved to be injurious to the health or physical comfort of the community—*Shadi v Emp* 1888 P R 17

This section deals with the condition of things at the time when the order is made. It is not meant to apply to what may happen at some indefinite time in the future or under quite abnormal circumstances. Therefore, a Magistrate is not competent to order an occupation to be prohibited or a tree to be cut down or a building to be demolished merely because at some future time the occupation may become injurious to the health of the neighbourhood or the tree may cause an obstruction to public thoroughfare or the building may become dangerous to passers by—*Gokal Chand v Emp* 1 Lah 163 21 Cr L J 46. *Gokul v Emp* 22 A L J. 436 26 Cr L J 104. *Rajawan v Emp* 1890 P R 5

In all criminal proceedings initiated under this section the Magistrate should bear in mind that he is supposed to be acting purely in the interests of the public and should be on his guard against any tendency to use the section as a substitute for litigation in the Civil Courts in order to obtain settlement of private disputes—*Tarzand Ali v Hakim Ali* 37 All 26 (28)

321 Secs 133 and 144—Sec 144 is more general and sec 133 is more specific therefore nuisances specially provided for in this section

are taken out of the general provisions of section 144 of the Code—*Anonymous* 2 Weir 58 10 W R 53 But where an order prohibiting a nuisance cannot be made under this section e.g. an order prohibiting burial in certain places on sanitary grounds it should be made under the more general sections (143 or 144)—*Anonymous* 2 Weir 64 If proceedings are taken under sec 133 the procedure laid down in the present chapter must be obeyed and the matter cannot be disposed of summarily under Sec 144 of the Code—8 W R 37

But the essential difference between the two sections is that Sec 133 expressly directs that the injunctive order should be an order nisi i.e., it is an order accompanied by a condition that it is not to operate if the party shows cause while Sec 144 speaks only of an *absolute* order—10 W R 53

322 Secs 133 and 147 —Sec 133 is not a bar to a proceeding under Sec 147 The fact that Sec 133 expressly provides for an order by the Magistrate directing the removal of an obstruction to a pathway does not necessarily imply that a similar order cannot be passed under Sec 47 of the Code—*arupanna v Kandasami* 26 M L J 223 15 Cr L J 362 But when proceedings have been taken under section 133, no order can be passed under Sec 147—*Abdool Rachman v Safar Ali*, 15 C W N 667 12 Cr L J 43

323 Nature of proceedings —Proceedings under this section are more of the nature of civil than of criminal proceedings and the person against whom proceedings are taken under this section is not an 'accused' person within the meaning of Sec. 342 He can give evidence on his own behalf and may be examined on oath—*Hirananda v Emp*, 9 C W N 983 Proceedings under this chapter are not proceedings in respect of offences, and further inquiry cannot be ordered under Sec 436 if the proceedings are dropped by the Magistrate—*Srinath v Ainaddi* 24 Cal 395 But orders passed on proceedings under this chapter are orders passed in 'a criminal trial' for the purpose of section 15 of the Letters Patent, and no appeal lies against an order passed by a single Judge of the High Court under sec 439 revising an order of the Magistrate—*Subbaya v Ramayya*, 39 Mad 533 16 Cr L J 349

Magistrates empowered —It has already been pointed out above (under heading 'Change' supra) that all first class Magistrates are now authorised to take action under this section, and it is no longer necessary that they should be specially empowered by the Local Government In the United Provinces and in C. P., the Local Government may invest Municipal Boards with the powers of a District Magistrate to institute proceedings under this section See Sec 57 of N. W. P. Municipalities Act XV of 1883, and sec 86 of the C. P. Municipal Act XVIII of 1889

In Presidency towns the Presidency Magistrates are not empowered to act under this chapter. In nuisance cases they act under the Penal Code the Police Acts the Municipal Acts and other Local enactments dealing with special kinds of nuisances.

324 Unlawful obstruction.—Obstruction to a public road is a nuisance though no practical inconvenience is caused—23 All 4 And it is absolutely irrelevant with what motive an obstruction upon the public highway is caused—13 All 150

A dam constructed across a public river which amounts to an obstruction to the river and causes damage to the lower riparian owners may be ordered to be removed under this section—*Jagannath v Claudiha* 6 O L J 616 21 Cr L J 55

Where a cattle market is situated in a congested part of the town so that owing to the cattle having to be driven through narrow and congested lanes, obstruction and inconvenience are caused to the public it may be suppressed by an order under this section—*Mahendra v Emp* 22 Cr L J 582 (Cal)

The obstruction must be *permanent* and not temporary—*Emp v Devras* 6 Bom L R 359 and it must be an *existing* obstruction a Magistrate cannot make any order as to what should be done in case of future obstructions—21 W R 10 Thus where a solid and vigorous branch of a tree is 15 feet above the level of a road in a village it cannot be said that at such a height it causes an obstruction having regard to the normal traffic and it cannot be ordered to be cut down merely because it is likely at some future time and under abnormal circumstances to prove an obstruction—*Golul v Emp* 22 A L J 436 26 Cr L J 104

Where a proceeding under this section is instituted against a number of persons for various acts of unlawful obstructions to a public way it is essential that the order should state accurately with regard to each person the specific obstruction made by him which he is required to remove unless it is alleged that all the persons are jointly responsible for all the obstructions complained of—*Raimohan v Emp* 44 Cal 61 (65) 70 C W N 1171 17 Cr L J 409

Where on a complaint being made to a Magistrate that a certain person had erected a platform on a public thoroughfare and had thereby obstructed it the Magistrate ordered that such portion of the platform as might be obstructing the highway should be removed held that the order was vague the Magistrate ought to have definitely pointed out and marked off how much of the platform should be removed—*Jhau Lal v Emp* 73 A L J 43 26 Cr L J 731 A I R (1925) All 310

Under this section it is only the power to order the removal of an obstruction (e.g. a *bund*) which is given to a Magistrate. There is no provision for the reconstruction of a *bund* which has once been removed.

under this section—*Rajmuddi v Sher Ali* 40 C L J 597 26 Cr L J 517

The word channel is not defined in the Code but it is quite wide enough to include a water course carrying water to a public *urani*. Where there was a catchment area in the centre of which there was a watercourse which was obstructed and the water which flowed into the watercourse was attempted to be carried away by the petitioners to their own village tank by building a *bund* and cutting a new channel and by cutting down a new portion of the old *bund* of the catchment area thus making the water run away in a direction different to that of the watercourse and preventing it from falling into the *urani held* that this was an obstruction to the watercourse—*Ramasami v Ramanathan* 22 L W 470 A I R (1926) Mad 165

325 Public — Public place —The provisions of this section apply to those cases where the obstruction is caused to a public thoroughfare—25 W R 4 *In re Chundernath* 5 Cal 875 36 All 709 *In re Maharana* 22 Bom 988 15 W R 67 It is not necessary that the way should be one which is generally used by the public it is sufficient if the way is one which is or may be lawfully used by the public—10 Cr L J 210 (Cal) *Churaman v Emp* 1 A L J 1074 *Teni Prasad v Sarjoo* 70 Cr L J 536 (Pat) *Rang v B N H Ry* 4 P L T 402 But the fact that the residents of a particular village have a right to take cattle across a field is not sufficient to constitute a public right of way—*Junnu v Emp* 1906 A W 190 A railway land is not necessarily a public place—*Rang v B N H Ry*, 4 P L T 40.

An obstruction to a private path (*In re Dalaji* 4 Bom L R 88 *Gouri Shankar v Bhagalu* 11 O L J 659 25 Cr L J 1118 *Q v Janoke Nath* 2 W R 36) or to a private drain (5 W R 59) or to a private channel (*Jagannath v Parameshwar* 36 All 209) does not come within the purview of this section In such cases the parties must go to a Civil Court

If a private right is set up by the defendant the procedure of the new section 139A will apply

326 Nuisance —As to nuisances under the Penal Code see Sects 268 to 294A, I P C

Keeping a gaming house is a nuisance if crowds of disorderly persons flock there and cause annoyance to the public—*Q E v Thandalarayudu* 14 Mad 361 but if no annoyance is caused it is not a nuisance—7 B H C R 74 So also a burning ghat may not itself be a nuisance but if the ghat or ground is in such an offensive state or if cremation is performed upon it in such a way as to be a source of injury annoyance or danger to the neighbouring people it will become a nuisance—*Indra Nath v Q E*, 25 Cal 425 So also if a privy is allowed to remain in such a

condition as to be a nuisance to passers by lawfully using a public place or way proceedings to cause the nuisance to be abated may be instituted under this section—*In re Balaji* 4 Bom L R 88. But this section does not empower a Magistrate to order a privy to be removed merely because it has been only recently made in any locality—*Ibid*

Slaughtering cattle though it might be offensive to the prejudice and sentiments of a community is not a nuisance—5 W R 7

Selling fish on the roadside is not a public nuisance unless annoyance has been caused to the public—1 Bur L T 94

The act of a manager of a bonemill in permitting a large stock of bones to remain uncovered in the open air for a long time so as to become rotten and to emit a smell noxious to the people living in or passing by the vicinity constitutes a public nuisance—*Emp v Berkefield* 34 Cal 73

A noise which is injurious to the physical comfort of the community is a nuisance—*Krishna Mohan v A K Guha* 32 C I J 42 21 Cr L J 669

A private owner may be guilty of acts done on his private property if it gives rise to a public nuisance to those living in the neighbourhood. Therefore the owner of a cremation ground may fairly be held to create a nuisance, if he allows the cremation of bodies upon that ground to be so performed as to annoy or endanger the lives and properties of persons living in the vicinity—*Indra Nath v Q E* 25 Cal 425

A nuisance is not legalised by long enjoyment. No prescriptive right can be acquired to commit maintain or continue a public nuisance involving actual danger to the health of the community—*In re Sheikh Mohidin* 2 W R 59, 16 W R 6, 7 B I R 499. *In re Balaji* 4 Bom L R 88. Thus an old slaughter house can be removed if it becomes offensive to the health of the neighbourhood—*Municipal Commissioners v Mahomed Ali* 7 B L R 499

But although no length of enjoyment can legalise a public nuisance yet such fact may tend to show that the dispute was a *bona fide* dispute of title such as would have the effect of ousting the Magistrate of his jurisdiction (under section 139 A). Therefore, the Magistrate is bound to see whether the fact of such long possession and enjoyment of the nuisance has not given to the objection of the person so enjoying it the character of a *bona fide* dispute as to title—*Premnath v Gobordhane* 25 Cal 278

'Should be removed'.—These words show that the nuisance must be something which is capable of being removed. If it is not capable of being removed (e.g. some objectionable accompaniments to a religious ceremony practised by the members of a religious sect) this section does not apply—*K. E v Faizal Hussain* 1901 A W N 126

327 Offensive trade or occupation.—The proprietor of a

ground who puts his land at the disposal of any one who wishes to cremate a dead body, cannot be said to be carrying on any trade or occupation merely because he makes his profit by charging a high rent from a tenant who sells wood to the persons coming to cremate a dead body—*Indra Nath v Q F* 25 Cal 425

Para 3 deals only with trades which are in themselves injurious to the health or physical comfort of the community and not with those which are in themselves innocent but in the course of which the manager or plicar commits a public nuisance—1888 P R 47 Thus keeping a house of public entertainment is not by itself an offensive trade—*Ibid*

This section relates to an *existing* state of affairs and not to the possibility of future results. Where an occupation is perfectly innocent at present the mere fact that it may in future become offensive to the neighbours is no ground for issuing an order under this section. Where there is no evidence that the occupation of manufacturing bricks is in itself injurious to the health or that the petitioners were so working it that the health of any one was being injured no order under this section can be made in anticipation of the occupation being injurious to the health of the community in future—*Gopal Chand v Emp* 1 Lah 163 21 Cr L J 462

In order to bring a trade or occupation within the operation of this section it must be shown that the interference with the public comfort was considerable and a large section of the public was affected injuriously—*Fazal Din v Crown* 1911 P I R 117 12 Cr L J 146 The working of rice husking machines throughout the whole night in a residential quarter is a public nuisance being injurious to the comfort of the whole neighbourhood—1904 P R 9

A lawful and necessary occupation such as tanning ought not to be interfered with unless it is proved that it is injurious to the health of the community—*Shadi v Emp* 1883 P R 17 Cultivation of maize jowars or *bigree* within a short distance from the town is not an injurious occupation—1889 P R 39

A person who opens a new market close to an existing market in the village cannot be held to be carrying on a trade or occupation that is injurious to the health or physical comfort of the community, nor does the fact that the people in one market are sometimes forcibly dragged from it to the rival one, giving rise to mutual recrimination and abuse justify an order under this section—*In re Moidin*, 2 Weir 62, *Moidin v Abdulla*, 14 M L J 207

A prostitute who behaves orderly and quietly and creates no open scandal by riotous living and causes no actual discomfort to the neighbourhood cannot be removed from her house merely on the ground of her bad character—24 W. R 68 So also the mere existence of houses

of prostitutes by the roadside or the fact that they ply their trade in their houses cannot affect the physical comfort of the passers by—5 C W N 560 But where they are on the public road soliciting passers by their occupation is certainly injurious to the comfort of the community and may be stopped by an order this section—*Nur Jan v Emp* 1900 P R 2 though for the purposes of the Penal Code such an act does not amount to a public nuisance within the meaning of Sec 268 of that Code—Q E v Vanni 22 All 113

A person who inoculates children upon an outbreak of small pox can not be said to be carrying on an offensive occupation—(1903) U B R 1st Qr 205

Under the old law if a trade or occupation was found to be offensive, the Magistrate had to pass an order *totally prohibiting* it under the present law it may be ordered to be *regulated* instead of being totally suppressed

328 Building likely to fall —There must be proof that the state of the building is dangerous in *præsenti* and not in *futuro* That the building might become dangerous by another man altering the adjoining premises in future or undermining the building in question is not a ground of action under this section—*Rajawan v Empress* 1890 P R 3

Persons living etc in the neighbourhood —This section is limited to injuries likely to be caused to passers by or to persons living or carrying on business in the neighbourhood These words do not refer to the persons who are living actually in the alleged dangerous building or in the servant's houses in the compound belonging to it but those unascertained members of the public whose ordinary avocations may take them to the neighbourhood of the building complained of Therefore, a Magistrate cannot under this section order the owner to repair his house which is standing in its own compound at a distance from the public road—Q E v Jasodanand 20 All 501

329 Filling up excavations —In order to fill up and bring in to one level with the adjacent land excavations made for taking mud for the manufacture of bricks is illegal as the Magistrate can only order them to be fenced even if they are by the side of a public way—22 Bom 714

Fencing a tank —Where a tank is used as a reservoir for water the Magistrate can order to have it fenced to prevent accidents, but where it is proved to be injurious to the health and comfort of the community he may treat it as a public nuisance and cause it to be filled up—*In re B sloo* 10 W R 27

330 Procedure to be strictly followed —Where a Magistrate commences proceedings under sec 133 he is not at liberty to proceed otherwise than in conformity with the rules laid down in this chapter—Q v Ilti Singh 8 W R 37 Cases have come before the Judicial C

missioner in which proceedings under Chapter X have been instituted on a vernacular order merely initialed by the Magistrate. In proceedings thus laxly instituted, other irregularities have naturally followed. The accused has not received proper notice of what he was required to do, and has not been given an opportunity of appearing to show cause against the conditional order made by the Magistrate. The Judicial Commissioner would impress upon every Magistrate exercising powers under Chapter X the necessity of recording in each case a formal order in his own hand, stating the information he has received and the order he proposes to issue, and of seeing that a proper notice is issued to the accused giving him full information of what he is required to do and an opportunity of appearing to show cause against the order if he wishes to do so"—C P Cr Cir, Part II No 8.

Taking evidence—Before passing a conditional order under this section a Magistrate is not bound to take evidence. Because the proceedings under this section are entirely *ex parte*, but he should do so before making the order absolute under sec 137—*Srinath v Annadai*, 24 Cal 395.

331. Nature of order—An order under this section is *ex parte*—24 Cal 395.

The order should be a written one. If no written order is passed, the procedure is faulty and a person cannot be convicted of disobeying such an order—*Gout v Choonce* 1st 2 Agra 1.

The order should be directed to particular individuals and not be general except in cases of emergency to which Chapter XI applies, when they can be addressed to the public generally—*Q E v Johlu*, 8 All 99. A person disobeying a general order passed under this section (e.g. an order prohibiting the establishment of cotton ginning yards in several villages of 1 taluk) cannot be convicted under section 188 I P Code—*Q E v Manab Chaud Ratulal* 31. The disobedience of a general order passed under this section prohibiting the public in general from frequenting the roads and paths of a certain village between certain hours is not punishable under sec 188 I P C—*In re Kowul Kisto*, 12 C L R 231.

The order under this section must not be vague, it must be such that the persons to whom it is directed will be able to learn from its contents what they are ordered to do for the purpose of complying with it—*Koti Mohan v Nakari* 11 C L J 114. If the order is ambiguous and open to two interpretations the one most favourable to the accused will be adopted—16 Cal 9.

The order must be conditional and not absolute. Every order should state the time within which and the place where the person to whom it is issued may appear and move to have it set aside—9 Cal 637. Disobedience of an order which fixes no time or place is not an offence under sec. 188 I P C.—1 Bur 5 R 363.

And lastly the order must be confined to the removal of the nuisance only and should not direct the removal of the whole thing for instance, in the case of a tank the order should be to fence the tank and not to fill up the tank—*In re Distoo* 10 W R 27 If the Magistrate finds a burning ghat to be a nuisance he cannot order the removal of the ghat itself but can order the removal of the nuisance, i.e. he can take such steps as would result in the cremation ceasing to be a nuisance—*Indra Nath v Q E* 25 Cal 425 In a case where sparks from a forge might set fire to a cotton stored in an adjoining building the Magistrate cannot order the removal of the forge but should order its construction in such a way that sparks shall not issue out of it into the open air—*Rataulal* 872 If the branch of a tree is likely to fall on passers by the Magistrate should not order the tree to be cut down but may secure the safety of the public by ordering proper support to be given so as to prevent the branch from falling—*Gekul v Emp*, 22 A L J 436 26 Cr L J 104

332 Dropping of proceedings—If a Magistrate is satisfied that there are no sufficient grounds for taking action under this section he can drop the proceedings—*Issur Churn v Aah Churn* 8 Cal 883 *Sonar v Jogendra* 1 C L R 486 Thus where the Magistrate before making a final order comes to know that the road is not a public one he can drop the proceedings and abstain from carrying out the order for the removal of the obstruction—15 W R 67 In such cases the High Court will not interfere in revision with the order of the Magistrate dropping the proceedings—*Sonar v Jogendra* 1 C L R 486

Proceedings once dropped can be revived if sufficient cause is shown—5 C W N 173

Further inquiry—Sec 437 (now 436) enables a superior Court to direct further inquiry in case of offences But proceedings under this chapter are not proceedings in respect of offences and therefore sec 437 (now 436) cannot apply So if a Magistrate drops proceedings under this section neither the District Magistrate nor the Sessions Judge can order further inquiry under sec 437 (now 436)—*Srinath v Annuddi* 24 Cal 395 The proper procedure for the District Magistrate in such a case is to refer the matter to the High Court—*Indra Nath v Q E* 25 Cal 425 *Prithipal v K E A I R* 1925 Oudh 736

333 Orders not under this Section—A Magistrate has no jurisdiction under this section to pass the following orders—

- (1) An order regarding the custody and guardianship of children—2 Weir 66
- (2) An order directing the construction of a new drain—*Bisha Nath v Emp* 1900 A W N 138
- (3) An order to build a pigsty at a certain distance from the abadi—O. S C 60

(4) An order on a person to lop off branches of a tree of his which overhung a certain house and were thus dangerous in affording facility to thieves—*Emp v Hiratal* 1883 A W N 222

(5) An order to close a graveyard—12 C W N 70

(6) An order prohibiting persons to drink the water of a certain well—*Emp v Sheoamber* 1893 A W N 145

(7) A general order prohibiting the public to frequent the roads and places of a certain village between certain hours—12 C L R 231

(8) An order calling upon the inhabitants of a town to keep themselves well supplied with pots filled with water upon their roofs, and also with hooked stiel's for use in beating out fires—1 Bur S R 363

(9) An order directing a person to repair a well is a valid and proper order but an order directing him to pay a fine for non repair of the well wherefrom the Magistrate directed the well to be repaired is an illegal order—*Reg v Tatyā Ratanlal* 50

(10) An order directing a person to use his own property as not to cause injury to the property of another—*In re Jaswant Singh; Ratanlal* 510

(11) An order directing a person not to cultivate his land—1 A L J 615

334 Civil Suits—No suit will lie in a Civil Court to set aside an order passed under this section and the Civil Courts have no jurisdiction to question or set aside such order—12 W R (T B) 18 (overruling 7 W R 95) 11 W R 434 (civil) 4 B L R 74 Thus a Civil Court has no jurisdiction to order a road which has been declared by the Magistrate as a public road to be closed—11 W R 434 (civil) But in spite of an order under this section a suit will lie for a declaration under sec 42 of the Specific Relief Act against any one of the public who claims to use the road as a public road—*Chuni Lal v Ram Aishen*, 15 Cal 460, 5 B 11 C R A C 94 19 W R 46 (civil) 6 Cal 291, 6 Bom 670

Since a Magistrate's order under this section is not a conclusive determination of the question of title it is competent to a Civil Court to try the question whether a land is private property or a public place—6 Cal 291

The suit will lie, as regards a public road not against the Magistrate but against the Secretary of State—6 Bom 670, but of course it is open to the party to bring a declaratory suit against any member of the public who may use the road as a public one and in such cases, it is unnecessary to make the Secretary of State a party—15 Cal 460

334A Costs—There is no provision in this chapter for the payment of costs by any party to the proceeding The Magistrate has no jurisdiction to order that the costs of the removal of an obstruction should be

born by either party—*Rajimaddi v Sher Ali* 40 C L J 597 26 Cr L J 517

335 Revision—The High Court can interfere when the Magistrate acted without jurisdiction or in excess of his jurisdiction or when there was an error in law. Where the Magistrate came to a finding after considering all the evidence before him the High Court cannot interfere on the ground that the finding was erroneous—9 B L R 417. But the High Court can interfere when there is no evidence or no reasonable evidence on record to justify the Magistrate's finding or where the finding arrived at is perverse or such as no reasonable man could have arrived at on the evidence produced—*Abdul Wahid v Abdullah* 45 All 656 (661) 7 B L R 516. The High Court will interfere where an attempt has been made to abuse the powers of the Court that is where the Magistrate has given a decision regarding matters which properly lie within the cognizance of Civil Courts (as for instance in a case when a *bona fide* claim of right to a way or road has been set up by a party)—*Abdul Wahid v Abdullah* 45 All 656 (657) 7 B L J 59.

Further it is not the practice of the High Court to entertain an application in revision against an order made by a Magistrate in a proceeding under this section, unless the party aggrieved had first moved the Sessions Judge under Secs 435 and 438 of the Code—*Rash Behari v Phani Bhushan* 72 Cr L J 650 48 Cal 534.

336 Review—A proceeding under this section being a judicial proceeding is open to review by the High Court—9 B H C R 4 C 160 7 B L R 441.

134. (1) The order shall if practicable be served on the person against whom it is made in manner hereinafter provided for service of a summons.

(2) If such order cannot be so served it shall be notified by proclamation published in such manner as the local Government may by rule direct and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

337 Non service of notice—The terms of this section are directory and ought to be followed but an omission to follow its provisions is a mere irregularity and does not nullify the order—*Parbuly v Q E* 16 Cal 9. Thus the non service of notice does not invalidate the order if the parties admit that they knew of the existence of the notice—5 W R 4. Where the parties had information of the order it is immaterial that mode in which it was brought to their notice was not in strict

with the provisions of this section—*Nur Jau v Emp* 1900 P R 2
Ahush Ram v Crown 4 Lah 1 (9) Thus where the persons
 against whom the order was made were residents of a *Mohalla* and the
 order instead of being served on them personally was stuck up in some
 conspicuous place of the *Mohalla* and the parties came to know of the
 order held that the service of the order though irregular did not affect
 its validity—*Ahush Ram v Crown* 4 Lah 224 (29) 4 Cr L J 457
 5 Lah L J 40

Proclamation—In Bengal the proclamation is to be made by beat
 of drum—*Calcutta Gazette* 1883 Part III p 215 In Bombay it is
 to be made by beat of drum and by publication in the Bombay Gazette
 and such local newspapers as the Magistrate directs—*Bombay Gazette*
 1901 Part I p 779

135 The person against whom such order is made shall—
 Person to whom order is addressed to obey or shew cause or claim jury (a) perform within the time and in the manner specified in the order the act directed thereby or

(b) appear in accordance with such order and either show
 cause against the same or apply to the Magistrate by whom
 it was made, to appoint a jury to try whether the same is
 reasonable and proper.

Change—The italicised words have been added by sec 25 of the
 Criminal Procedure Code Amendment Act (VIII of 1913)

338 Application to show cause and for a jury—Since the proceeding
 under Sec 133 is in the first instance entirely *ex parte*, and since the report
 or other information whereon the Magistrate has taken action before making
 the conditional order under section 133 is no evidence against the opposite
 party it is consequently desirable that reasonable opportunity should
 be given to the opposite party to show cause as contemplated by this
 section and to adduce evidence as prescribed by section 137—*Raimohan*
v Emp 44 Cal 61 (64) 20 C W N 1171

Under this section a party cannot both show cause and apply for a jury
 at the same time, he has the right to adopt only one of the alternatives
 —13 C W N 367

339 Bona fide claim—If the person against whom an order under
 sec. 133 is made claims a private right of way the question as to whether
 the claim set up by the defendant is a bona fide one is to be decided by
 the Magistrate himself and not to be left to the jury.—6 Cal 860 See
 Note 355 under sec 133 & sub sec (3) A case can be referred to the
 jury only after the Magistrate has decided that the claim set up by the

petitioner is not a *bona fide* claim and that the way alleged to be obstructed is one which is or may be lawfully used by the public. The jury is not competent to decide the question whether there is a public right of way. What the jury has to consider is whether the order passed by the Magistrate under sec. 133 is a reasonable and proper order—*Nisar ulah v. Ashraf* 3 C W N 345 *Ashraf v. Pam Lal* 6 Cal 269 *Dulal Ram v. Baishnab* 10 C W N 242 31 Cal 979 *Id. Ashrafuddin v. Sk. Harun Bulsh* 18 C W N 1119 15 Cr L J 515. Therefore a Magistrate is not competent to make a reference to the jury without first determining whether the way is a public thoroughfare or not or without determining whether the claim set up by the opposite party is *bona fide* or not—*Dulalram v. Laishnab Charan* 10 C W N 242 *Matukdhar v. Harimadhab* 31 Cal 979 26 Cal 869 *Sk. Imrat Ali v. St. Amjad Ali* 2 P 1 J 67 18 Cr L J 457 *Ahusha Ram v. Crown* 4 Lah 221 (276). If however the Magistrate through a mistaken view of the law makes a reference to the jury without finding whether the way is a public way or not the jury would be met by a *bona fide* objection that the way is private property which would render them powerless to proceed. The Magistrate will then have to take up the matter himself again and if the claim is *bona fide* will have to refer the parties to a Civil Court—*In re Chundernath* 5 Cal 875.

When a person has applied for a jury and a jury has been appointed the party cannot set up the plea that he caused the obstruction under a *bona fide* claim of private right to the way—22 All 267 30 All 364. The application for a jury will operate as a waiver of the plea of *bona fide* claim. Once a jury is appointed on the application of the person against whom an order has been made under sec. 133 it is not open to him at a later stage to set up a claim of right to the subject of contention and to have his claim determined by the Magistrate before the jury proceed with the matter—*Ah Yuay v. Ma Gyi* 7 Bur L T 23 15 Cr L J 269.

136 If such person does not perform such act or appear

Consequence of his failing to do so and show cause or apply for the appointment of a jury as required by section 135, he shall be liable to the penalty prescribed in that behalf in Section 188 of the Indian Penal Code, and the order shall be made absolute.

340 Object of section.—The provisions of this section are stringent because the intention is to create facilities for conditional orders which Magistrates are authorised to pass under this chapter becoming final without needless delay and thereby promptly to ensure public safety—12 Mad 475. Therefore an order under this section must be passed

without delay. Where a conditional order issued under section 133 was made absolute 4 years later the High Court treated the final order as resting on no conditional order and reversed it—23 Bom. L. R. 844.

341 Order absolute.—This section conclusively presumes that the conditional order under sec. 133 was correctly made—17 Mad. 475. Where an order has become absolute under this section it cannot be questioned in any subsequent proceeding—1900 P. R. 2. It is not competent to the party to go behind the order and question its validity in any way—13 All. 577. But where the Magistrate makes an order which he had no jurisdiction to pass the party affected by it can go behind the order—20 All. 501.

Even though an order has been made absolute under this section by reason of the party not being able to attend on the date fixed the Magistrate can set aside the *ex parte* order on the appearance of the party. In such a case the Magistrate must proceed to record evidence as provided by Sec. 137 and shall then either make the order absolute again or shall drop the proceedings as the case may be—19 Cr. L. J. 214 (Pat.).

342 No further notice necessary.—Whenever the time fixed in the order under sec. 133 has been allowed by the defendant to pass without compliance with the order or without protest the liability to punishment attaches at once and no further notice is necessary under sec. 140—31 Mad. 82.

137. (1) If he appears and shows cause against the order
 Procedure where he the Magistrate shall take evidence in the
 appears to show cause matter as in a summons case.

(2) If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.

(3) If the Magistrate is not so satisfied the order shall be made absolute.

343 Magistrate.—The power to issue a conditional order belongs only to the Magistrate mentioned in the beginning of sec. 133. The power to appoint a jury also belongs to the Magistrate who made the conditional order (see sec. 135). But the Magistrate who is to hold the inquiry under section 137 need not be the Magistrate who made the order under sec. 133. The Magistrate in section 137 is the Magistrate *before whom the party is ordered to appear* (see sec. 133) he may be either the Magistrate himself who issued the conditional order or a Magistrate of the first or second class mentioned in the first part of section 133 (1). This must be the meaning of sections 133 and 137 read together. Therefore, where

a Magistrate issuing a conditional order under sec 133 required certain persons to appear before a Civil Magistrate the latter can exercise his powers under section 137 and can take evidence concerning the conditional order or any further proceedings—see 9 Val 61 25 Cal 278 2 Pers 61

341 Taking evidence.—When a party appears to show cause the Magistrate is bound to take evidence. He cannot make the order absolute without taking evidence—26 W R 7 *Jassi v Emp* 70 A I J 69 25 Cr L J 266 1 Bom L R 783 *Ratn Lal v S C I R* 831 11 Bom 375 *Dehon v Emp* 47 All 341 A I R (1905) All 614 26 Cr L J 905 *Sant Sahai v Lachman Singh* 9 O L J 61 23 Cr L J 250 Even if the party appears after the time fixed in the order but before the case is taken up the Magistrate is bound to hear his objection and take evidence for the order he has to make—10 W R 77 The absence of the objector at an adjourned hearing after he has once appeared to show cause will not absolve the Magistrate of his duty of taking some evidence at least before making the order absolute—2 Bom J R 818 *Heelal v Emp* (supra) The Magistrate cannot act solely on his own opinion he is bound to take evidence as the basis of his order which he is to make—*Doraiswami v Sudarsana* 17 M I T 14 16 Cr L J 207 11 Bom 33 2 Weir 6 It is illegal for him to make the order absolute solely on the report of a Talwadar. He must go into the evidence adduced by the Talwadar and record his findings—*Ismail v Banda* 6 A I J 637 The report or information received by the Magistrate before passing the conditional order under sec 133 is no evidence against the other party (the proceeding under sec 133 being *entirely ex parte*) and the Magistrate cannot act upon it but is bound to take evidence in the presence of the opposite party—*Srinath v Annadu* 1 Cal 395, *Raimohan v Emp* 44 Cal 61 He also cannot even with the consent of the parties refer the matter to a subordinate Magistrate for inquiry and report and then pass the final order on the basis of that report he must take the evidence himself—*In re Karivappa Ninappa* 47 Bom 89 he cannot base his decision upon the information gathered from a personal local inspection instead of taking evidence even though the parties agree to abide by his decision—*Upendra v Rampal* 10 C L J 482 *Doraiswami v Sudarsana* 17 M I T 142 *Raimohan v Emp* 43 Cal 61 (64), *Kalisaday v Sidheswar*, 23 C W N 1054 20 Cr L J 322 20 Cr L J 217 (Pat) *K E v Kanhaiya Lal* 24 O C 267 *Balbhadra* 1 P L W 292 18 Cr L J 418 This section does not authorise a Magistrate to assume the role of an arbitrator even though the parties agree to his being so and to pass an order after a local inquiry without recording evidence—*Chandra Mandal v Ram Mandal* 21 C W N 926 18 Cr L J 738 *Upendra v Rampal* 10 C L J 482

345 *Dropping of proceedings*:—See Note 332 under sec 133 The Magistrate cannot make an order dropping the proceedings under sub-section (1) of this section without taking evidence in the matter as directed by sub-section (1)—*Shew Kelaon v Vayan*, 22 Cr L J 239 (Cal) Where in a proceeding in respect of an alleged obstruction of a public way the Magistrate made a conditional order but dropped the proceedings on the opposite party taking the objection in showing cause that the Court had no jurisdiction to proceed with the inquiry on the ground that the identical way had previously been the subject matter of an inquiry under sec 133 by a Court of competent jurisdiction held that the Magistrate was bound to take evidence as prescribed by sub-section (1) of this section, it was open to the Magistrate after taking evidence to consider whether there was a complete answer to the case against the opposite party or whether the case was one where the parties should be referred to the civil Court for the determination of a matter which the Magistrate considered he could not decide—*Sarojeshashini v Sripati Charin*, 12 CrL 702 16 Cr L J 415 19 C W N 332

346 *Procedure*—As in a summons case the complainant shall first begin by calling his witness who may be cross examined by the other party After the complainant has finished the other party shall let in his evidence—6 A I J 695 The opposite party is not bound to produce evidence until the party who has set the law in motion has produced his evidence—*Indira K F* 11 A I J 931 15 Cr L J 23 *In re Daktinim mirthi* 14 Cr L J 848 (Ma 11)

Where a Magistrate passed a conditional order under sec 133 and on the 17y fixed the accused put in a written statement to the effect that no obstruction to the public thoroughfare had been caused and produced a number of witnesses who deposed to the same effect but the Magistrate without recording any evidence for the prosecution made the order absolute under this section it was held that the Magistrate's order was illegal since he should have proceeded as in a summons case—*Crown v Sift Rm* 1917 P R 32 *Jones v Emp*, 20 A L J 692

The Court is bound at the party's request to compel the attendance of witnesses—6 C W N 548

Reference to Jury—Reference to a jury is entirely optional with the party against whom the order is made but if he applies for a jury he is bound by their verdict If no reference is made the order made by the Magistrate under this section will become final—14 CrL 60

347 *Illegal order*—Where a conditional order under Sec 133 was passed without jurisdiction the subsequent order under this section confirming the conditional order is also illegal—*Ratanlal* 516

Illegality of procedure cannot be cured:—Where a Magistrate, instead of taking the evidence himself as provided by this section sent the case

to a subordinate Magistrate for inquiry and report and then made the order absolute on the basis of that report *held* that there was a complete disregard of the imperative provisions of this section. It is not a mere irregularity of procedure but a grave illegality which cannot be cured under Sec. 537 even by the consent of the parties—*In re Kartavappa* 47 Bom 89

138 (1) On receiving an application under Section 135 to appoint a jury the Magistrate shall—

Procedure where he claims jury

- (a) forthwith appoint a jury consisting of an uneven number of persons not less than five of whom the foreman and one half of the remaining members shall be nominated by such Magistrate and the other members by the applicant
- (b) summon such foreman and members to attend at such place and time as the Magistrate thinks fit and
- (c) fix a time within which they are to return their verdict

(2) The time so fixed may for good cause shown be extended by the Magistrate.

348 Section imperative.—This section leaves no discretion to the Magistrate and he is bound to appoint a jury when he is asked to do so—*Weir* (3) 13 C W N 307. If he refuses to do so he acts illegally—1887 P R 19 2 C L R 509

349 Appointment of jury.—The Magistrate to whom an application to appoint a jury is made cannot delegate that duty to another Magistrate—*Ratanlal* 460

The word forthwith must be interpreted in a reasonable way. It merely means that the Magistrate shall appoint the jury as soon as he reasonably can. Therefore where the Magistrate appointed the jury 2 days after the parties applied for a jury *held* that the terms of this section were substantially complied with and there was no unreasonable delay—*Khuski Ram v Crown* 4 Lah 224 (229)

The appointment or the cancelment of appointment of a jury must be made in the presence of the parties and not behind their back—5 Cal 875

The following persons should not be appointed as jurors—(a) Complainant and his witnesses because it is plainly against the principles of right and equity that a person should be compelled to submit his case to the arbitration of his adversary—22 W R 47 (b) Friends and supporters of the complainant—*Tarjand Ali v Hakim Ali* 37 All 26 1897 P R 4 (c) Nominees of the party interested in upholding the Magistrate's

345 *Dropping of proceedings*.—See Note 332 under sec 133 The Magistrate cannot make an order dropping the proceedings under sub section () of this section without taking evidence in the matter as directed by sub section (1)—*Stew Kelaon v Vayan* 22 Cr L J 239 (Cal) Where in a proceeding in respect of an alleged obstruction of a public way the Magistrate made a conditional order but dropped the proceedings on the opposite party taking the objection in showing cause that the Court had no jurisdiction to proceed with the inquiry on the ground that the identical way had previously been the subject matter of an inquiry under sec 133 by a Court of competent jurisdiction held that the Magistrate was bound to take evidence as prescribed by sub section (1) of this section, it was open to the Magistrate after taking evidence to consider whether there was a complete answer to the case against the opposite party or whether the case was one where the parties should be referred to the civil Court for the determination of a matter which the Magistrate considered he could not decide—*Sarajebashini v Sripathi Charin* 12 CrL 702 16 Cr L J 413 19 C W N 332

346 *Procedure*—As in a summons case the complainant shall first begin by calling his witness who may be cross examined by the other party After the complainant has finished the other party shall let in his evidence—6 A L J 685 The opposite party is not bound to produce evidence until the party who has set the law in motion has produced his evidence—*Idra v A F* 11 A L J 931 15 Cr L J 23 *In re Dakshinamurthi* 18 Cr L J 848 (Mad)

Where a Magistrate passed a conditional order under sec 133 and on the day fixed the accused put in a written statement to the effect that no obstruction to the public thoroughfare had been caused and produced a number of witnesses who deposed to the same effect but the Magistrate without recording any evidence for the prosecution made the order absolute under this section it was held that the Magistrate's order was illegal since he should have proceeded as in a summons case—*Crown v Sidi Raw* 1917 P R 32 *Jasat v Emp* 20 A L J 692

The Court is bound at the party's request to compel the attendance of witnesses—6 C W N 548

Reference to Jury—Reference to a jury is entirely optional with the party against whom the order is made but if he applies for a jury he is bound by their verdict If no reference is made the order made by the Magistrate under this section will become final—14 CrL 60

347 *Illegal order*—Where a conditional order under Sec 133 was passed without jurisdiction the subsequent order under this section confirming the conditional order is also illegal—*Ratimal* 516

Illegality of procedure cannot be cured:—Where a Magistrate instead of taking the evidence himself as provided by this section sent the case

to a subordinate Magistrate for inquiry and report and then made the order absolute on the basis of that report held that there was a complete disregard of the imperative provisions of this section. It is not a mere irregularity of procedure but a grave ill quality which cannot be cured under Sec. 537 even by the consent of the parties—*In re Iyappa* 47 Bom 89

138 (1) On receiving an application

Procedure where he claims jury under Section 135 to appoint a jury the Magistrate shall—

(a) forthwith appoint a jury consisting of an uneven number of persons not less than five of whom the foreman and one half of the remaining members shall be nominated by such Magistrate and the other members by the applicant

(b) summon such foreman and members to attend at such place and time as the Magistrate thinks fit and

(c) fix a time within which they are to return their verdict

(2) The time so fixed may for good cause shown be extended by the Magistrate

348 Section imperative—This section leaves no discretion to the Magistrate and he is bound to appoint a jury when he is asked to do so—*Weir* 63 13 C W N 367 If he refuses to do so he acts illegally—1887 P R 19 3 C L R 509

349 Appointment of jury—The Magistrate to whom an application to appoint a jury is made cannot delegate that duty to another Magistrate—*Ratanlal* 460

The word forthwith must be interpreted in a reasonable way it merely means that the Magistrate shall appoint the jury as soon as he reasonably can. Therefore where the Magistrate appointed the jury 2 days after the parties applied for a jury held that the terms of this section were substantially complied with and there was no unreasonable delay—*Akshay Ram v Crown* 4 Lah 224 (229)

The appointment or the cancelment of appointment of a jury must be made in the presence of the parties and not behind their back—5 Cal 875

The following persons should not be appointed as jurors—(a) Complainant and his witnesses because it is plainly against the principles of right and equity that a person should be compelled to submit his case to the arbitration of his adversary—22 W R 47 (b) Friends and supporters of the complainant—*Fazlul Ah v Hafim Ali* 37 All 26 1897 P R 4 (c) Nominees of the party interested in upholding the Magistrate

order (i.e. nominees of the complainant)—21 W R 43 26 Cal 869 73 Cal 499

A Magistrate has no power to veto the appointment of a person nominated by the applicant—1897 P R 4

The summons to jury should specify the time and place when and where the jurors should attend—5 All 7

350 Jury improperly constituted —If the Magistrate appoints the foreman of the jury alone the jury is not a properly constituted one—16 W R 23 Where one of the five jurors remains absent and the foreman substitutes a juror in the place of the absent one he acts illegally because he has no such power and the jury is not legally constituted—10 C L R 193 If one of the jurors declines to act or remains absent the Magistrate cannot proceed with the inquiry unless he appoints another juror in his place—*Uma Churn v. Joslein* 11 Cal 84

A jury consisting of less than five persons is not a properly constituted one and an order based on the verdict of such a jury is invalid—*Ajit v. Jamatulla* 20 Cr L J 511 (Cal)

351 Procedure —This chapter does not lay down any rules as to the procedure which a jury appointed under this section should adopt in inquiring into a matter submitted to them—3 All 364

The jury is bound to hear the parties and their witnesses. They can not decide a matter referred to them merely on logical inspection without taking evidence—26 Cal 869 C C W N 886

352 Verdict after time fixed —Where a jury appointed under this section had considered the matter referred to them and the individual members of the jury had given in their opinion to the foreman but he went in his report after the time fixed but before a final order was made by the Magistrate it was held that the Magistrate should act on the verdict of the jury and should not appoint a second jury—21 W R 54

Extension of time.—The power conferred by subsection (2) for the extension of time for delivery of verdict can be exercised by the Magistrate only and cannot be delegated to the foreman of the jury—23 All 159

353 Reference to arbitration —As the dispute under this chapter is of a public nature in which public interests are involved the case cannot be referred to arbitrators by agreement of parties—*Rajabai v. Nawlak* 2 P I T C 22 Cr L J 377 *Ajit Shalkh v. Jewatulla* 22 Cr L J 511 (Cal)

139. (1) If the jury or a majority of the jurors find that the order of the Magistrate is reasonable and proper as originally made, or subject to a modification which the Magistrate

accepts the Magistrate shall make the order absolute subject to such modification (if any)

(2) In other cases no further proceedings shall be taken under this Chapter

354 Verdict of the jury —The jurors are not to give their individual and separate opinions to the Magistrate but they are to consult together and then express their collective opinion through their foreman—18 All 158

The findings of all the jurors need not agree in every detail but if all the members agree that the order of the Magistrate taken as a whole is improper such jurors shall be counted together as unanimously objecting to the order—5 W R 31

Where one of the five jurors declined to act and the remaining four being equally divided in opinion the Magistrate declined to pass any order under sec 139 and struck off the case held that the course adopted by the Magistrate was irregular he should have summoned a fresh jury and commenced the inquiry afresh—*Uma Churn v Joshe* n 11 Cal 84

The only thing which the jury is to consider is whether the conditional order passed by the Magistrate under Sec 133 is reasonable and proper. They cannot enter into the question of rights of parties—*In re Chunder Nath* 5 Cal 875 *Matuldhari v Harimathab* 31 Cal 979 *Dilalram v Ba Shwab* 10 C W N 845 *Nasaruddin v Alisulhi* 3 C W N 345 They cannot decide the question of bona fides of the claim set up by the opposite party—See Notes 339 and 359 under Secs 133 and 139A

Verdict of majority —The majority means a majority of the persons appointed and not a majority of the persons attending—13 Cal 775 Therefore where one juror out of five was all along absent the Magistrate cannot accept the verdict of the majority of the four who attended—11 Cr L J 402 (Cal) So also a decision by three out of five in the absence of the other two is invalid—23 All 159 So again a verdict is defective when four out of five jurors were present at the time of the local investigation and one was absent. Such a verdict is illegal and cannot be acted upon and a fresh jury should be appointed—*Srimati Dasya v Nibaran* 24 C W N 928 21 Cr L J 448

The finding of the jury should be arrived at after each juror exercises his own discretion in the matter. A verdict given by jurors some of whom blindly follow the opinion of others is not proper. Where out of five jurors two only saw the place and the third never visited it but passed his opinion solely on what had been told him by the other two it was held that the opinion of the so called majority was not that of a legal majority—25 W R 4

Objection to verdict —The party objecting to the verdict must show *prima facie* that either the jury did not apply a judicial discretion to the case or that they could not have arrived at that verdict by a proper exercise of their discretion on the materials before them—23 W R 15

355 *Magistrate bound by verdict* —A Magistrate is not at liberty to take only a part of the verdict he is bound to be guided by their whole decision. If any part of their verdict is ambiguous he can ask them to express their opinion clearly—12 W R 28

The Magistrate must accept the verdict in its entirety If one part of the verdict is erroneous (e.g. if the verdict provides for the *reconstruction* of an obstruction) the whole verdict must be rejected. The Magistrate cannot split up the verdict and accept that part of the verdict which is correct rejecting the portion which is erroneous—*Rahimaddi v Sher Ali* 40 C L J 597 26 Cr L J 517

If the verdict modifies the Magistrate's order he may or may not accept the modification. If he accepts the modification he is bound to be guided by their decision. If he does not accept the modification he must stop further proceedings—12 W R 26

Remitting the case to another Magistrate —On receipt of the verdict of the jury the Magistrate is not competent to remit the case for disposal to a second class Magistrate. The 1st class Magistrate is alone competent to deal with the case further and must dispose of the case himself—*Angapa v Perumal* 43 Mad 316

356 *Reference to High Court* —The decision of the jury appointed under Sec 138 is not a proceeding in a Criminal Court which the District Magistrate can call for and examine and refer to the High Court under Sec 435—*Ratinalal* 336

139A (1) *Where an order is made under Section 133 for the purpose of preventing obstruction nuisance or danger to the public in the use of any way river, channel or place the Magistrate shall on the appearance before him of the person against whom the order was made question him as to whether he denies the existence of any public right in respect of the way river channel or place and if he does so the Magistrate shall before proceeding under Section 137 or Section 138 inquire into the matter*

(2) *If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial he shall stay the proceeding until the matter of the existence of such right has*

been decided by a competent Civil Court, and if he finds that there is no such evidence he shall proceed as laid down in Section 137 or Section 138 as the case may require

(3) A person who has on being questioned by the Magistrate under sub section (1) failed to deny the existence of a public right of the nature therein referred to or who, having made such denial has failed to adduce reliable evidence in support thereof shall not in the subsequent proceedings be permitted to make any such denial, nor shall any question in respect of the existence of any such public right be inquired into by any jury appointed under Section 138

This section has been newly added by sec 26 of the Criminal Procedure Code Amendment Act (XVIII of 1973)

The procedure which ought to be followed by the Magistrate in case a *bona fide* claim of right is set up by the petitioner was not laid down in any section of this chapter under the previous law. But quite a large volume of caselaw had gathered round this point which the Legislature has now thought fit to crystallize into a new section

"The principal question in connection with this clause is whether as provided in the Bill questions of title in relation to rights of way and the like should for the purposes of the Chapter be finally decided by the Magistrate or whether the almost uniform decisions of the High Courts which lay down that the Magistrate must stay proceedings if he is satisfied that the question has been raised *bona fide* should be followed. We prefer to accept the latter view as laid down in *Manipur Dey v Birhu Bhuyan Sirkar* 1 L R 42 Cal 158 and we have provided for it as a special case in a new section 139 A' — *Report of the Joint Committee (1922)*

The leading case on this subject is *Manipur Dey v Birhu Bhuyan Sirkar* 47 Cal 158 18 C W N 1086 15 Cr L J 698 (referred to in the above Report of the Joint Committee) which has laid down the following important propositions of law. If the party against whom the order is contemplated to be passed under sec 133 raises a question that the pathway is not a public property in the sense of the provisions of this section the Magistrate trying the case should be careful not only to decide as to whether the pathway in question is situate on a private land or is for public use but he should, even when the claim of the objector is not substantiated find whether the claim is *bona fide* or is set up only to oust the jurisdiction of the Court. If the Magistrate finds that the claim which is set up is a mere pretence, he should then proceed to pass a final order and make the rule issued by him absolute. If however he finds that the claim although not substantiated is not a mere pretence and is

raised to oust the jurisdiction of the Court but that it is raised *bona fide*, he should stay his hand and refer the party to the Civil Court. And if the party within a reasonable time does not have recourse to the Civil Court the Magistrate may then proceed to make the rule absolute.

357 *Bona fide claim*—If there is a *bona fide* dispute as to the existence of a public right the powers under sections 133, 137 as regards obstruction to public ways cannot be exercised by the Magistrate—4 Bom L R 687 *In re Dnyanoba* 15 Bom L R 57 14 Cr L J 71 *In re Mahirana Jaswatsangji* 22 Bom 989 11 Cal 8 1 C L J 434 2 Weir 61. But the claim in order to have this effect must be *bona fide* and not a mere pretence to oust jurisdiction. The mere assertion of a claim made without reasonable ground or honest belief in it or honest intention to support it will not oust a Criminal Court of its jurisdiction under these sections—15 Cal 564 25 Cal 278 22 Cr I J 459 (Cal) 22 Cr L J 577 (Cal). It is not open to any person illegally causing obstruction to a public property to set up a bogus question of title to such property for the purpose of ousting the jurisdiction of a Magistrate and notwithstanding the raising of such a question the Magistrate is entitled to hear the case sufficiently to enable him to make up his mind whether or not a *bona fide* question of title is raised—*Imp v Dost Muhammad* 29 All 98 (99). A claim set up to annoy an enemy of the claimant cannot be said to be a *bona fide* claim—1 C L J 434.

Therefore when a person against whom an order is made under section 133 to remove an obstruction from a public way claims it as a private way the Magistrate should first determine whether the claim is *bona fide* or not—*Kylash v Ram Lal* 26 Cal 869 31 Cal 979 *Minipur Dey v Bidhu Bhushan* 42 Cal 158 *Upendra v Kshilish* 23 Cal 493 3 C W N 345 7 C W N 117, 10 C W N 845 2 P L J 67 22 Cr L J 321 (Cal). In the absence of a finding as to the *bona fides* of the claim set up by the petitioners to the subject matter of the dispute the judgment is liable to be set aside—*Chandra Mandal v Ram Mandal* 21 C W N 906 18 Cr L J 738 *Blagat v Ramsup* 21 C L J 116 16 Cr L J 160. The question of *bona fides* of a claim is a question of fact and has to be enquired into like any other question of fact—*Nundo Gopal v Kusum* 1 C L J 434, *Teni Prasad v Sarjoo* 20 Cr L J 556 (Pat).

If, however, the encroachment complained of is made on a way which is admittedly public the jurisdiction of the Magistrate is not ousted and it is not necessary, in order to give jurisdiction to the Magistrate that there should be a finding as to the *bona fide* character of any claim that might be made by the accused to any particular piece of ground on which the encroachment is made—6 C W N 886. Similarly, if upon inquiry the Magistrate finds that the channel in question is a public channel the

Magistrate is not bound to inquire whether the accused had a *bona fide* claim of right to the channel or to refer the matter to the Civil Court but has jurisdiction to proceed with the case—*Fah r Mullick v Imp*, 28 C L J 211

A *bona fide* claim should be set up at or before the hearing but not afterwards and the Magistrate who finds the claim not to be *bona fide* should state the reasons for his decision, which is subject to revision by the High Court—15 Cal 501 7 C W N 117

In *Em v Dost Muhammad* 28 All 98 the Allahabad High Court seems to have laid down that the moment a *bona fide* dispute as to title is raised by the defendant the jurisdiction of the Magistrate is ousted and the Magistrate is bound to stop the proceeding and to refer the parties to a civil suit. That ruling has been dissented from in a recent case of the same High Court in which it has been held that the Magistrate's jurisdiction is not ousted merely by reason of the defendant raising a *bona fide* dispute as to title but he is entitled to decide whether the way obstructed by the defendant is a public way—*Abdul Wahid v Abdullah*, 45 All 659 (660) 21 A L J 529

357A Procedure—The provisions of this section are imperative and as soon as the accused denies a public right the Magistrate ought to inquire into the matter and find whether the place obstructed is a public one or not. If, instead of doing so he at once proceeds under sec 137 to take evidence from the complainant the trial is vitiated by wrong procedure and the final order is liable to be set aside—*Raghunath v Emp* 23 A L J 187 26 Cr L J 873 A I R (1925) All 311

As soon as the accused appears before him the Magistrate is bound to question him as to whether he denies the existence of any public right in respect of the way, river etc. and if he does so the Magistrate shall before proceeding under sec 137 or 138 inquire into the matter. It is the duty of the Magistrate to follow the above procedure without waiting for the objection to be raised by the accused and the Magistrate cannot refuse to inquire into the matter because the objection was not taken until a late stage of the case—*Sh Sadir v Sabirah* 29 C W N 649 26 Cr L J 1168 A I R 1925 Cal 735

Dispute between Government and private individual—In case of a dispute between the Government and a private individual as to the right to the ground on which an encroachment is alleged to have been made by the latter by building a wall a Magistrate should not proceed under this section until the dispute is settled in a Civil Court—*Ratanlal* 378, 2 Bom L R 818

358 Sub-section (2)—The law requires first of all that the party shall appear before the Magistrate and deny the existence of the public

right in question, secondly, that he shall produce some reliable evidence, and thirdly, that such evidence shall be legal evidence and shall support the denial. If these three conditions are satisfied, then the Magistrate's jurisdiction ceases to exist—*Thakur Sao v Abdul Aziz*, 4 Pat 783

If the Magistrate finds that the claim is *bona fide*, he should abstain from further action and should allow the party to substantiate his claim in a Civil Court—15 Cal 564, 17 Cal 562, *Nasaruddi v Akiluddi* 3 C W N 345, 8 C W N 143, *Manipur Deo v Bidhu Bhushan*, 42 Cal 158, *Khushi Ram v Crown* 4 Lah 224 (231), 25 Cal 278, *Nunda v Kusum*, 1 C L J 434, 22 Cr L J. 351 (Cal), *Debendra v Chairman*, 25 Cr L J 1080 (Cal), 1900 A W N 204, 28 All 98, 1903 P. R. 2, 10 Bom L R 563, *Rang v B N W Ry Co*, 4 P L T 402, L B R (1872 92) 530, 4 C P L R 142. So also where the question as to whether the way is private or public is seriously disputed and its decision becomes a difficult matter of mixed fact and law the Magistrate should decline to decide it, and should send the parties to a Civil Court—*Abdul Wahid v Abdullah* 45 All 656 (666), 21 A L J 529. When a *bona fide* question of title is raised, the Magistrate cannot proceed any further in the matter, he cannot decide whether the title exists or not—28 All 98, he is not competent to decide whether the title is barred by limitation or not—35 Cal 283. In *Ram Sagar v Alek Naskar*, 49 Cal 682 (F B): 26 C W N 142, the Calcutta High Court considered all the above cases and held that even though the Magistrate found that the claim of right set up by the defendant was *bona fide* his jurisdiction was not thereby ousted but he was entitled to proceed with the case and was not bound to refer the parties to a Civil Court. But the present section expressly lays down that if the Magistrate finds that there is any reliable evidence in support of the defendant's denial of a public right he should stay all proceedings until the matter of the existence of such right has been decided by a competent Civil Court.

If the Magistrate finds that the claim is made *bona fide*, he should allow the defendant a reasonable time within which to establish his rights in a Civil Court, and in the meantime *proceedings may be stayed*. If the defendant does not assert his right in a Civil Court within a reasonable time, the Magistrate should proceed with the case—*Hesat Ali v Abdur Rahim*, 8 C W. N 143, *Ram Sagar v Alek Naskar*, 49 Cal 682 (F. B) at p 693, *Lakshan Chandra v Ulas*, 22 Cr L J 351 (Cal), *Manipur Deo v. Bidhu Bhushan*, 42 Cal 158.

359. Sub-section (3) —Question shall not be inquired into by jury — The question as to whether the claim set up by the defendant is a *bona fide* one or whether the place is a public way or not is to be decided by the Magistrate himself and not to be left to the jury. The jury is not

competent to decide the question whether there is or is not a public right of way. They can merely find whether the Magistrate's order as originally made is reasonable and proper—*Ajlash v. Ram Lal*, 26 Cal 869, *Dulal Ram v. Basirnasb Chattran* 10 C W N 845, *Nasiruddi v. Akiluddi*, 3 C W N 345 *Matuk Dhar v. Hari Madhab* 31 Cal 979 *In re Chunder Nath* 5 Cal 875 *Sheikh Inrat v. Sheikh Amjad* 2 P L J 67 *Akushi Ram v. Crown* 4 Lah 224 (231) 24 Cr L J 457. Contra—30 All 364 where it has been held that it is within the competence of the jury to decide as to the validity of an objection that the way alleged to have been obstructed is not a public way. But the Allahabad ruling has been disapproved of by the Legislature and is rendered obsolete by this section. We think that the only question to be left to the jury should be whether the measures directed by the Magistrate to be taken are reasonable and proper and in view of the decision in 30 All 364 we think it desirable that this should be made clear"—*Report of the Select Committee of 1916*

140 (1) When an order has been made absolute under Section 136 Section 137 or Section 139, **Procedure on order being made absolute** the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that in case of disobedience he will be liable to the penalty provided by Section 188 of the Indian Penal Code

(2) If such act is not performed within the time fixed, the **Consequence of disobedience to order** Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building goods or other property removed by the order, or by the distress and sale of any other moveable property of such person within or without the local limits of such Magistrate's jurisdiction. If such other property is without such limits the order shall authorize its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found

(3) No suit shall lie in respect of anything done in good faith under this section.

360 A person who neither complies with the order passed u
Sec 133 nor protests against it within the time fixed can be pro

under Sec 136 without further notice being given under this section—31 Mad 280 (cited in Note 342 under Art 136) : 13 All 577

If a final order is passed by a Magistrate under this chapter, any succeeding Magistrate cannot go behind the order and question its legality, as if he were sitting in judgment over it as a Court of Appeal. Therefore, if an application is made under this section to the succeeding Magistrate for the enforcement of an order passed by a preceding Magistrate the former cannot reject the application on the ground that the order passed by his predecessor was an illegal order—*Kiran Chandra v Ramesh Chandra*, 27 C W N 459 24 Cr L J 317.

141 If the applicant, by neglect or otherwise, prevents the appointment of the jury, or if from any cause the jury appointed do not return their verdict within the time fixed or within such further time as the Magistrate may in his discretion allow, the Magistrate may pass such order as he thinks fit, and such order shall be executed in the manner provided by Section 140

Procedure on failure to appoint jury or omission to return verdict.

361 Jury failing to return verdict.—When the majority of the jurors perversely refuse to return a verdict for fear of displeasing either party, the Magistrate can discharge them and appoint a new jury—*Girwar Lal v Bansidhar*, 44 All 375. Where upon failure of the jury to return their verdict, the petitioners appeared before the Magistrate and prayed for appointment of a fresh jury, it was held that the Magistrate ought to have appointed a new jury and not made the original order absolute—12 C W N 1017. Under this section, the Magistrate upon failure of the jury to return a verdict has a discretion to pass such order as he thinks fit. Therefore, where the foreman of the jury simply returned the papers without a verdict the Magistrate had jurisdiction to make the order absolute—*Jiblal v Gena Sahu*, 4 P L T 15. 24 Cr L J 472. But it is desirable that under such circumstances the Magistrate should inquire into the case and should give the party an opportunity of showing cause and producing evidence, before he makes the order absolute under this section—4 P L T. 15, *Ajodhya Tewari v. Emp.*, 4 P. L. T. 13 : 24 Cr L. J. 583. But if upon the failure of the jury to return their verdict, the petitioners did not take any action to move the Magistrate for taking evidence on their behalf, the Magistrate was justified in making the order absolute—13 C. W. N. 367.

Fine :—An order sentencing a man to a fine for the nuisance, and

an additional fine for each day he continues it after the conviction, is illegal—1 B L R O C 41

142 (1) If a Magistrate making an order under Section 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public he may, whether a jury is to be, or has been, appointed or not, issue such an injunction to the person against whom the order was made as is required to obviate or prevent such danger or injury pending the determination of the matter

(2) In default of such person forthwith obeying such injunction the Magistrate may himself use or cause to be used such measures as he thinks fit to obviate such danger or to prevent such injury

(3) No suit shall lie in respect of anything done in good faith by a Magistrate under this section

362 Imminent danger — An injunction under this section can be issued only when there is imminent danger or fear of injury of a serious kind to the public—1 W R 86 Where a Magistrate who makes an order under this section subsequently directs further inquiry to be made the Magistrate must be held to have abandoned the proceedings under this section and he should have proceeded under Secs 136 and 137 instead of fining the party under sec 188 1 P C—*Ibid*

No injunction can be issued under this section when the danger has passed away—1 W R 8

143. A District Magistrate or Sub divisional Magistrate, or any other Magistrate empowered by the Local Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code or any special or local law

Magistrate may prohibit repetition or continuance of public nuisance.

Secs 143 and 144 — This section enables the Magistrate to prevent the continuing of public nuisance, whereas Sec 144 enables him to prevent it for the first time—19 Mad 464

363 Scope of section — A person will be bound by an order under this section only when the order is issued to him personally and not

proclamation addressed *generally* to the public at large—8 All 99 ~ W R 32

Revision —It was formerly held that orders under secs 143 and 144 were not open to revision because they were not proceedings within the meaning of sec 435—*Emp v Bisheshar* 1892 A W N 102 But now by reason of the omission of subsection (3) of section 435 by the Amendment Act of 1923 orders under section 143 will henceforth be liable to revision

CHAPTER XI

TEMPORARY ORDERS IN URGENT CASES OF NUISANCE OR APPREHENDED DANGER

144 1) In cases where in the opinion of a District Magistrate a Chief Presidency Magistrate Sub Divisional Magistrate or of any other Magistrate *not being a Magistrate of the third class specially empowered by the Local Government or the Chief Presidency Magistrate or the District Magistrate to act under this section there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable*

such Magistrate may by a written order stating the material facts of the case and served in manner provided by Section 134 direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management if such Magistrate considers that such direction is likely to prevent or tends to prevent obstruction annoyance or injury, or risk of obstruction annoyance or injury to any person lawfully employed or danger to human life health or safety or a disturbance of the public tranquility or a riot or an affray

(2) An order under this section may in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed be passed *ex parte*

(3) An order under this section may be directed to a particular individual or to the public generally when frequenting or visiting a particular place.

(4) Any Magistrate may, either on his own motion or on the application of any person, rescind or alter any order made under this section by himself or any Magistrate subordinate to him or by his predecessor in office.

(5) Where such an application is received the Magistrate shall afford the applicant an early opportunity of appearing before him either in person or by pleader and showing cause against the order, and if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing.

(6) No order under this section shall remain in force for more than two months from the making thereof, unless in cases of danger to human life, health or safety or a likelihood of a riot or an affray, the Local Government by notification in the official Gazette otherwise directs.

Change.—The italicised words in subsections (1) and (4) have been added. Subsection (5) has been newly enacted and the old subsection (5) has been renumbered as subsection (6) by section 27 of the Criminal Procedure Code Amendment Act (XVIII of 1923). The reasons have been stated below in their proper places.

364 Application of this section.—The power conferred by this section upon a Magistrate is an extraordinary power and the Magistrate should resort to it only when he is satisfied that other powers with which he is entrusted are insufficient. The authority of the Magistrate should be exercised in defence of rights rather than in their suppression in repression of illegal, rather than in interference with lawful acts.—*Sundaram v Q* 6 Mad 203. It is the duty of the Magistrate to support all lawful acts as far as possible.—*Venkataramana v A* 1, 22 M L T 323. 19 C L J 56. His first duty is to secure to every person the enjoyment of his rights under the law and by measures of precaution to deter those who seek to invade the rights of others but if he apprehends that the lawful exercise of rights may lead to civil tumult and he doubts whether he has available a sufficient force to repress such tumult or to render it innocuous regard for the public welfare is allowed to override temporarily the private right and the Magistrate is authorised to interdict its exercise.—*Muthulu v Jagan* 2 M L J 147. *Tekut Kurj Dhanu v Bihik* 5 C

W. N 329 An order under sec 144 may sometimes interfere with the legal rights of individuals, but when such interference is necessary, it is the duty of the Magistrate to limit it as much as possible, and for that purpose he should afterwards hold an inquiry into the circumstances and determine whether as a matter of fact the act prohibited as likely to lead to a breach of the peace is within or in excess of the legal rights of the person forbidden to do it. If it is found that a man is doing that which he is legally entitled to do and that his neighbour chooses to take offence thereat and to create a disturbance in consequence it is clear that the duty of the Magistrate is not to continue to deprive the first of the exercise of his legal rights but to restrain the second from illegally interfering with that exercise of legal rights—*Abdool v Lucky Narain* 5 Cal 132 (134 135), *Bharg v K L* 25 Cr L J 1178 (Pat), *Q L v Haz Faddin*, *Ratanlal* 907

365 Magistrates empowered —Since the power to be exercised under this section is an extraordinary power the law is careful to confer this power upon those Magistrates alone whose discretion is prominently guaranteed by their responsible position or by selection—6 Mad 203

In the Punjab all Magistrates of 1st and 2nd class have been empowered to act under this section—*Punjab Gazette* 1883 Part I p 52 So also in Upper Burma. In Bombay Assistant Superintendents of Police have been empowered to act under section 144. See *Bombay Gazette*, 1883, Part I page 396

When a Magistrate passes an order under this section the record should show in clear and unmistakable terms the authority under which he professes to act—*Thudamawara v Emp*, 1 Rang 49 2 Bur L J 22 24 Cr L J 727

By the Amendment Act of 1923, third class Magistrates have been expressly prohibited from being empowered under this section. 'We do not think that powers under section 144 should be granted to a Magistrate of the third class and we have provided for this by a small amendment'—*Report of the Select Committee of 1916*

366 Conditions precedent —Proceedings under this section may be taken only in urgent cases of nuisance or apprehended danger, the existence of these circumstances is a condition precedent to an action under this section—1 C L R 58 This section is to be applied in cases of urgency, and should not be allowed to take the place of any other provision of law (e g sec 133) which might be more appropriate. And before proceeding under this section the Magistrate should hold an inquiry and record the urgency of the matter—*Kamini Mohan v Harendra*, 38 Cal 876 Where the complaint was that a person by closing a drain and obstructing the flow of the rain water of another house endangered the safety

of the house but the owner could drain off the water in some other way and that it was not an *urgent* case of nuisance or apprehended danger and action under sec 144 was not justified—*Haji Ali v Emp* 26 Cr L J 560 A I R 1935 All C N Before taking action under this section the Magistrate should be of opinion that immediate prevention or speedy remedy is necessary and he should state in the order the materials upon which his opinion is based—3 Cal 935 Jurisdiction under this section depends on the urgency of the case and the mere statement of the Magistrate that he considered the danger to be imminent is not sufficient to give him jurisdiction if the facts set out by him show that really there was no urgent necessity for taking action—*Chandra Nath v F J Ry*, 23 C W N 145 19 Cr I J 951 The record of the Magistrate should disclose the existence of an emergency which called for an *ex parte* order under this section or that there was no sufficient time to serve notice on the party affected thereby But a Magistrate ought not to treat a case as a case of emergency merely because some people threaten to commit a breach of the peace unless he had no sufficient police or other force at his command to prevent an immediate breach of the peace and unless he is further unable to find out the persons threatening to commit a breach of the peace so as to bind them over to keep the peace—*Velkarantha v K J M L T* 313 1917 M W N 724 19 Cr I J 56

There is sufficient ground for proceeding —These words have been added during the Debate in the Legislative Assembly on the same grounds on which a similar amendment has been made in sec 107 See the *Legislative Assembly Debates* January 25 1923 pages 1495—1496

A Subordinate Magistrate passing an order under this section ought to use his own judicial mind on the report of the police and to come to his own conclusion whether a temporary and urgent order ought to be passed and should not be guided entirely by the instructions issued by the District Magistrate (which are not legally binding on him) though he ought to give due respect to the advice of the District Magistrate—*Govinda v Perumal* 38 Mad 489 (490)

An order under this section must be based upon proper evidence In the absence of such evidence the Magistrate cannot pass an order merely on the complaint of one party—*Chandra Kaula v K E*, 20 C W N 981 17 Cr I J 464 So also the Magistrate cannot act upon mere surmise or assumption (11 W R 46) or merely on the strength of a Police report (13 W R 19 11 W R 46) without hearing the petitioner or giving him an opportunity of being heard—11 W R 46

367 Order—Nature and contents —(a) The order must be in writing the words in the section are 'written order' There must be a writt

order directed to the accused and duly promulgated before he can be prosecuted for disobedience of the order—1905 P R 36

(b) The order must contain a statement of the material facts which the Magistrate considers to be the facts of the case and upon the footing of which he bases his order—10 W R 53 *Karoolal v Shyamlal* 32 Cal 935 *Akal v Mahabir* 1 Pat L R 223 Under this section something more is necessary to be done than a mere recital of the fact that in the opinion of the Magistrate there was sufficient ground for proceeding under the action the order should state the material facts relating to the case in order to show that there was justification for making the order—*Blong v Emp* 25 Cr L J 1178 A I R 1924 Pat 767 In the case of an *ex parte* order the material facts include the circumstances showing why the Magistrate was temporarily unable to prevent a breach of the peace by intending peace breakers—*Venkalaramana v K E* 22 M L T 373 Where the order did not state the material facts it was set aside—*Karoolal v Shyamlal* 32 Cal 935 *Govinda Chetty Emp* 27 M L J 628 14 Cr L J 658

(c) The order must be *specific and definite* in its terms An order that the petitioner should not go to a particular village and should not allow any of his servants or relatives or friends to go there is of the most indefinite character as to time and person—2 C W N 472 Similarly an order directing the petitioners not to commit any act which is likely to induce a breach of the peace and not to take forcible possession of a village not in their possession is indefinite and bad in law—11 C W N 121

(d) The order must be confined to the *particular act* for which the danger is apprehended any order prohibiting a course of conduct or an occupation involving a series of acts done at certain intervals and spread over a period of time (e.g. an order prohibiting inoculation) is illegal and must be set aside—*Anonymous* 2 Weir 67

(e) The duration of the order must be *co extensive with the emergency* it should not be wider than is necessary to prevent the emergency The Magistrate cannot issue an order intending to have effect for all time—*Muthialu v Bapin* 2 Mad 140 *In re Pedda Charu* 2 Weir 74 Thus the Magistrate is not competent to pass an order directing that all processions should stop music when passing a certain place of worship at any time when it is not shown that assemblies are held in that place for the purpose of worship at all hours of the day—2 Mad 140 2 Weir 74

(f) The order must *not be general* and sweeping in its terms A Magistrate cannot in general terms forbid two parties to use any musical instrument in the neighbourhood of each other's house though he may forbid the use of musical instruments for the purpose of mutual annoyance—6 W R 40

(g) The order must not be in its nature irrevocable e.g. an order to cut down trees—13 W R 7^o or an order for division of crops—*Umatal v. Nemat*, 32 Cal 154

368 Service of order —The order must be served in the manner provided by sec 134 i.e. served personally. If the order is not proved to have been served personally a conviction under sec 188 I P C for disobedience of the order is illegal—*Ratanlal* 30

369 Abstain from certain act —The words certain act means a definite act. An order directing a person not to collect rents from the ryots generally without mentioning any particular ryots is not an order to abstain from a 'certain act'—16 Cal 80 19 Cal 127 9 C W N 392. See also 2 C W N 422 and 11 C W N 121 cited in Note 367 above. But an order directing a person not to interfere with the management of a particular temple or a particular *mutt* is a direction to abstain from a 'certain act' and is a valid order under this section—24 Mad 45 3 Mad 354 18 Mad 40^o. So also an order directing the trustee of a Vaishnavite temple to abstain from interfering with the conduct of Adhyapakam service is an order restraining a person from doing a certain act and is valid—*In re Srinivasathathachariar* 19 Cr L J 933 (Mad)

370 Take certain order with respect to property —*Property whether moveable or immovable* —It has been held in *Q v. Goluck Chunder* 12 W R 38 that the power conferred by this section refers only to and is restricted to *immovable* property of the kind set forth in the next Chapter. The Magistrate cannot make an order regarding the custody of money in respect of which a breach of the peace is likely to take place. See also *Ananda v. Carr Stephens* 19 Cal 127 (129) which lays down that this section relates to interference or dealing of some kind with the *land* itself or something erected or standing on the land. But there is nothing in the section to justify this view.

Property outside jurisdiction —No order can be made by a Magistrate under this section when the property in respect of which the order is made is situated outside the local limits of his jurisdiction—2 C W N 572

371 Orders under this section —The following orders can be passed by a Magistrate under this section —

(a) An order prohibiting burials in certain places on sanitary ground—2 Weir 64

(b) An order directing that two rival sects of Muhammadans should enter and worship in a particular mosque only at particular hours—2 Mad 262

(c) An order to the priests of a temple to lighten and wi

the door way so as to prevent overcrowding of pilgrims—6 B H C R 36

(d) An order that certain persons should abstain from interfering with the Badves in the performance of their daily puja of the god *Vishnu* is a valid order if the Magistrate is of opinion that the interference with the puja is likely to cause annoyance to the worshippers—4 Bom I R 58

(e) An order prohibiting a procession on the ground that the Magistrate would not be able to prevent a breach of the peace with the force at his disposal—*Arumuga v Perumalswamy* 15 Cr L J 30 (Mad)

(f) An order prohibiting a meeting if owing to the prevalence of ill feeling between certain persons likely to attend the meeting a breach of the peace is to be apprehended—*Nga Ti v Maung Kyaw* 11 Bur L T 59 18 Cr L J 512

372 Improper orders under this section —A Magistrate is competent to issue an order directing a person to abstain from certain act or to take certain order with certain property and such an order can be passed under this section only when the object of the order is to prevent obstruction annoyance or injury to any person or danger to human life health or safety or a disturbance of the public tranquility or a riot or an affray and when immediate prevention or speedy remedy is necessary. Therefore the following orders not being orders of the above description are not valid under this section —

(a) An order directing the ryots to refrain from reaping the crops they have sown unless they pay the Government rent—*Isab v Emp* 8 C W N 373

(b) An order stopping the erection of an embankment on the ground that the erection may cause loss to the opposite party—*Ram Autar v Krisnaput* 13 C W N 188

(c) An order prohibiting a person to excavate a tank in his own land on the apprehension that the house of the opposite party would go down into the bed of the tank—38 Cal 876

(d) An order directing the owners of cattle to take proper care of them and not to allow them to stray on the high road—3 B L R A C 45 9 B L R App 36

(e) An order that prostitutes who had built huts should remove their huts because people visiting them will endanger their lives by having to cross a railway line—*In re Birechuar* 2 C W N 70

(f) An order directing a person to remove a wall erected on a land alleged to belong to another is invalid in the absence of evidence that any dispute or riot or affray is likely to occur—13 W R 19

(g) An order directing the removal of an embankment whereby adjacent lands are in danger of being flooded—5 M H C R App 19

(h) An order directing the owner of a tank situated in the dry bed of a river to destroy the banks of the tank on the ground that they are an obstruction to the public using the river in the rainy season and that the banks interfere with the drainage of the country—1 B L R S N 27

(i) An order directing the removal of a dam which obstructs the flood of water through an irrigation channel—*Emp v Prayag* 9 Cal 103

(j) An order in respect of collection of market dues—23 W R 57

(k) An order directing the owner of a building which has fallen down on his own land to re-erect the building—*In re Rahmatulla* 17 All 485

(l) An order regarding custody of children—*Anonymous* 2 Weir 66

(m) An order that a certain person should remove the roof drains on the eastern side of his house and should construct them in such a manner as not to injure or inconvenience any party—2 W R 22

(n) An order directing that certain hedges should be pruned—*Ratanlal* 81

(o) An order regulating boat traffic at a certain landing place on the ground that the over crowding of boats was dangerous to the health of the residents of the town—*Q E v Pratap* 25 Cal 852

(p) An order passed with the consent of parties that certain articles with respect to which there was a dispute should be removed to the custody of the Court—*Leong Yau v Tchurg* 12 C W N 1044 or an order directing the village Munsiff to take possession of the disputed property—*Boganathi v Velayee* (1916) 2 M W N 88 17 Cr I J 190

(q) An order directing that certain persons should continue to live in the *havelis* in which they were at the date of the order and that a police guard should keep watch on the outer door only allowing certain specified persons to enter the *havelis*—1878 I R 33

(r) An order to the disputing landlords that no rents should be collected from the tenants until the rights of both parties have been established in a competent Court—*Irostina v Lnp* 8 C I R 231

(s) An order by a Magistrate holding that the first of two parties was in possession and directing that the second party should not interfere with the possession of the first party—*Parkar v Ravi Khelaudhi* 11 C W N 271 or an order attaching immoveable property—13 C W N cxiv In such cases the Magistrate should act under Section 145

(t) An order directing division of crops between two rival landlords—*Umatal v Nemas* 32 Cal 154

(u) An order forbidding people of either party to read prayers in a mosque on account of an apprehension of a breach of the peace (there being at the time an ill feeling between the parties regarding the manage-

ment of the mosque) is illegal—*Haji Md Ismail v Barkat Ali*, 26 C W N 904.

373 Orders regarding hats or markets —A Magistrate may direct one of two rival *hat* holders to change the day of his *hat*, so as not to interfere with the days of the hat of the other proprietor, if the Magistrate is of opinion that the holding of two *hats* on the same day, will lead to a breach of the peace—14 W R. 46 or he may direct that one of two rival *hat* holders should not hold his *hat* on the same day as another—18 W R 47 *Nagendra v Rakhal Das*, 23 C W N 141; *Parameshwar v Emp.*, 3 P L T 268 or where a new *hat* is established within half a mile of an old one the Magistrate may order the new *hat*-holder to abstain from holding his *hat* on certain days—18 W R 22 But the Magistrate cannot direct one of the two *hat* holders to hold his *hat* on particular days e.g. Saturdays and Tuesdays only, for though the section empowers the Magistrate to make an order prohibiting a person from holding his *hat* on certain specified days (*viz* the days on which the rival *hat* is held) the law does not empower him to direct that *hats* shall be held only on certain days, leaving the party no option to hold his *hat* on some other days on which his rival does not hold his *hat*—*Shyamanand v Emp.*, 31 Cal 990

A general order prohibiting the holding of *hats* for an indefinite period is illegal—*Bidhu Ranjan v Ramesh*, 11 C W N 223 *Md Bakar Ali v Hanwant* 1897 A W N 59 *Parameshwar v Emp.*, 3 P L T 268 An order forbidding certain persons from establishing a *hat* at certain places, and giving a vague direction not to interfere in any way with the trade of another hat, is improper—*Satish Chandra v. Emp.*, 11 C W. N 79

The right to hold a *hat* is a man's lawful right and he has the right to establish the *hat* in the place and on the days most advantageous to him (4 W. R. 12) provided that no breach of the peace is caused by any dispute between two rival *hat* holders Therefore an order of a Magistrate directing that one of the two rival *hat* holders should not hold his *hat* opposite to that of the other but should hold it a mile away is illegal, because such an order would render the *hat* of no use to him—*Shurul Chunder v Bama Churn*, 4 C L R 410 A general order prohibiting a person absolutely from holding a *hat* within an extensive area is illegal, for a person is entitled to exercise all rights of ownership on his property, and the holding of a *hat* on one's own property is not a wrongful act—*Benowars v Pranab Krishna*, 26 C. W N 663; *Rakhal Das v. Emp.*, 19 C W N. 248

An order can be passed under this section only on the grounds specified in the section, *viz* grounds of apprehended danger etc. Thus, an order

to close a *kat* can be passed on the ground that it was very near to another *kat* and a breach of the peace was apprehended—20 W R 43 but an order prohibiting a party from holding a *kat* on a particular day cannot be passed merely on the ground that another party had long been used to hold a *kat* on the adjacent land on the following day—21 W R 26 Even where there is a likelihood of a breach of the peace the likelihood must be imminent a Magistrate cannot restrain the holding of a *kat* merely because there is already a *kat* existing and the ulterior consequence of holding the new *kat* may be a breach of the peace—*Rakkhal Das v Emp.*, 19 C W N 248 13 Cr I J 311 If disturbance is anticipated the proper procedure would be to act under section 107 of the Code—*Benoochari v Prabod Krishna* 26 C W N 663

373A. Effect of order under this section.—An order under this section restraining a certain person from going upon the land of another should not be treated as a substantive evidence of possession of the latter, in a case of rioting which subsequently takes place in respect of the possession of the land No importance should be attached to a temporary injunction under this section which is intended only for emergencies Having regard to the peculiar jurisdiction conferred by this section no inference can be drawn from it as to the possession of either party—*Gita Prasad v A. F.* 5 F 1 T (5) 13 Cr I J 919 A I R 1925 Pat 17

374 Order contrary to Civil Court decree.—The Magistrate has no jurisdiction to pass an order the effect of which would be to interfere with the orders of a Civil Court—17 All 485 32 Cal 154 It is the duty of the Criminal Courts to respect the opinions of the Civil Courts and no order contrary to that of the Civil Court should be passed by a Magistrate under this section when the Civil Court has passed an order of temporary injunction against one party—*Murari v Ajjasam* (1922) M W N 112 23 Cr I J 159 Where the landlords of a certain share in an estate had obtained a decree in a Civil Court for arrears of rent and for ejectment of their tenants and also obtained possession under the decree, but the Magistrate at the instance of the tenants passed an order prohibiting the landlords from interfering with the possession of the tenants as the landlords were unable to point out the particular lands of which they had obtained possession under the decree *held* that the order was illegal being contrary to the Civil Court decree as its effect would be to deprive the landlords of the lands to which they were entitled under the decree, *held* further that it was on the tenants to shew what lands they held from the landlords—*Gobinda Sahai v Sims* 6 C W N 466 Where a person purchasing some property at a sale in execution of a mortgage debt put in possession of the same a Magistrate is not competent un

section to order the purchaser or any of his subordinates to refrain from entering upon the lands and the properties—2 C W. N 572

375 Question of title —A Magistrate acting under this section has no business to adjudicate upon rights and has no jurisdiction to decide upon any question of title or possession the only question before him is whether a breach of the peace is imminent and to make an order with the object of preventing a breach of the peace—*Appala Narasimhulu v Mahant* 11 M L J 122 Therefore a Magistrate's order directing the petitioner to take certain idols into the house of a certain person on the ground that the latter is entitled to them according to long usage, is illegal—8 C W N 376

376 Notice to file statements —This section does not authorise a Magistrate to issue notice upon the parties for filing written statements before the Court on a fixed date The issue of such a notice is not within the contemplation of the section and is a clear innovation beyond the jurisdiction of the Magistrate Such a notice being in effect a notice contemplated by section 145 (1) (although professedly issued under sec 144) the High Court under its powers of superintendence and control will prohibit the innovation and will order the Magistrate to convert the proceedings under sec 144 into proceedings under Chapter XII and to complete the proceedings by following the procedure prescribed by Chapter XII—*Kanis Amina v K E* 3 P I J 243 19 Cr I J 869

377 Secs 144, 145—Dispute relating to immoveable property —Section 144 is a larger and more general section than sec 145 An order under sec 144 can be made under various circumstances including a danger of a breach of the peace arising from disputes as regards possession, sec 145 is of limited scope and applies only where there is a danger of a breach of the peace due to such dispute The former section is discretionary, the latter is mandatory Therefore where the special condition of section 145 is fulfilled section 144 yields to sec 145 so that when the Magistrate finds that there is a real dispute tending to a breach of the peace, he is bound to institute a proceeding under section 145 irrespective of any order that he might have originally made under section 144—*Sheobalak v. Kamaruddin*, 2 Pat 94 107 (F B) 3 P L T 573 23 Cr L J 549

Where there is a dispute regarding possession of immoveable properties between the rival parties and a breach of the peace is likely to ensue the proper procedure to be adopted by the Magistrate is to pass an order in a proceeding under sec 145 deciding the question of possession on evidence and not an order in a proceeding under this section—*Parhar v. Ram Khalaun* 11 C W N 271, *Kanis Amina v. K. E.* 3 P L J 243, *Lachman v Dhuru* 19 Cr L J 1002 (Pat). *Tarapada v Emp.* 1 P I T 72 21 Cr L J 241 By adopting a procedure under

sec 145 in such a case, the Magistrate puts himself in a position to effectively and conclusively settle the dispute between the parties. Otherwise the dispute might still exist at the end of two months—27 Cal 785, *Tarapada v Emp.*, 1 P. L. T. 72, *Bhairav v Emp.*, 1 P. L. T. 377, *Jhama v Thakur*, 1 P. L. T. 369, 21 Cr. L. J. 625. Sec. 144 applies only where possession is either undisputed or clear beyond any shadow of doubt, but where possession relating to immovable property is disputed, the proper procedure is to take proceedings under sec. 145 which will permanently settle the dispute so far as the Criminal Courts are concerned—*Bhairav v. Emp.*, 1 P. L. T. 377, 21 Cr. L. J. 646, *Gouri Dutt v Gobind*, 1 P. L. T. 44, *Tarapada v Emp.*, 1 P. L. T. 72, *Madan v. Gul Chand*, 2 P. L. T. 464, 22 Cr. L. J. 635. In cases of apprehension of a breach of the peace the Magistrate may act under sec. 144, or 107. See Note 234 under sec. 107.

Section 144 is of general application, and contains nothing which ousts the Magistrate's jurisdiction in case of *bonafide* disputes as to possession of land. Therefore where section 107 or 145 will meet with the requirements of the case, section 144 is not an appropriate remedy, and if it is found that the danger was not so imminent and that it could be otherwise averted, an order under sec. 144 will be generally held to have been made without jurisdiction—*Sheobalak v. Kamaruddin*, 2 Pat 94 (F. B.): 3 P. L. T. 573, 23 Cr. L. J. 549, *Munni Lal v. Gatti*, 6 P. L. T. 746: 26 Cr. L. J. 1229.

The use of sec. 144 is a suitable method of avoiding a breach of the peace, only if it is clear that the claim of the party creating the disturbance is not a claim made in good faith—*Kaniz Amina v. K. L.*, 3 P. L. J. 143, 19 Cr. L. J. 869. Where it is clear upon the materials before the Magistrate that one of the parties is in possession, and that another person whose claim to possession is a mere pretence is threatening to interfere with that possession, the Magistrate is bound to maintain the party in possession, and forbid the party who is not in possession by a summary order under sec. 144 of the Code, if immediate prevention or speedy remedy is desirable. Sometimes it may even be necessary to take action against the party who is actually in possession, but in every case it must be shown that the conditions required by sec. 144 exist. What the Court deprecates is the habitual and unjustifiable use of sec. 144 as a substitute for sections 107 and 145—*per* Mullick J. in *Sheobalak v. Kamaruddin*, 2 Pat 94, 101 (F. B.): 23 Cr. L. J. 549. If on the expiry of the injunction under section 144, there is any further apprehension of a breach of the peace, the appropriate procedure would be to take proceedings under sec. 145 (but not under sec. 107)—*Abinash v. Lokenath*, 19 Cr. L. J. 367 (Cal.).

The subsistence of an order under section 144 does not take away

the power of the Court to take proceedings under section 145. Therefore where in a dispute between the trustees of a temple as to the possession and management of the temple and its properties an order under section 144 was passed and during the subsistence of that order proceedings under section 145 were initiated and pending final orders the properties were attached and a receiver was appointed *held* that the procedure was not illegal—*Gopala v Krishnaswamy* 27 M L T 234 21 Cr L J 73. So also when proceedings are initiated under section 144 with respect to land the possession with regard to which is honestly disputed the Magistrate would be acting properly in converting the proceedings into those under sec 145 and making an order under the latter section—*Nandkishore v Bikan Sing* 3 P L T 570 23 Cr L J 200 *Sheobalak v Kamaruddin* 2 Pat 94 F B (*per* Jawala Prasad J).

But where a Magistrate while passing an order under sec 144 in case of dispute relating to immoveable property makes an incidental observation as to possession of the property the observation cannot have the force of an order under sec 145—*Munni v Gathi* 6 P L T 746 26 Cr L J 1229.

378 Clause (2)—*Ex parte* order.—An *ex parte* order can be made only in cases of emergency—27 Cal 785 3 B L R A C 4 2 C W N 747. Ordinarily in proceedings under this section notice should be issued upon the person against whom the order is made and an opportunity afforded to him to show cause why it should not be passed—10 W R 53, 19 Mad 18 2 C W N 747.

In the case of *ex parte* orders the record of the Magistrate should disclose the existence of emergency which called for such *ex parte* orders and should show that there was no sufficient time to serve notice on the party affected thereby—*Venkataraniama v A E* 22 M L T 323 19 Cr L J 56. The record of the Magistrate should indicate with reasonableness the materials on which he concluded that there was an emergency to justify the passing of *ex parte* orders affecting the liberty of persons—*Ibid*.

379 Clause (3) Order to whom to be addressed.—In an Allahabad case in which the Magistrate issued a proclamation forbidding any persons to spread night soil on his fields so as to cause disease it was held that the order was *ultra vires* and not within the scope of this section because the order issued by the Magistrate was not directed to the public generally frequenting or visiting a particular place but was directed to a portion of the community—*Q E v Jokhu* 8 All 99. This view of the law does not appear to be correct. In an Oudh case it has been held and more correctly held that the words public generally are not restricted to the corporate body pursuing its public avocations but also mean the whole

number of individuals who in the circumstances cannot be particularly addressed and an order duly promulgated will have the effect to control either the private or public actions of every such individual according to its tenor. The proper interpretation of this section is that the order may be directed to a particular individual but when owing to the number of particular individuals it is impracticable for the Magistrate to address each of them individually an order under this section may be issued to the whole number of particular individuals designated as the public generally and such order in respect of each particular individual will have the same effect as a separate order served upon him provided of course that it has been so promulgated that it has come to his knowledge—*Abdool Gaffur v Emp* 18 O C 70 This is the plain meaning of this clause.

Frequenting or visiting a particular place—These words have been interpreted in *Q E v Lallumidas* 14 Bom 165 to mean that the order can be directed to the public generally only when frequenting or visiting a particular place. Therefore, where owing to the prevalence of cholera the District Magistrate issued a notification in the form of a proclamation forbidding the public in general to give caste dinners in that city it was held that the order not being directed to a particular person nor to the public *when frequenting a particular place* (but to residents) was illegal in its manner of publication. In another Bombay case also it has been similarly held that an order directing all persons in Surat City to abstain from interfering with the destruction of dogs is *ultra vires* as the Magistrate has power only to direct an order to a particular person or to the public generally when frequenting or visiting a particular place—*Limp v Bhagubai* 16 Bom J R 684. The Calcutta High Court likewise holds that an order which directs the public in general to abstain from attending *has* is illegal since it is not until the public attends the *lat* that the order can be binding on them. If the order can only be issued to the public generally when frequenting or visiting a particular place—*Asutosh v Harish* 23 C W N 411 26 Cr L J 874. But in *Abdul Gaffur v Emp* 18 O C 70 it has been held that the words frequenting place are intended to extend rather than to limit the scope of the order so as to include therein the *residents* of the locality as well as casual or frequent visitors from outside the limits of the locality.

380. Clause (4)—Rescinding or altering an order.—A Magistrate who passed an order under this section without taking evidence can afterwards cancel the order, if after hearing the evidence he finds that there is no reason to apprehend a breach of the peace—13 W R 72.

Applications for rescinding or modifying *ex parte* orders under this section should be disposed of as quickly as possible, but it is not illegal to

put off an inquiry for a reasonable time within two months—*Satish v Emp.* 11 G.W.N. 79 4 Cr L J 433

An order passed under this section by a Joint Magistrate, while acting as a District Magistrate, can be rescinded or altered, after his reversion to the post of Joint Magistrate by the next District Magistrate, and the latter cannot transfer an application for rescission or alteration to the former—*Sudarsanam v Srinivasachari*, 16 Cr L J 74 (Mad)

It was once held by the Patna High Court that a District Magistrate could rescind or alter an order of a subordinate Magistrate only on the ground that having regard to circumstances which had happened since the passing of the order, the reason for its having been passed did no longer exist so that an alteration or rescission of the order was necessary as a corollary, he could not reverse the order of a subordinate Magistrate on grounds existing at the date of the order, i.e., he could not, sitting as it were in appeal or revision reverse the order on grounds which interfered with the discretionary power of the Magistrate who originally made the order—*Cheddi Lal v Mahabir* 2 P L T 650 23 Cr L J 27 But this decision has been overruled by a recent Full Bench case where it has been laid down that the powers given by this sub section need not be confined to cases where there has been a change of circumstances since the original order was made If the Magistrate has power to rescind an order previously made by a subordinate Magistrate because the circumstances no longer require it to remain in force, he would equally have power to rescind it if he is satisfied that it never ought to have been made—*Sheobalak v Hamaruddin* 2 Pat 94 (F B) 3 P L T 573

A District Magistrate in cancelling an order of the subordinate Magistrate is not competent to substitute an order of his own in the nature of an innovation Thus where in a case of dispute as regards immoveable property, the subordinate Magistrate started a proceeding under this section, and considering the claims of the second party to be a mere pretence passed an order against such second party, but the District Magistrate under clause (4) cancelled the Sub Magistrate's order and substituted an order of his own, prohibiting the first party from cutting crop, it was held that the order of the District Magistrate was in the nature of an innovation and therefore without jurisdiction and must be set aside—*Ganpat v K.* E 3 P L J 287 19 Cr L J 880

Although a District Magistrate may rescind or alter an order made by a subordinate Magistrate, still the District Magistrate cannot direct the subordinate Magistrate to initiate proceedings under section 145 instead of under sec 144, because it is the subordinate Magistrate who has to satisfy himself by the exercise of his own independent judgment and upon proper materials as to the existence of a reasonable apprehension of danger, and the District Magistrate acts illegally in interfering with that discre-

tion by directing him to substitute proceedings under sec 145 in place of proceedings under sec 144—24 Cal 391 *Tilaki Bai v Emp*, 2 P L T 372, *Chaddi Lal v Makar* 2 P L T 650 23 Cr L J 27

Intermediate order—Except orders contemplated by sub section (4) (i.e., orders of rescission or alteration) no other intermediate order can be made while an order under sec 144 is still in force. When the High Court has issued a rule in any case it takes full seisin of the case and it is the High Court alone that can pass *ad interim* orders in the case. The Magistrate against whose order the rule is issued has no such jurisdiction—*Satish Chandra v Emp* 11 C W N 79

Final of order—When a Magistrate set aside his order and struck the case off the file he had no power to re-arrest without a fresh proceeding—*Bradley v James* 8 Cal 560

Clause (5) — It was suggested to us that section 144 should be elaborated so as to enable a person aggrieved by an order made under the section to require the Magistrate to make a judicial inquiry regarding the truth of the information on which he had acted and thereby to bring in the revisional powers of the High Court. We think this proposal goes too far and that it is necessary to maintain the executive character of proceedings under section 144. We have not therefore accepted this suggestion. We are however prepared—and we have proposed an amendment to this effect—to lay down that a person aggrieved shall be entitled to apply to the Magistrate and show cause against the order and that the Magistrate shall give him an opportunity to be heard in person or by pleader and shall record an order in writing on the application giving his reasons where he rejects it — *Report of the Joint Committee (1922)*

381 Clause (6)—Duration of order —An order under this section is temporary and is to remain in force for only two months. An order for perpetual injunction passed under this section is beyond the jurisdiction of the Magistrate—*Q E v Sheodin* 10 All 115 *Bradley v Jameson* 8 Cal 580 5 Cal 7 *In re Vengayam Ammal* 1914 M W N 169 15 Cr L J 145. Thus an order prohibiting a landlord from ever holding *hats* on his land on certain days is illegal—*Gopi Mohan v Taramoni* 5 Cal 7. So also, an order that a certain person should abstain from taking any part in the management *till* another is duly evicted from management is *ultra vires*—24 Mad 45. so also an order that no rents should be collected from the tenants by their contending landlords *until* their rights have been established by a Civil Court—*Prasanna v Emp* 8 C L R 231, or an order directing a party not to interfere with the land without the order of a competent Court—*Runjit v Lachman* 7 C W N 140

A temporary injunction can be passed under this section even though the dispute demands a permanent injunction for final settlement. Thus,

where disputes were going on between the applicant and the opposite party, and the latter used to strike a bell continuously at night time in order to annoy the applicant, who thereupon applied to the Magistrate for an injunction held that the Magistrate could pass a temporary order under this section—*In re C J R* 22 Bom L R 157 (per Hayward J) but Shah J held that the Magistrate could pass no order under this section because the applicant's application was for the prevention of a nuisance which was not temporary but permanent.

Non specification of time—An order under this section is not bad merely because it does not state that its operation is confined to two months or some shorter period. Under this subsection it will be presumed in the absence of anything to the contrary that the duration of the order is limited to the full period of two months—34 Cal 897 *Ponnappa v Vanamamalai* (1919) 11 W N 872 20 Cr L J 755. In another case the Madras High Court has held that an order which is indefinite as to time is to that extent without jurisdiction—*Muthukumaraswami v Md Rowther* 42 M L J 352 23 Cr L J 404.

Extension of time by successive orders—A Magistrate cannot by passing successive orders extend the operation of this section beyond the time limit prescribed by this section—11 C W N 79 *Biswaswar v Emp*, 17 Cr L J 200 20 C W N 758 *Gouri Datt v Govind* 20 Cr L J 829 1 P L T 44 *Murari v Ayyasami* (1922) 11 W N 64 23 Cr L J 689. If there is really a very serious danger of a breach of the peace he can take action under section 107—3 P L J 130 13 C W N cclviii. But he cannot, under the shelter of this section assume a jurisdiction to prohibit persons by a permanent injunction by arbitrary and successive renewals of orders under this section—*Govinda v Perumal* 38 Mad 489 *Govinda Chetty v Emp*, 7 M L J 68 7 C W N 140. The period cannot be extended by drawing up the same order once more and merely adding a larger number of persons to whom it is directed. Such a proceeding is an attempt to evade the provisions of this clause and is illegal—*Ashutosh v Haris Chandra* 29 C W N 411 26 Cr L J 874.

Extension of time by Local Government—The last three lines of this section lay down that the Local Government may extend the order in cases of danger to human life etc and it can extend the order for any length of time. The fact that the heading of this Chapter refers to temporary orders does not support the contention that the Local Government has only power to extend the order for a definite and very limited time. The Legislature has not seen fit to limit the time for which the force of the order may be extended by the Local Government and under the terms of this section it is competent to the Local Government to extend the order so long as the danger which is apprehended continues to exist.

Moreover in extending the order it is not necessary for the Local Government to state its reasons or even to state the fact of a likelihood of a riot or affray or other danger which it apprehends—*Emp v Bhure Mal*, 43 All 52 (3-7) 24 Cr L J 629

352 Revision.—Subsection (3) of section 435 which disallowed the powers of revision of the High Court the Sessions Judge etc. in respect of proceedings under Sec. 144 has now been omitted by the Criminal Procedure Code Amendment Act XVIII of 1923 and the effect of the omission is to overrule all the cases in which it was held that the High Court had no power under secs. 435 and 439 of this Code to interfere in revision with orders under this section. Under the old law, the High Court could revise an order passed under this section, not by virtue of sec. 439 of the Code but by virtue of the powers conferred upon it by sec. 13 of the Charter Act (35 Mad 489 8 Cal 580, 16 Cal 80) and this power could be exercised only by the Chartered High Courts and not by the non-chartered ones e.g. the Chief Courts or the Judicial Commissioners' Courts. Under the old law, the High Court could revise under sec. 439 of this Code an order passed under sec. 144, only when the order was *ultra vires* or without jurisdiction that is when the order was such that it could not be made under this section (even though it purported to be made under this section) and therefore did not fall within the purview of this section—*Ananda v Carr Stephen* 19 Cal 127 *Roop Lal v David Monook* 2 C W N 57. *Isab v Emp* 8 C W N 373 *Q E v Parash Chunder* 25 Cal 852 *Empress v Prayag* 9 Cal 103 *Palaniappa v Dorasamy*, 18 Mad 402, *Gopi Mohan v Iaramoni* 5 Cal 7. Under the present law, not only the High Court (both chartered and non-chartered) but also the Sessions Judge and the District Magistrate can call for the record of a proceeding under this section and the order may be revised by the High Court on any ground whatsoever.

But the High Court does not ordinarily interfere in revision with an order under this section when other remedies are open to the aggrieved party especially because the High Court is loth to reject the opinion of the Magistrate responsible for the peace of his locality that there is an emergency which justified an *ex parte* order—*Lenkataramani v K. E* 22 M L T 323 19 Cr L J 56. The Magistrate is the sole Judge as to whether the material is sufficient or not to justify an order under this section—19 Cr L J 113 (Pat.)

The High Court can set aside an order under this section even though two months had expired from the date thereof—*Gandranath v L. I. Ry.*, 23 C W N 145 *Bisheswar v Emp* 20 C W N 758, *Chandrahanta v K. L.*, 20 C W, N 981, *Dhanraj v Bharat*, 6 P. L T 253 26 Cr L J 42 M L J 352. In *Gowda v Perumal*, 38 Mad 489 (490) and *F*

Poomalai, 47 M L J 439 25 Cr L J 1304, however, the High Court declined to set aside the order as the two months during which the order would remain in force was almost expiring on the date of hearing

383 Reference —An order under this section not being a judicial proceeding a District Magistrate cannot refer it to the High Court but can himself deal with it in his executive capacity—*Ratanlal* 129 Or the party aggrieved by the order may apply to the District Magistrate to recall the order and failing him to the Local Government—*Mad H C Pro* 5 12 1879

384 Punishment —See sec 188 I P C

The Magistrate issuing the order under this section cannot himself punish a man for disobeying his order—*Chandra Kanta v K E* 20 C W N 981 17 Cr L J 461, 10 B H C R 424 *Reg v Tatyia Ratanlal* 50, 4 C W N 226

385 Civil suit —An order under this section is not a bar to the institution of a civil suit by the party on whom the order is made Therefore where the plaintiffs and the defendants are owners of adjoining properties and the defendants obtained an order of the Magistrate under sec 144 preventing the plaintiffs from erecting certain buildings on their own property without adjudication of the private rights of the parties it is open to the plaintiffs to sue the defendants for a declaration that they are entitled to make use of their property and erect buildings on it as they desire and for an injunction restraining the defendants from interfering with them in so doing and the order under section 144 far from being a bar to such suit would itself furnish the cause of action for the suit—*Baba Sah v Mahomed Hussain* 42 M L J 179 15 L W 68 1921 M W N 867

386 Proceedings judicial —Inquiries under this section before an order is issued are judicial proceedings within the meaning of sec 4 (m), and the Magistrate can take action under sec 476 if he thinks that false evidence has been given before him in such proceedings—19 *Mad* 18 (Section 476 as amended in 1923 is no longer limited to judicial proceedings, but applies to any proceeding)

CHAPTER XII

DISPUTES AS TO IMMOVEABLE PROPERTY

In proceedings under this Chapter the Magistrate should distinctly indicate under what section of the Code he takes proceedings. It should not be left to the higher Courts to speculate to see under what section the order was passed—*Srinivasa v Ranganathan* 18 Cr L J 295 (Mad)

145 (1) Whenever a District Magistrate Sub divisional Magistrate or Magistrate of the first class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof within the local limits of his jurisdiction he shall make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in person or by pleader within a time to be fixed by such Magistrate and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute

(2) For the purposes of this section the expression land or water includes building markets fisheries crops or other produce of land and the rents or profits of any such property

(3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute

(4) The Magistrate shall then without reference to the statements of the claims of any of such parties to a right to possess the subject of dispute peruse the statements so put in hear the parties, receive all such evidence as may be produced by them respectively consider the effect of such evidence take such further evidence (if any) as he thinks necessary and if possible

Procedure where a dispute concerning land, etc., is likely to cause breach of peace

Inquiry as to possession

decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject

Provided that if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed he may treat the party so dispossessed as if he had been in possession at such date

Provided also that if the Magistrate considers the case one of emergency he may at any time attach the subject of dispute pending his decision under this section

(5) Nothing in this section shall preclude any party so required to attend or any other person interested from showing that no such dispute as aforesaid exists or has existed and in such case, the Magistrate shall cancel his said order and all further proceedings thereon shall be stayed but subject to such cancellation the order of the Magistrate under sub-section (1) shall be final

(6) If the Magistrate decides that one of the parties was *or should under the first proviso to sub*
Party in possession to retain possession until legally evicted *section (4) be treated as being in such pos*
session of the said subject he shall issue
 an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law and forbidding all disturbance of possession until such eviction *and when he proceeds under the first proviso to sub section (4) may restore to possession the party forcibly and wrongfully dispossessed*

(7) When any party to any such proceeding dies the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry and if any question arises as to who the legal representative of a deceased party for the purpose of such proceeding is all persons claiming to be representatives of the deceased party shall be made parties thereto

(8) If the Magistrate is of opinion that any crop or other produce of the property the subject of dispute in a proceeding under

this section pending before him is subject to speedy and natural decay he may make an order for the proper custody or sale of such property and upon the completion of the inquiry shall make such order for the disposal of such property or the sale proceeds thereof, as he thinks fit

(9) The Magistrate may if he thinks fit at any stage of the proceedings under this section on the application of either party issue summons to any witness directing him to attend or to produce any document or thing

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under Section 107

Change —The amendments as shown by the italicised words have been effected by sec 17 of the Crim Pro Code Amendment Act (XVIII of 1923). The reasons have been stated below in their proper places

387 Object and scope of section —Sec 145 was intended only to provide a speedy remedy for the prevention of breaches of peace arising out of disputes relating to immoveable property by maintaining one or other of the parties in possession—*Debi Prasad v Sleodai* 30 All 41 *Tarapada v Nurul Haq* 32 Cal 1093 30 Cal 155 *Manindra v Barada Kanta* 30 Cal 112 *Ramchandra v Monohar* 21 Cal 19 The object of this section is to enable a Magistrate to intervene and pass a temporary order in regard to the possession of property in dispute having effect until the actual right of one of the parties has been determined by a competent Civil Court—*Daulat v Rameswar* 26 Cal 625 *Kunja Dehari v Khetra* 29 Cal 208

Litigants often resort to section 145 as an easy way of getting possession without the expense delay and trouble of a civil suit regarding the land in dispute and Courts should be on guard against an abuse of legal powers—*Ma Ma Gyi v K E* 2 Bur L J 295 25 Cr L J 1161 The object of this section is only to prevent a breach of the peace and not to protect or maintain anybody in possession Courts should take action under this section only if there is a report or information of a breach of the peace and the same cannot be obviated without an order under this section—*Phulanja v Emp* 25 Cr L J 1109 (Nag) The scope of this section is merely a determination of actual possession for the purpose of preventing a breach of the peace pending a decision on the merits in a Civil Court This section does not provide for a decision by the Magistrate of any question affecting the rights of parties See Note 410 post

388 Secs 107, 144 and 145 —As to whether a Magistrate should

proceed under Sec 107 or 144 or 145 in case of disputes relating to immoveable property between the rival parties likely to cause a breach of the peace see Notes 234 and 377 under Secs 107 and 144 where the subject has been fully discussed

Where a Magistrate initiated proceedings under Sec 144 and at a later stage intimated to the parties who were present in Court his intention to draw up proceedings under sec 145 held that the Magistrate was not guilty of any irregularity—*Chadhari v Raja Ramsingh* 19 Cr L J 396 (Pat)

389 Nature of proceedings under this section —A proceeding under this section is taken for the prevention of crime it does not arise out of or deal with a crime already committed Therefore a proceeding under this section is not a criminal case within the meaning of Sec 526 —25 Bom 179 *Farid v Piru* 8 S L R 215 16 Cr L J 249 An action taken under this section is a quasi executive action—25 Bom 179 A proceeding under this section is in reality a civil one—33 Cal 68 *Contra* —*In re Arumuga* 26 Mad 188 *Jaggu v Murlu* 34 All 533 *Misra v Narasingh* 2 P L T 186 and 11 O C 61 where it is held that a case under this section is a criminal case and the High Court has power to transfer it under Sec 526 of this Code or under clause 29 Letters Patent It should be noted however that the word criminal in sec 526 has now been omitted so that the question as to whether a proceeding under this section is a criminal or civil one is immaterial for the purpose of sec 526 the High Court is competent to transfer the proceeding under the provision of that section

Though the Court dealing with a case under this section is a criminal Court yet an order under this section is not one made in a criminal trial within the meaning of Sec 15 of the Letters Patent and therefore an appeal lies from an order of a single Judge of a Chartered High Court—17 M L J 158 But see 39 Mad 537 (cited in Note 323) in respect of a proceeding under sec 133

Competency of Magistrates —*Bench of Magistrates* —A Bench of Magistrates exercising first class powers may be invested by virtue of Sec 15 (2) with powers to take proceedings under this section The decision in 3 Cal 754 under the old Code of 1872 is no longer good law

390 Is satisfied —Before taking proceedings under this section the Magistrate must satisfy himself that there is an existence of a dispute likely to cause a breach of the peace, and he ought not to assume jurisdiction in those cases where the suggested apprehension of a breach of the peace is merely colorable and made to induce him to deal with matters properly cognisable by the Civil Courts—*Obhoy Chandra v Md Sabir*, 10 Ca 78 (80) Unless the Magistrate is satisfied that there is a likelihood

of a breach of the peace he cannot proceed under this section—*H I Low & Co v Mansindra Chandra Vandy* 3 Pat 809 (814) It is necessary that the Magistrate should himself inquire into the likelihood of a breach of the peace and should come to a judicial decision upon it It is that judicial decision which is the foundation of the subsequent investigation and without it the investigation is void and inoperative—*Anundee Koer v Soonat Koer* 9 W R 64 An order of the Magistrate merely on the complainant's petition without determining whether any breach of the peace was likely to occur or enquiring whether the accused had any evidence is bad in law since the Magistrate has failed to find the facts that were necessary to constitute the foundation of his jurisdiction—*Buddhu v Emp.* 1885 P R 6 The ground stated by the Magistrate must be such as to satisfy a Court of Revision before which such case may be brought by any of the parties concerned—20 Cal 513

The fact that the Magistrate is satisfied as to the necessity of proceedings under this section and the ground of his being so satisfied must appear on the record—15 All 394 and in the first order directing the issue of notice—*Pai Abas v Jagannath* 6 C P L R 21 *In re Pandurang* 24 Bom 527 2 Bom L R 84 28 Cal 416 *Posukha v Tandalagara* 4 M L T 213 8 Cr L J 399

Power of High Court or Sessions Judge to direct proceedings—The Magistrate must satisfy himself and use his own discretion as to the necessity of proceedings Therefore neither the High Court nor the Sessions Judge has power to order a Magistrate to take proceedings under this chapter—23 W R 58 20 Cal 112 *Q E v Gobind Chandra* 20 Cal 520 9 W R 64 If the Magistrate is satisfied that there was no likelihood of a breach of the peace the High Court cannot direct him to be satisfied as to such likelihood and to take proceedings under this section—*H I Low & Co v Mansindra Chandra* 3 Pat 809 (814) So also the High Court has no power to direct the revival of proceedings after they have been stayed by the Magistrate—30 Cal 112

Where a subdivisional Magistrate having regard to the circumstances of the case came to the conclusion that proceedings under sec 144 should be taken, and made an order accordingly the District Magistrate had no authority to direct the Sub divisional Magistrate to institute proceedings under section 145—*Kailash v Kunja Behari* 24 Cal 391

391. *Police-report*—A Police report upon which a Magistrate bases his initial order under this section should contain a statement of the facts from which the Magistrate may be satisfied as to the existence of a likelihood of a breach of the peace No rule can be laid down so as to specify the sufficiency of the materials upon which the Magistrate may act but there is no inflexible rule that the police report must

that the disputing parties are actually assembling men or doing some other specific overt acts—*Kuloda Kinkar v Danesh* 33 Cal 33 A police report which sets out sufficiently substantial reasons for believing that a dispute likely to cause a breach of the peace relating to a certain land exists is a good foundation of proceedings under this section—20 Cal 513 But a police report which does not state that there was any apprehension of a breach of the peace is not sufficient to give the Magistrate jurisdiction under this section—6 C W N 340 But this is not an inflexible rule and the fact that the police report stated that there was no likelihood of a breach of the peace would not by itself take away the jurisdiction of the Magistrate to proceed under this section if upon a consideration of the materials before him and by exercising his own independent judgment he came to the conclusion that there was a likelihood of a breach of the peace—*Ganga Bishun v Rajo* 5 P L T 252 26 Cr L J 133

A mere expression of opinion by a police officer without sufficient materials that a breach of the peace is likely to happen, ought not to be the foundation of an action under this section Thus where the police report showed that the parties disputing over a tank were big Zemindars and that although there was nothing to show that a breach of the peace was likely to happen yet such a breach was not impossible it was held that the Magistrate ought not to proceed upon such report which was merely an expression of opinion by the Police—*Malaraj Baladur v Rajjit Singh* 11 C W N 835 *Surjarkanta v Jagodindra* 11 C W N 198 *Kuloda Kinkar v Danesh* 33 Cal 33

The report must contain a definite statement by a responsible police officer to the effect that he apprehends that there will be a disturbance of the peace which is beyond his power to prevent and that he therefore desires the exercise of the higher powers of the Magistrate to prevent it When no such report is sent to the Magistrate the fact will be almost conclusive as an indication of the absence of any likelihood of a breach of the peace—*Phulanja v Emp* 25 Cr L J 1109 (Nag).

A Magistrate is in no way bound to act on all that is stated in the Police report before him—27 Cal 892 He is to exercise his own independent judgment upon the materials placed before him and to arrive at a conclusion as to whether upon those materials there is a likelihood of a breach of the peace He would not be justified in acting merely upon an expression of opinion by the police—*Ganga Bishun v Rajo* 5 P L T 252 26 Cr L J 133; *Kuloda Kinkar v Danesh* 33 Cal 33

Evidentiary value—A Police report is not itself evidence although it may be sufficient to justify a Magistrate in taking action under this section—*In re Bhadreswaris* 16 W R 17 7 B L R 329 The police report and the evidence contained therein about the factum of possession is in

admissible in evidence in a proceeding under this section except for the purpose of initiating the proceeding—1 P L T 501

392 Other information —The Code does not limit the materials on which the Magistrate may act. He may act on any information and without any formal complaint being made before him. He is not confined to evidence recorded on oath—*In re Kishoree Mohun* 10 W R 10

The word 'information' does not refer to any particular way in which a Magistrate's attention should be drawn. It is wide enough to cover the knowledge of the Magistrate derived by reading the petition filed by the parties in another proceeding which satisfies him that a breach of the peace was imminent—*Jhaman v. Thakurs* 1 P L T 369 21 Cr L J 65

But a telegram is not a sufficient information—72 Bom 956 so also a statement made by a witness in the course of a trial that a dispute likely to cause a breach of the peace exists—70 Cal 570 or a mere petition by an officer in the employ of a party interested in the dispute that a dispute likely to cause a breach of the peace exists is not a sufficient basis of proceedings under this section—29 Mad 561. Where there is no police report the statement of interested parties as regards the existence of a breach of the peace must be received with great caution but if a Magistrate has reason to believe such statement, it cannot be said that he acts without jurisdiction in taking proceedings on the basis of that statement—*Joymangal v. Kanta Gope* 24 Cr L J 304

393 Dispute —The essence and basis of the jurisdiction which a Magistrate can exercise under this section depends upon there being a dispute likely to create a breach of the peace and when the parties appear before the Magistrate if they are able to show or if it otherwise appears to the Magistrate that there is no dispute or no such dispute as is likely to induce a breach of the peace the Magistrate should hold his hands and not proceed further—*Gobind v. Abdul Sayaf* 6 Cal 835. Thus when the rights of the parties have been determined by a competent court the dis-

creed of the competent Civil Court—6 Cal 835 *Daulat v. Rameswari* 26 Cal 625; *Sims v. Johurry* 5 C W N 563 79 Cal 203. The proper course for a Magistrate to pursue if the defeated party does any act that may probably occasion a breach of the peace is to take action under sec 107 of the Code—6 Cal 835 *Amruteshwari v. Darpa Varain* 7 C W N 558 *Subba Nayah v. Trincall* 7 Mad 460. As to the effect of a prior decree of a Civil Court see Note 438 *infra*

The term 'dispute' means a reasonable dispute a *bona fide* dispute a dispute between parties who have each some semblance of a

or supposed right—*Gobind v Abdul Sayad* 6 Cal 835 In every case in which a Magistrate finds that there is a *bona fide* dispute about land no matter how erroneous the contention of one or other of the parties may be he ought to adopt the procedure laid down in sec 145 But if the Magistrate comes to the conclusion that the defendants are wrongfully and without any *bona fide* claim seeking to eject the other party by force and a breach of the peace is imminent he is not bound to act under this section but is justified in making an order under sec 107—*Emp v Ram Baran* 28 All 406

394 Likelihood of breach of peace —The basis of the Magistrate's jurisdiction under this section is the likelihood of a breach of the peace Therefore where in his order directing the issue of a proceeding under this section the Magistrate was of opinion that there was *no likelihood* of a breach of the peace but that as the dispute was one relating to possession section 145 was applicable held that the Magistrate acted without jurisdiction—*Sib Narayan v Satish* 24 C W N 621 21 Cr L J 593 Where the police report did not disclose that there was any apprehension of a breach of the peace the Magistrate's order under this section was without jurisdiction—*Ram Sarup v Darsano* 1 P L T 387 21 Cr L J 748

The term *likely* in this section does not mean that the breach of the peace complained of must be imminent or likely to happen immediately but simply signifies that there is a probability or a likelihood of a breach of the peace—*Balmukand v Crown* 1 S L R 50 8 Cr L J 170 The Magistrate must decide in each case whether there is a likelihood of a breach of the peace and it is not enough on the one hand that the breach is merely probable nor is it necessary that it should be *imminent* as indicating a higher degree of chance of the event happening than is denoted by the *'likelihood of it'*—*Kulada Kankar v Danesh* 33 Cal 33 But a mere probability that a breach of the peace may occur if no proceedings are taken will not justify the Magistrate in taking action under this section the Magistrate must be satisfied of the existence of a dispute likely to induce a breach of the peace rendering it necessary for him to take immediate steps for its prevention—7 Cal 385 An order under this section will be justified if there is an immediate danger of a breach of the peace—*Janu v Moniruddin* 8 C W N 590 If there be no present danger of a breach of the peace the fact that a breach may happen at a future time will not justify an order under this section—*Uma Churn v Beni Madhub* 7 C L R 352 A mere finding that the parties are in a contesting mood without any finding as to the likelihood of a breach of the peace, is insufficient—*Mannu Lal v Harde Ram* 12 O L J 256 26 Cr L J 944 When there is ample time to have the dispute settled in the Civil Court,

action under this section is not justified—*Choley Lal v Emp*, 25 Cr L J 227 A I R. 1924 Oudh 341

Where a party was acting properly and within his rights there is no reason to suppose that any breach of the peace was likely to be committed by him—*Bejoy Singha v Emp* 3 C W N 463

There must be a likelihood of a breach of the peace on the date on which the Magistrate draws up proceedings. He cannot take proceedings on the strength of a Police report which is more than three months old, when he has no information that a breach of the peace is likely to occur at the time of his taking action—*Ckhedi Lal v Mahabir* 2 P L T 650 23 Cr L J 27

Where at the date of the initial order the materials before the Magistrate do not disclose the existence of such dispute as is likely to result in a breach of the peace the order made by him would not be void if it appears from the evidence in the course of the trial that there was at the date of the institution of the proceedings a dispute likely to cause a breach of the peace—33 Cal 33 dissenting from 23 Cal 557

The mere fact that a person complains of being dispossessed of his land is no reason for the institution of proceedings under this section if the petition made by the complainant refers only to the commission of various offences none of which necessarily involves a breach of the peace—*Kasu v Moti Molla* 4 C W N 57

The primary object of this section is the preservation of peace. Therefore if it is found during the proceedings that there is no likelihood of the peace being disturbed there is no necessity for the Magistrate to continue the proceedings—*Ramchandra v Monohur* 21 Cal 29. The Magistrate has jurisdiction to decline to proceed with the inquiry whenever it is shown to his satisfaction that the dispute no longer exists or that the danger has disappeared—4 L W 57. See notes under sub-section (5)

Inquiry and Record—A Magistrate who purports to act under this section must himself enquire into the question whether a dispute likely to cause a breach of the peace exists and must record a judicial decision thereon. Where a preliminary order was made on the report of a *Zaildar* and the parties had had no opportunity of producing their evidence before the *Zaildar*, held that in the absence of judicial evidence showing the likelihood of a breach of the peace the report of the *Zaildar* could not be invoked in support of an order under this section—*Prem Singh v Crown*, 1917 P L R 115 18 Cr L J 565 1917 P W R 25, 2 Weir 117. The Magistrate must also record the ground of his belief as to the existence of such likelihood—4 Cal 650

The law does not require the Magistrate to record an express finding in his judgment (final order) that a breach of the peace was imminent

Such a finding in respect of the existence of a dispute likely to cause a breach of the peace is a matter to be considered in relation to the preliminary order—*Maqimunnissa v. Ahmedunnissa*, 2 O. W. N. 704 : 26 Cr. L. J. 1581.

395. Subject matter of dispute.—*Land or water*.—The words in the 1882 Code were "tangible immoveable property." The section of the present Code does not limit the action of a Magistrate to disputes relating to the possession of tangible immoveable property, but it empowers him to take cognisance of a dispute likely to cause a breach of the peace concerning any land or water or boundaries thereof, and sub-section (2) gives an explanation of the words "land or water"—26 Cal 188. See notes "under sub-section (2) *infra*

Proceedings under this section cannot be instituted with respect to moveable properties—*Hira Lal v. Emp*, 11 O L J. 59. 25 Cr. L J. 440

Property must be specified.—To bring a case under this section, the property which is the subject of dispute must be capable of being accurately defined—23 Cal 80. Therefore a Magistrate cannot proceed under this section in the case of a dispute about an undivided share of land, or rent or profit issuing from such undivided share, because the subject matter of the dispute is uncertain, and the boundaries of the land are undefined—7 C W N 462

Before a proceeding is drawn up by the Magistrate, the subject matter of dispute should be clearly determined—*Maharaja Suryakanta v. Maharaja Jagadindra*, 11 C W N 198 ; *Sabid Mandul v. Lakshmi*, 7 C. W. N. 599. Absence of clear specification of the subject matter of dispute in the proceedings is a serious defect—*Sib Narain v. Salish*, 24 C. W. N. 621 : 21 Cr. L. J. 593. But where the parties are not at dispute upon the question as to what the disputed lands are, the real question being which party was entitled to possession under a Civil Court decree, the want of a proper specification of the boundaries of the property will not vitiate the proceedings—*Sims v. Johurry*, 5 C. W. N. 563 ; *Jhantan v. Thakuri*, 1 P. L. T. 369 : 21 Cr. L J. 625.

An order under this section which does not specify by metes and bounds the lands in dispute may be amended by the Magistrate himself—2 Weir 107. But an order which gives no information as to the subject matter of dispute and which leaves the persons to whom notice is ordered to be issued quite in the dark as to the property in regard to which they have to put forward their respective claims, is not merely defective but invalid and liable to be set aside in revision—27 All. 296.

396. Within jurisdiction :—This section does not authorise a Magistrate to pass orders respecting lands situate outside the local limits of his

jurisdiction—17 W R 33 Therefore where a *jalkar* was situate partly within and partly without the local limits of his jurisdiction and proceedings were taken with regard to the *jalkar* as a whole the whole proceedings were set aside and the Magistrate was allowed an option to institute fresh proceedings with regard to such portion of the *jalkar* as came within his jurisdiction—*Korban v Raja Srinath* 1 C L J 329

Where it is uncertain in which of two local areas the land in dispute is situated proceedings may be taken by a Magistrate having jurisdiction over any of such areas—12 O C 400 See also *Audendra v. Daman Singh*, 16 Cr L J 527 (All)

A Magistrate of one district has jurisdiction to institute proceedings under Sec 145 on a report drawn up by a police officer of another district in respect of such portions of the land or water as lie within the limits of his jurisdiction—29 Cal 885

397 Preliminary Order —The making of a formal order under sub-section (1) is absolutely necessary to the initiation of proceedings under this section—*Nathu Ram v Emp*, 15 A L J 270 18 Cr L J 557; *Kaku v Harnaman* 1917 P W R 28, and an omission to make such an order and to draw up a proceeding under sub-section (1), will render all subsequent proceedings void—*Banuari v Hriday*, 32 Cal 552, 30 Cal 443, 4 W R 26, *Dhaniram v Kaliram* 26 P L R 712, *Kaku v Harnaman*, 1917 P. W R, 28, *Sher Khan v. Fazl Iishi*, 26 P L R 187 26 Cr. L J. 1177 *Hakam v Rakia Ram* 4 Lah 66 24 Cr L J 751 20 Cr L J 124 (Oudh), 6 C W N 923 *Jamuna v Mohan*, 2 P L T 724 23 Cr L J. 64 In *Sajad Hussain v Nanah Chand*, 1917 P W R 22* 18 Cr L J. 461 (following *Muhammad Shareef v Dhaupat* 1914 P W R 15 15 Cr L J 279) however, it has been held that the omission to record the preliminary order is not a fatal defect if the Magistrate afterwards in the presence of parties recorded an order which essentially complied with the requirements of this sub-section So also in *Nur Baksh v Crown* 1917 P W R 26 18 Cr L J 633 the omission to record a preliminary order in writing or to serve it on the parties did not invalidate the subsequent proceedings, where the parties appeared before the Magistrate who explained matters to them fully and they evidently understood everything that was requisite The Rangoon High Court also holds that the omission to draw up a preliminary order is a mere irregularity curable by sec 537, where no objection was taken before the Magistrate and no party was prejudiced—*Mg Po Lon v Mg. Ba*, 3 Bnr L J 256* 26 Cr. L J 324

It is essential that the provisions of this section must be strictly complied with, otherwise the order must be deemed to have been made without jurisdiction Where no order was recorded, no notice issued, no ten statements called for, and no inquiry held, the order must be

to be an order without jurisdiction and therefore void—25 All 537 *Tara Chand v Behari Lal* 1916 P R 22 18 Cr L J 36 *Budhan v Ram Rakha* 1915 P L R 169 16 Cr L J 628

An order under this section must state all the particulars necessary to enable the Magistrate to act under this section otherwise the proceedings are without jurisdiction It is not sufficient that the Magistrate should have before him a police report that he should have given orders thereon and that a written order be drawn up [according to the terms of this section It is his duty to draw up an order which in all respects satisfies the requirements of law The written order should be correct and complete in its terms—27 Cal 981

The essential points to be kept in mind in connection with proceedings under this section are as follows —

(a) The Magistrate should in his order which must be in writing declare himself satisfied from a proper report or other information and for reasons given that a dispute exists concerning land within the local limits of his jurisdiction and that the dispute is one likely to cause a breach of the peace

(b) When land is in dispute the boundaries should be duly defined in the order and care should be taken to include nothing beyond the subject of dispute

(c) The order should proceed to require the parties concerned in the dispute to attend the Magistrate's Court in person or by pleader on a certain date to file written statements of their respective claims as regards the fact of actual possession and to be prepared with their oral and documentary evidence there and then

(d) The date should be so fixed as to allow reasonable time for the due service and return of the notice promulgating the order and the production of evidence

(e) A copy of the order should be published and affixed at or near the subject of dispute

(f) The forms prescribed in Sch V should be used such modifications being made therein as the circumstances of the case may require"—Cal G R & C O pp 10 11

Where the Magistrate purported to pass an executive order but from the form of the order it was evident that it was a thinly disguised order under sec 145 but no formalities of sec 145 were observed (viz no preliminary order was made no written statement called for) held that the order was passed without jurisdiction and must be set aside—*Harbans v Md Syad* 26 Cr L J 1511 A I R 1926 Pat 37

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proceedings under this section ought to set out the grounds on which he is satisfied that a dispute likely to cause a breach of the peace exists—28 Cal 416 *Dan Pershad v Ganesh* 11 A L J 696 14 Cr L J 495 16 C. P. L. R. 21 2 Bom L. R. 84 *Akhubi v Darbari* 2 P. L. T. 267 22 Cr L J 481 Even where the Magistrate acts upon a local inquiry held by himself he is still bound to state the grounds upon which he is satisfied that there is a likelihood of a breach of the peace—32 Cal 771

Omission to state grounds—The object of drawing up a proceeding prior to the issue of notice is to inform the parties of the grounds or information which satisfy the Magistrate that a dispute exists—7 C. W. N. 599, For it is the intention of the law not only that the Magistrate should have sufficient grounds for proceeding under sec 145 but that he should inform the parties concerned of the grounds on which he is proceeding—30 Cal 570 Therefore where the Magistrate omits in the preliminary order to state the grounds for his being satisfied as to the likelihood of a breach of the peace the final order is without jurisdiction and must be set aside—37 Cal 771 *Nga Po Tin v Nga Po Saung* 1 Rang 53 *Ma Gyi v King Emp*, 2 Bur L J 295 25 Cr L J 1161 But the Allahabad High Court holds that failure on the part of the Magistrate to set forth explicitly the grounds for his being satisfied that there was a likelihood of a breach of the peace will not vitiate the proceedings if there was otherwise a substantial compliance with the requirements of this section—*Har Prasad v Pandurang* 1905 A. W. N. 260 *Har Piar v Nathe Lal* 18 A L J 1140, 4 A L J 91 In 1884 A. W. N. 317 it has been held that the omission to state the grounds is a mere irregularity curable by Sec 537 Similar view is taken by the Oudh and Sind Courts—*Parbhu Dayal v Emp* 25 Cr L J 1139 (Oudh) *Mad Mahdisha v Wahdalsah* 26 Cr L J 1792 (Sind) The Madras High Court also lays down that once the Magistrate is satis-

by section 537 of the Code—*Kamal Kutty v Udayavarma* 36 Mad 275: 23 M L J 499 13 Cr L J 753 and in 30 Mad 548 and 2 Weir 98 the High Court refused to interfere in revision unless either of the parties had been prejudiced by the Magistrate's omission to record the grounds

But in his final order the Magistrate should sufficiently state his reasons so that the High Court in revision may determine whether or not the Magistrate has complied with the provisions of sub section (4) and directed his mind to the consideration of the evidence—*Bhuban Chandra v Nibaran* 49 Cal 187

Where neither the preliminary order nor the final order stated in that the Magistrate was satisfied that the dispute was likely to

to be an order without jurisdiction and therefore void—25 All 537; *Tara Chand v Behari Lal* 1916 P R 22 18 Cr L J 36, *Budhan v. Ram Rakha*, 1915 P L R 169 16 Cr L J 628

An order under this section must state all the particulars necessary to enable the Magistrate to act under this section, otherwise the proceedings are without jurisdiction. It is not sufficient that the Magistrate should have before him a police report, that he should have given orders thereon and that a written order be drawn up [according to the terms of this section. It is his duty to draw up an order which in all respects satisfies the requirements of law. The written order should be correct and complete in its terms—27 Cal 981

The essential points to be kept in mind in connection with proceedings under this section are as follows —

(a) The Magistrate should in his order, which must be in writing, declare himself satisfied from a proper report or other information, and for reasons given, that a dispute exists concerning land within the local limits of his jurisdiction, and that the dispute is one likely to cause a breach of the peace

(b) When land is in dispute, the boundaries should be duly defined in the order, and care should be taken to include nothing beyond the subject of dispute

(c) The order should proceed to require the parties concerned in the dispute to attend the Magistrate's Court in person or by pleader on a certain date, to file written statements of their respective claims as regards the fact of actual possession, and to be prepared with their oral and documentary evidence there and then

(d) The date should be so fixed as to allow reasonable time for the due service and return of the notice promulgating the order and the production of evidence

(e) A copy of the order should be published and affixed at or near the subject of dispute

(f) The forms prescribed in Sch V should be used, such modifications being made therein as the circumstances of the case may require" —*Cal. G R & C O*, pp 10, 11.

Where the Magistrate purported to pass an executive order, but from the form of the order it was evident that it was a thinly disguised order under sec 145, but no formalities of sec 145 were observed (*viz*, no preliminary order was made no written statement called for), held that the order was passed without jurisdiction and must be set aside—*Harbans v Md. Syad*, 26 Cr L J 1511 A I R 1926 Pat 51

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A I R 1925 Oudh 190 Although a person is not one of the parties to the dispute but is in possession of a part of the land, he is a necessary party to the proceedings and should be asked to file a written statement—*Ram Bhaushan v Ram Lakshan*, A I R 1925 Oudh 484. 26 Cr L J 630

It was held in several Calcutta cases that the words 'parties concerned' in this section meant not only the persons who were actually disputing but also the persons *interested in or claiming a right* to the property in dispute, and the Magistrate was bound to ascertain those persons and to give notice to them all so that the whole matter, so far as his Court was concerned, might be disposed of in one proceeding—*Ram Chandra v Monohur*, 21 Cal 29 (32), *Laldhars v Sukdeo* 27 Cal 892 (904), *Ganesh Jaha v Ayubal*, 4 C W N 753, *Mangal Halder v. Naimuddin* 6 C W N 101

But these cases must be deemed to have been overruled by the Full Bench case of *Arishna Kamini v Abdul Jabbar*, 30 Cal 155, in which Frisep, C J, referring to the above cases, made the following remarks (at pp 183, 184) —“The reported cases seem to have proceeded on the ground that proceedings under sec 145 should be regulated on the same principles as if the Magistrate were trying a civil suit involving a right to possession, and that unless all persons having any possible claim are made parties to those proceedings, they are bad for want of jurisdiction. But the law does not require this, nor is it the object of proceedings under sec 145 that the Magistrate should deal with the matter before him as if he were acting as a Civil Court. It may be very desirable that such parties (i.e. the parties who may be *interested in, or may have a claim* to the property in dispute) should be heard so as to avoid a possible injustice by determining in their absence an issue which may affect their rights. But the law nowhere declares that such person is entitled to come into the proceedings and that the refusal of the Magistrate to hear him amounts to a refusal to exercise jurisdiction under the law. The object in view is to prevent a breach of the peace between certain parties found to be in dispute by determining the subject matter of that dispute, not the determination of actual possession or a right to possession in regard to all persons who *may possibly* be concerned in such a matter.” In the same case, Hill J observed (at pp 195-196) — The object of a proceeding under sec 145 is the ascertainment of the persons actually in possession at the time of the initial order under sub section (1) and having regard to that object I should feel disposed to think that the words 'parties concerned in the dispute' were intended to indicate all persons claiming to be then in possession, and I think that the Magistrate should endeavour to bring all such persons into the proceeding. But the scope of the inquiry under this section is confined to the *fact of actual possession* irrespective of the merits of the claims

breach of the peace the proceedings were set aside as illegal—1884 A W N 317

A mere omission by the Magistrate to record the source of information will not invalidate the proceedings where the Magistrate held the inquiry in the presence of the parties and they were aware of the fact in the course of the inquiry—*Sabid Mondal v Lakshmi* 7 C W N 599

Where the Magistrate omitted to state in detail the grounds of his satisfaction that a breach of the peace was likely to happen but referred to a petition which contained such grounds and also recorded that there was no denial of the same by the opposite party it was held that there was a substantial compliance with the provisions of this section and that the order was valid—16 M L J 148

Reference to police report—An initial order made by the Magistrate under sub sec (1) is not defective merely because it is not self contained and does not state in express terms the grounds upon which he is satisfied when such grounds appear in the police report upon which it is founded and to which it makes reference and which is incorporated in it—*Ahosh Mohamed v Asir Mahomed* 33 Cal 352 *Goluck Chandra v Kali Charan* 13 Cal 175 Where the police report sets out sufficient grounds and is expressly referred to in the initial order by the Magistrate such an order sufficiently fulfils the requirements of the law—33 Cal 357 If the Police report or other information shows that there is a dispute and the Magistrate believes it and issues the preliminary order basing his information on such report only he acquires sufficient jurisdiction to act under this section and it is not necessary for him to set out any further reasons for his being satisfied as to the existence of such a dispute His order is final and the High Court will not scrutinize the said reason — *Krishnaappa v Alamelu* 5 L W 165 18 Cr L J 23 But it is remarked in *Kali Krishna v Golam Ali* 7 Cal 46 that it is the duty of the Magistrate to record distinctly what the law requires to be recorded and he performs his duty in an unsatisfactory manner if without stating the grounds he merely refers to a police report

399 Parties concerned—The words parties concerned should not be so narrowly construed as to mean only the persons actually disputing but should be extended to persons who are concerned as claiming to be in possession Had it been intended to confine the proceeding to the actual disputants the Legislature would have used the words 'parties disputing' instead of the words parties concerned—*per* Hill J in *Krishna Hanani v Abdul Jubbar* 30 Cal 155 (F B) at p 198 Proceedings under this section are not without jurisdiction merely because some of those persons (i.e. persons claiming to be in possession) are not likely to cause a breach of the peace—*Abadi Begam v Mirza Ahmed* 11 O L J 757

the proceedings—*Manik v. Govind* 6 C W N 206 Where the Zemindars on both sides claim possession through their respective tenants the presence of the rival tenants is necessary and they must be made parties. The order passed in favour of one tenant as against the other is a good and valid order—*Gurusis v. Kedar Nath* 38 Cal 889 15 C L J 184 12 Cr L J 408

Where the disputed land consisted of several plots of land all held by tenants on a yearly rent of half the produce and the parties to the proceedings were the *lakhirajdar* and the *patindar* the dispute between whom was as to the right to collect rent and it appeared that as regards some of the plots there was a dispute as to what tenants were in possession it was held that as regards the plots about which there was a dispute as to what tenants held the lands the Magistrate should not have passed any order in those proceedings in the absence of the tenants because they might be very seriously prejudiced by an order in favour of one or other of the parties to these proceedings—19 C W N 67

Where the petitioners allege that the landlords have fraudulently attempted to dispute their possession by setting up false tenants as cultivators of the lands in dispute the landlords are the real parties—*Raj Kumar v. Mahadev* 4 C W N 748

Agent or Manager or Servant—Where the person in whose favour an order was made under this section regarding a dispute as to the right to dig coal in a certain mouza was merely the manager of the coal company claiming the property *Ield* that the possession of such person was not one as contemplated by this section and the order was bad as the parties really interested were not before the Court—*Behary Lal v. Darby* 21 Cal 915 The person in possession of land merely as agent or manager is not a party concerned within the meaning of this section—*Brown v. Prithviraj* 25 Cal 423 *Jhabu v. Rutherford* 7 C W N 208 *Newaz v. Ramnallabh* 21 Cal 916 (Note) An order passed against servants without their masters being on the record is one made without jurisdiction and is liable to be set aside in revision by the High Court—*Nagoji v. Subbarajulu* 5 L W 118 18 Cr L J 44 But if the actual proprietors are not resident within the jurisdiction of the Magistrate an order under this section can be made in favour of the person who claims to be in possession as agent or manager of the proprietors—*Dhondas v. Follet* 31 Cal 48 (F B) If both the master and the servant are resident within the Magistrate's jurisdiction the master must be made a party to the proceedings—*Jibahan v. Bansrup* 6 C L R. 193

In 32 Cal 287 and *Chhakar v. Ishar* 6 F L T 799 however it was held that where the Magistrate made the manager a party to the proceedings instead of the proprietor who was resident within the Magistrate

of the parties concerned. A claim merely to a right to possession as distinguished from a claim to be in possession, would be outside the scope of the inquiry. —I am therefore unable to agree in the view which has been taken in certain cases that all parties interested in, or claiming a right to, the property in dispute are entitled to be, or should be made parties to the proceeding. To require the Magistrate to ascertain who are the persons interested in or claiming a right to the property in dispute would be to impose on him in some cases an almost impossible task, and would undoubtedly have the effect of unduly prolonging and greatly embarrassing his proceedings and of depriving them altogether in many instances of their summary character."

The Madras High Court, however is of opinion (following the old Calcutta cases) that the words 'parties concerned' include persons who are interested in or claim a right to the property in dispute—*Q. E v Kuppayyar*, 18 Mad 51. *Nagoji v Subbarayulu*, 5 L W 118: 18 Cr L J 44

The Magistrate should do his best to ascertain who are the parties concerned in the dispute in a case under sec 145. But his order cannot be pronounced to be vitiated by any error of jurisdiction merely because such inquiry has not been made or carried far enough—*Arishna Kamini v Abdul Jubbar*, 30 Cal 155 (F B) at p 193

It is upon the basis of the information conveyed to him that the Magistrate is in the first instance to select the persons whom he will require to attend his Court for the purpose of laying their claims before him—*Ibid* (at p 196)

Owners occupiers —This section concerns owners as well as occupiers. When a Zeminder has let his lands in farm he and his farmers and their occupying ryots are all in their degree concerned in the dispute as to possession, and they ought to be maintained in the possession of the interests which they severally enjoy—*Harah Narain v Luchmi*, 5 C L. R. 287.

Landlords, tenants —Where in a dispute concerning the ownership and possession of land between a Zeminder as well as his tenants on one side, and another Zeminder as well as his tenants on the other (so that the dispute was of a dual character) the Zeminders were made parties, but the tenants were not, it was held that the presence of the tenants was essentially necessary for the proper and effectual decision of the case, and the omission to join them as parties was illegal and without jurisdiction—*Laldhari v. Sukdro*, 27 Cal 892. Where the dispute existed only among the tenants of the rival Zeminders, and the Zeminders not being concerned in the dispute did not move in the matter themselves, the omission to add the Zeminders as parties to the dispute would not vitiate

the proceedings—*Manik v. Gotsind* (C W N 206) Where the Zeminders on both sides claim possession through their respective tenants the presence of the rival tenants is necessary and they must be made parties. The order passed in favour of one tenant as against the other is a good and valid order—*Gurudas v. Ketarnath* 38 Cal 889 15 C L J 184: 12 Cr L J 408

Where the disputed land consisted of several plots of land all held by tenants on a yearly rent of half the produce and the parties to the proceedings were the *lakhrajdar* and the *patindar* the dispute between whom was as to the right to collect rent and it appeared that as regards some of the plots there was a dispute as to what tenants were in possession, it was held that as regards the plots about which there was a dispute as to what tenants held the lands the Magistrate should not have passed any order in those proceedings in the absence of the tenants, because they might be very seriously prejudiced by an order in favour of one or other of the parties to these proceedings—19 C W N 62

Where the petitioners allege that the landlords have fraudulently attempted to dispute their possession by setting up false tenants as cultivators of the lands in dispute the landlords are the real parties—*Raj Kumar v. Mahadev* 4 C W N 748

Agent or Manager or Servant—Where the person in whose favour an order was made under this section regarding a dispute as to the right to dig coal in a certain mouza was merely the manager of the coal company claiming the property held that the possession of such person was not one as contemplated by this section and the order was bad as the parties really interested were not before the Court—*Behary Lal v. Darby* 21 Cal 915 The person in possession of land merely as agent or manager is not a party concerned within the meaning of this section—*Brown v. Prithiraj* 25 Cal 423, *Jhabu v. Rutherford*, 7 C W N 208, *Newaz v. Rambhulabh* 21 Cal 916 (Note) An order passed against servants without their masters being on the record is one made without jurisdiction and is liable to be set aside in revision by the High Court—*Nagoji v. Subbarajulu* 5 L. W. 118 18 Cr L J 44 But if the actual proprietors are not resident within the jurisdiction of the Magistrate an order under this section can be made in favour of the person who claims to be in possession as agent or manager of the proprietors—*Dhondai v. Follet* 31 Cal 48 (T B) If both the master and the servant are resident within the Magistrate's jurisdiction, the master must be made a party to the proceedings—*Jitaban v. Bansrup*, 6 C L R. 193

In 32 Cal 287 and *Chhakauri v. Ishar* 6 P L T 799 however, it was held that where the Magistrate made the manager a party to the proceedings instead of the proprietor who was resident within the Magistrate's

jurisdiction the course adopted by the Magistrate was a mere irregularity or at most an error of law which did not vitiate the proceedings

Receiver —Where the land in dispute is in the possession of a receiver appointed by a Civil Court his possession is the possession of the Court. Such an officer cannot be described as a party interested in a dispute under section 145. Even if such officer can be so described there will be no jurisdiction in the Magistrate to make any order on him under this section without the sanction of the Court appointing him—30 Cal 593. In a dispute between the old and the new tenants of an estate the receiver who granted new leases to the new tenants and who himself was not in actual possession was not a proper party to the proceedings—*Chinna Veeranna v Narayanaswami* 9 M L T 502 12 Cr L J 185

Reversioner —A person who is the next reversioner to the estate is not a person concerned in the dispute and is not a necessary party because he has no right to present possession—24 All 443

Minor —A minor who is interested in the dispute is a proper party, but he is not a necessary party as he is not a party likely to cause a breach of the peace. Non service of notice on the minor does not invalidate the proceedings—*Nandan v Siaram* 26 Cr L J 1287 A I R 1926 Pat 67

400 *Non joinder of parties* —Questions of misjoinder or non joinder of parties do not ordinarily go to the jurisdiction. Such questions as whether A ought to have been added as being a person likely to be affected by the proceeding or B omitted as not being concerned in it or whether C was added at too late a stage are questions of procedure by which the jurisdiction of the Magistrate is not affected—*Krishna Kamini v Abdul* 30 Cal 155 200 (F B) *Nandan v Siaram* 26 Cr L J 1287 A I R 1926 Pat 67. Therefore proceedings under this section are not without jurisdiction because some person claiming to have possession of portions of lands in dispute has not been made a party when he was not one of the parties in the dispute so far as appeared from the information on which the Magistrate acted and when such person does not appear and raise any objection. And further proceedings under this section are not without jurisdiction merely because the parties that have been joined are concerned only with possession of portions of the land in dispute—*Krishna Kamini v Abdul* 30 Cal 155 (F B) *Safani Kanta v Shamsher Ali* 24 Cr L J 235

But non joinder of persons concerned in a dispute whose presence is essentially necessary for the purpose of a proper decision of the case involves a question of jurisdiction and the High Court has power to set aside an order made in a proceeding in which such persons are not made parties—*Anesh Mollah v Fajharuddin* 28 Cal 446

401 *Addition of Parties* —It was held in *Protap Narain v Rajendra*

Narayan 24 Cal 55 (F B) that a Magistrate had no power to add parties after the initiation of proceedings under this section and that if in the course of the proceedings it appeared to the Magistrate that it was absolutely necessary that other parties should be required to attend and he was satisfied that they were concerned in the dispute the only course open to him was to initiate a new proceeding.

But this case was decided under sec 145 of the old Code of 1882 in which subsection (3) regarding the service and publication of notice did not exist. The opinion of the Full Bench in 24 Cal 55 cannot in view of the alteration of law introduced by subsection (3) of sec 145 as it now stands be regarded as a binding authority on the construction of the section. Subsection (3) has been enacted not simply for the purpose of regulating the issue and service of notice generally under this section but it is also intended to empower the Magistrate after he has issued the order provided for by subsection (1) to the persons claiming to be in possession, to bring in any other persons whom from subsequent information it may seem to him proper to have before him—*Krishna Kamini v Abdul Jubbar*, 30 Cal 155 (F B) at pp 197 199. And the addition of those persons does not put an end to the original proceeding and does not require the initiation of any fresh proceeding—*Ibid* (at pp 192 193 201).

The Magistrate has very wide powers with respect to the persons whom he will bring into the proceeding. He may alter or add to the array of parties either of his own motion or on the application of any one claiming to be concerned in the dispute (*i e* claiming to be in possession). But the Magistrate can add parties at any time *up to the commencement of the inquiry* under subsection (4). He has no power to add fresh parties *after* the opening of the inquiry. The section contains no provision for the addition of parties after the commencement of the inquiry and it was no doubt considered that the power conferred on the Magistrate by subsection (3) of summoning such persons as he deemed proper, and the means prescribed by the same clause for giving publicity to the proceeding provided a sufficient guarantee that before the actual inquiry is entered upon, all parties really concerned will either have been summoned to attend the proceedings or will have had the opportunity of doing so afforded them if they care to avail themselves of it. It would lead to much inconvenience and delay if it were held that any one claiming to be concerned in the dispute was entitled to come in and join in the proceedings *after* the commencement of the inquiry. It would probably be necessary in such a case to start the inquiry afresh as the party added would have a right to have the evidence taken in his presence, and if several claimants successively were to come in this way it is evident that the proceeding might be indefinitely prolonged—*per Full J.* in *Ibid* (at pp 198, 199). The same Judge again remarked in the same case (at p 201):—'If parties are added after

who is himself a co-sharer must be deemed to be in possession under this section—1890 A. W. N. 178

Proceedings under this section are not without jurisdiction merely because some of the parties are concerned only with possession of a *portion* of the land in dispute—*Narayan v Chandrabhaga*, 26 Cr L J. 1289 (Nag).

The possession contemplated by this section is absolute, continuing and not occasional possession. Where the petitioners claim possession of a market stall for only one day in the week, this section is inapplicable—*Narayan Manjari v Fazley Haq*, 49 Cal 871. So also, where one of the parties to a proceeding under this section claimed only the right to worship on the disputed land on only one day in the year and the right to make due and proper preparations for the holding of that worship by erecting huts for the purpose of holding *pujah held* that the right of such party to be in possession for only one day in the year or to take such steps as were necessary to prepare for the *pujah* was in the nature of an *easement* and not in the nature of possession, and proceedings under this section could not be taken as this section contemplates absolute continuing possession of either party—*Manik Chandra v Prem Nath*, 17 C W N 205

Wrongful possession.—The possession referred to in this clause is actual possession at the time of the initiation of proceedings and not possession at the date of the Magistrate's order. Therefore, possession though obtained by wrongful means but complete at the time of inquiry is actual possession within the meaning of this section—*Q. E. v Gauhar*, 1897 P. R 5. So also, possession obtained by fraud or trickery—*In re Girdhar*, Ratanlal 27. The Magistrate's duty is to determine actual possession and not whether the possession is rightful or wrongful—*In re Sangambasawa*, 7 Bom L R 18. 2 Cr L J 28

Origin of possession.—A Magistrate ought to inquire into the question as to who is in actual possession of the property in dispute, he has no concern as to how the party obtained possession, provided that the possession dates more than two months prior to the date of the preliminary order—11 Cal. 365. *Dastur v. Fell*, 6 B H C R. 30

Actual possession, what is not.—Possession by tenant is not possession of landlord in cases where there is a dispute between the tenant and the landlord as to the fact of possession—2 Weir 107. Also, in case of dispute between two rival zemindars, constructive possession through intermediate holders (*e. g. ticcadars*) to whom the ryots pay rents, is not contemplated by this section—3 Cal 320. This section does not contemplate the possession of a superior landlord to whom the occupier of the land does not pay rent. It contemplates the possession of a landlord by his immediate tenant *i. e.*, the person who pays rent to him—*Sutherland v. Croud*, 18 W. R. 11 (13).

The possession contemplated by this section is a real tangible possession therefore where a party claims *under a document* or agreement the right to do certain things over a large extent of territory the performance of acts under such alleged right in one portion of the ground over which the right extends (although it may be sufficient for the purpose of keeping alive that right so as to be an answer to a plea of limitation raised in a civil suit) is not of itself a sufficient possession on which the Magistrate's order under this section may be based for the purpose of forbidding in a distant locality acts necessarily not in conflict with such possession but at variance with the right—*Bejay Nath v Bengal Coal Co* 23 W R 45 (48) So also the mere purchase at an execution sale without delivery of possession does not amount to possession of the property purchased and the rights of the purchaser will not be protected by this section—31 Mad 410

The possession given by Am n in butwara proceedings is simply one of ownership and not of occupancy and is not contemplated by this section—4 Cal 378 3 C L R 94

A succession certificate only authorises the holder to collect the debts of the deceased and is no bar to the Magistrate maintaining another party in possession of the lands belonging to the deceased—*Seslaram v Roy Sheo Golam* 13 W R 34

Possession of forest land —In a dispute regarding forest land the right to possession of which was exercised by cutting timber from time to time and removing the timber upon a certain price being paid for it is necessary to inquire as to who was in undisturbed possession of the land in dispute by felling the trees and removing the same without objection on the occasion immediately preceding the time when the dispute arose and whichever party be found to have been in possession on that occasion should be presumed to have possession when the proceedings commenced—16 Cal 281 Where it was found that certain jungle lands were in the *khas* possession of the Zemindar and the other party without claiming any easement or customary right cut a few trees and encroached upon a small portion of the jungle held that such intermittent encroachment did not oust the possession of the Zemindar—*Bhola Nath v Wood* 32 Cal 287

Permissive possession —Possession that can be pleaded in a proceeding under this section must be possession based on a claim of right to possession The possession of a person which is merely permissive can not come within the purview of this section—*Nrit a Gopal v Chandu Charan*, 10 C W N 1088

405 *Joint possession* —Section 145 contemplates a dispute between two parties, each of whom asserts the right to hold *exclusive* posses-

of the property as against the other (*Bidhu Bhusan v Annoda* 6 C W N 883) and not a dispute between a party claiming to hold joint possession with another and the latter contesting such right. Such a dispute nearly always arises out of a claim to hold a specific share in the property and this obviously is a matter which no Criminal Court can properly deal with. Therefore, where two parties are in joint possession of the property in dispute and one of them tries to evict the other so as to endanger the public peace this section does not apply and an order allowing one of the parties to be in possession till evicted by law is bad—*Tarujan v Asamuddi* 4 C W N 426 *Krishna v Radhasyam* 7 C W N 118 *Dhani Ram v Bholanath* 1902 P R 23 10 C W N 1088 *Makhan v Barada* 11 C W N 512 5 Cr L J 296 *Shamlal v Rajendra*, 21 Cr L J 790 1 P L T 594 *Arjun v Chandan* 22 Cr L J 625 24 O C 167

This section is not intended to regulate the mode of enjoyment and when the parties are jointly entitled an order under sec 145 should not be made—23 Cal 80. This section clearly refers to exclusive possession and is not capable of being so construed as to authorise a Magistrate to take cognizance and dispose of disputes regarding joint possession—190* P R 23. The object aimed at by the Legislature is the prevention of a breach of the peace. This can be secured by asking one of the parties to keep away from the property. But where both parties have been in joint possession and are still prepared to commit a breach of the peace by trying to oust one another it will not be in the interests of the preventive remedy that both should be maintained in possession. It will certainly not help to maintain order and peace. That is the reason why Courts have declined to declare the joint possession of the contending parties—*Mohammad Kaola yappa v Sheikh Abdul* 27 M L J 169 15 Cr L J 572. Even in such cases the Magistrate is not competent to put one of the parties in possession—*Veerabhadra v Shanmugan* 17 Cr I J 76 (Mad). Where it was found that the second party was in possession of the disputed land on behalf of the first party as also on behalf of himself, both parties being members of the same family and the Magistrate declared the second party to be in possession the order was held to be without jurisdiction—*Hinu Mandal v Haji Baul* 23 C W N 1051.

Where the parties do not claim joint possession but each party claims exclusive possession it cannot be said that it is a claim for joint possession making this section inapplicable—*Bidhu Bhusan v Annoda* 6 C W N 883 *Ramjharis v Piar Koeri* 4 P L T 308 *Makhan v Makhan Singh* 2 Lah 372 23 Cr L J 225 *Dasudeo v Makadea* 6 P L T 454 26 Cr L J 1187. Thus, where the case is one of exclusive possession claimed by each set of landlords through their respective tenants the Magistrate has jurisdiction to pass an order in favour of one tenant against the other.

persons setting up their tenancy—*Gurudas v Kedar Nath*, 38 Cal 889: 12 Cr L J 408 15 C L J 184 And the fact that there may be a *joint title* to land does not prevent the application of this section, if the Magistrate finds that possession is with one party—*Baynath v Street* 20 C W. N 518 17 Cr L J 251 *Malan v Makhhan Singh* 2 Lah 372 The only question for the Magistrate is whether either party has actual possession, and if he finds that one party has actual possession of a defined area and the other party has not, he can make an order under this section irrespective of the fact that the parties may have *joint title* to the land—*Basanta Kumari v Mohesh*, 40 Cal 982 17 C W N 944 14 Cr L J 269

Where it has been declared by a Civil Court that the property is joint and partition has been ordered, no proceedings under this section can be taken until the partition has been effected—8 C W N 485

If the co-shares have by express or tacit arrangement made a partition between themselves so that each of them is in possession of a specified and demarcated portion of the estate, there is nothing to prevent the application of this section—*Basanta Kumari v Mohesh*, 40 Cal 982. So also, where it was found that each party to the dispute was in possession of separate dwelling rooms in the same house the Magistrate was competent to pass an order that the separate possession of each party should continue—2 Weir 108

Debtor property being by nature impartible and inalienable possession of such property by co-sherebais must always be necessarily joint and as such beyond the scope of an order under this section Where one of several co-sherebais had been entrusted with the sole management of the debtor estate for convenience, a dispute between him and the other co-sherebais claiming to have joint management with him is not a fit subject for a proceeding under this section—*Nritta Gopal v Chand Charan*, 10 C W N 1088

406 Clause (2)—Land or Water —These words have been substituted for the words 'tangible immoveable property' occurring in the Code of 1882, and this subsection gives an explanation of the expression

Building—Temple —A dispute relating to possession of a temple comes within the provisions of this section—2 Weir 110 whether the temple be wholly or partly private property or dedicated to purposes of public worship—2 Weir 99 A dispute arising between two pujaries regarding the right to perform the puja in a certain temple comes within the purview of this section—2 Weir 112 This case will now properly fall under sec 147 as amended in 1923

Markets —A dispute about the exclusive right to collect the entire toll from one partitioned half of the market may be a subject of proceedings under this section—30 Cal 593

Fisheries —Under the Code of 1882, by reason of the word 'tangible' occurring in the section, incorporeal rights were excluded from the operation of this section—11 Cal 413 and therefore a dispute concerning the right of fishing in a *jalkar* was held to be not governed by this section—12 Cal 539 13 Cal 179 But these decisions are no longer good law in view of the express words fisheries occurring in this subsection Therefore where there is *bona fide* dispute about a fishery or *jalkar* right, proceedings under this section may be properly instituted—35 Cal 117

Where parties have joint rights in a certain fishery and neither of them can be considered as claiming exclusive possession, and a dispute arises with regard to its possession, this section is inapplicable because joint possession does not come within this section If what was in dispute was not a share in the fishery but a share in its profits (i.e. either the fish caught or their price when sold) it might have been dealt with under this subsection—*Bhabanath v Peary* 11 C L J 412 11 Cr L J 370

Alluvial lands —In the case of alluvial lands (in Bengal) recently reformed where questions of breach of the peace arise it is open to the Magistrate to deal with the matter either under the Bengal Alluvial Lands Act (V of 1920) or under the provisions of section 145 of this Code This section has not been impliedly repealed by Act V of 1920 in the case of alluvial lands recently formed—*Abdul Jabbar v Mafizuddin* 28 C W N 783 25 Cr L J 1107 A I R 1924 Cal 980

Crops or other produce —The word land includes crops or other produce of land—2 Weir 108 But crops mean standing crops and not crops which have been severed from the land and stored on the thrashing floor—3n Cal 110 *Srinivasa v Sathayappa* 13 Cr L J 295 (Mad) *Ganga Prosad v Narain* 15 All 394 *Chaurasi v Ram Shankar* 28 All 266 *Contra*—2 Weir 108 where it is held that the mere fact that the crops which are the subject of dispute have been removed from the land is not sufficient to oust the jurisdiction of the Magistrate under this section

Mines —A dispute as regards mines and minerals and the right to work mines falls under this section as mining rights must reasonably be regarded as falling within the definition of the term land which is intended to cover all profits derivable from land—*Andrew Yule & Co v Skone* 4 P L J 154 20 Cr L J 199 *Mahaheo Dutt v Sarkar* 24 Cr L J 263 *Bimala Prosad v Tata Iron & Steel Co Ltd* 35 C L J 456 24 Cr L J 103

Trees severed from the land do not come within the purview of this section and no order under this section can be made with respect to them—1917 P W R 22 But trees growing on the land come within this section as being produce of land But lac which is not a part of the tree itself but is a parasitic growth on it is not a produce of land or crop—*Ali*

Mohammad v Fakiruddin, 24 C W N 1039 22 Cr. L. J. 131 The right to tap a tree is an intangible property and may be the subject of proceedings under this section—*Jiblal v Emp* 3 P L J 316 19 Cr L J 656 It would more properly come under sec 147

Rents—A dispute as to collect rents is a dispute concerning land, within the meaning of this section—*Pramatta v Durga Churn* 11 Cal 413 15 Cal 57 12 Mad 88 18 Cr L J 156 (Mad) *Abhayessari v. Sidhessari* 16 Cal 513 *Lalithari v. Sukdeo* 27 Cal 892 (903) 27 Cal 259 *Haridas v. Abdul Malieb* 19 C W N 959 16 Cr L J 590 The decision in *Durga v. Phulzari* 1885 A W N 299 (decided under the Code of 1882) is no longer good law in view of the express words of this subsection

Where there is no dispute as to the possession of or extent of share in a certain immoveable property and the dispute is merely as to who is entitled to collect rents on behalf of all from the tenants this section does not apply—*Md Fazil v Md Abdul Samad* 5 Cr L J 394 10 O C 89 *Ahaloo v Mohesh* 36 Cal 986 *Ramlochan v Emp* 12 A L J 162 36 All 143 That is where there is no dispute as to possession or share of land a Magistrate can not under this section determine the method by which the possession of the parties is to be exercised or the method by which the the parties in possession are to collect the profits of land—*Ahaloo v Mohesh* 36 Cal 986

This section applies where the dispute is as regards the collection of rents between joint owners governed by the Mitakshara Law as for instance where one of the joint owners dismisses the common manager and claims to collect the rents separately on his behalf—*Sri Mohan v Narsing*, 27 Cal 259 (261)

Profits—The profits must arise out of or emanate from immoveable property therefore fees paid by pilgrims at Gaya for performing Sraddh ceremonies cannot be said to arise out of land and proceedings under this section cannot be instituted in respect of a dispute regarding such fees—3 C L J 137 So also a right to the offerings given by worshippers for the worship of any deity cannot be said to be a right to profits issuing out of the temple but arising out of the deity irrespective of the temple building in which the deity may happen to dwell A dispute relating to the rights to the offerings only is a dispute relating to moveable property and is outside the scope of this section—*Ram Saran v. Raghunandan* 38 Cal 387 13 C L J 445 12 Cr L J 3 *Gurram v. Lalbehari* 37 Cal 578 14 C W N 611 11 Cr L J 292 So also a dispute concerning the right to take sandalwood paste when removed from an idol does not fall under this section—2 Bom L R 438 A dispute with respect to the collection of offerings at a karbala cannot be the subject matter of a proceeding this section—*Chulam Sibzun v. Kanur Khatun* 3 P L J 216 2 P D 608 21 Cr L J 57-

A dispute as to the right to collect fees (as mere remuneration for conducting the business of the market) from the sellers of a market the payment of such fees being purely voluntary on the part of the sellers and being in no way connected with the ordinary rents and profits of the market, and not being a perquisite of the Zeminder, is not a dispute as to the profits of a market within the meaning of this section—*Ram Lochan v Emp*, 36 All 143 12 A L J 162

Right of succession to a muth —A Magistrate has no jurisdiction to institute proceedings in case of a dispute arising out of a right of succession to a *muth* and its appurtenances—11 W R 23

Right to ferry —The right to a ferry, i. e., the right to carry passengers and their goods to and fro in a boat across a river, cannot be treated apart from the possession of lands used on either side of the stream for the purpose of landing them. Therefore a dispute regarding a ferry including the land and the water upon which the right is exercised, comes under this section—26 Cal 188. But questions relating to rights to use a ferry come under section 147 and not under this section—*Harbulla v Bajrang*, 3 C W N 148

Disputes as regards easements fall more appropriately under sec 147 than under this section—*Kali Kumar v Bejoy*, 21 Cr L J 697 (Cal), *Aasram v Chotu Lal* 22 Cr L J 768 (Nag). e. g. a dispute as regards the right to use a well—*Nanke v Jamid ul Rahman*, 23 A L J 41 26 Cr L J 683

407. Clause (3)—Service of Notice —A copy of the order, stating the grounds of the Magistrate's satisfaction must be served on the parties for it is the intention of the law not only that the Magistrate should have sufficient grounds for proceeding under this section, but that he should inform the parties concerned of the grounds on which the proceedings had been instituted —20 Cal 520

A Magistrate before proceeding under this section ought to satisfy himself that a notice of the proceeding and a copy of the order drawn up under clause (1) have been duly served on the parties alleging the non-receipt of the notice, and the Magistrate's omission to do so vitiates all subsequent proceedings—*Sripati v Ram Kumar*, 8 C W N 76

When the Court decides to take action, all processes should be served at the expense of the Crown—*Phutanja v Emp*, 25 Cr L J. 1109 (Nag)

Local service of notice —This clause also provides for the publication of a copy of the order in a conspicuous place at or near the subject of dispute, and the publication of such notice is a condition precedent to the exercise of a Magistrate's jurisdiction in an inquiry under subsection (4)—*Nawab Khaja Solemulla v Ishan Chandra*, 9 C W N 909

The provision regarding the local service of notice was made with the

intention of guarding against collusive proceedings as well as to give to any one interested who may through an oversight or otherwise not have received a summons an opportunity of coming in with his claim and to notify generally to all persons in the locality that a proceeding under this section has been set on foot—*Krishna Kamini v Abdul Jabbar* 30 Cal 155 197 (F B) As regards the effect of clause (3) on the power of the Magistrate to add parties see 30 Cal 155 (F B) cited in Note 401 *ante*

Form of notice—Though the section prescribes no particular mode of giving notice the language of this section indicates that the notice shall be to known individuals and not in the form of a general citation or public proclamation—4 Cal 650

Notice under section 107 or 147 not sufficient—Where notice was issued under section 107 to show cause why the accused should not execute a bond for keeping the peace and the Magistrate when he tried the case recorded an order in the course of which he stated that on facts the case was one for the application of Sec 145 and not one under Sec 107, and proceeded at once to pass an order under clause (6) of this section, the order was held to be bad—30 Cal 443 Similarly where a Magistrate gave notice under sec 147 and started proceedings under that section, but on objection being taken did not decide whether Sec 147 was applicable to the proceedings but passed an order purporting to be under sec 145 without giving notice of his intention to act under sec 145 the Magistrate's order was made without jurisdiction—19 M L J 18 In both these cases the Magistrate ought to have issued fresh notice under sec 145

Service on whom to be made—The service of notice need not be made on all co sharers It is enough if notice is served upon persons concerned in the dispute—*In re Gobinda* 18 W R 54 A service of notice upon a mofussil naeb who takes no steps to consult his employer or act under his directions is not such service as is contemplated by this section—*Ramranginee v Goroo Das* 17 W R 9

Proof of service—Where one of the parties denies the service of the order the written return of the serving peon is not sufficient proof of the service The Magistrate should examine the serving peon and allow him to be cross examined on this point—8 C W N 719

Non service of personal notice—Failure to serve the notice upon the parties concerned is a mere irregularity cured by sec 537—*Mg Mauk v Mg Po* 3 Rang 169 *Bidhyadhar v Jagodish* 7 O C 334 *Bhure Khau v Fakira* 25 Cr L J 159 (Nag) and will not render the proceedings void if the parties were present and no prejudice was caused—*D bi Prosad v Slocdat* 30 All 41 or if the parties appeared before the Magistrate who explained matters to them fully and they evidently understood everything that was requisite—*Nur Bakish v Crown* 1917 P W R 26 18 Cr L J 633 or if the person did not question the order—30 Mad 548 But accor /

ding to the Patna High Court non service of the notice is a grave irregularity which vitiates the trial—*Ram Sahai v Deonandan* 19 Cr L J 71 (Pat) *Sleonandan v Wahidul* 19 Cr L J 112 (Pat), but non service of notice on one member invalidates the proceedings only so far as that member is concerned and does not invalidate the whole proceedings—*Nandan v Siaram* 26 Cr L J 1287 (Pat)

Where the Magistrate did not serve any notice upon any person nor did he affix a notice on the property in dispute nor receive a written statement from either party and passed the order in the absence of one party the proceedings of the Magistrate were very irregular and were bad for want of jurisdiction—35 Cal 774 1907 P R 7 *Dasawan v Tilak* 4 P L T 723 24 Cr L J 345

If the proceedings are heard and order passed *ex parte* on account of the absence of a party and that party afterwards appears and alleges non service of notice and applies for rehearing of the case the Magistrate cannot reject the application but is bound to re open the case after satisfying himself of the truth of such allegation—*Aali Charan v Abdul Lashar* 24 C W N 902 21 Cr L J 848

Omission of publication of notice —The provision as to the publication of the order in some conspicuous place near the property in dispute is directory and a matter of procedure only Omission to publish the notice is not an illegality which deprives the Magistrate of his jurisdiction and unless it be shown that some one interested has been materially prejudiced by the omission the High Court will not interfere—*Sukh Lal v Tara Chand* 33 Cal 68 F B (overruling 8 C W N 590 and 9 C W N 909) *Debi Prosad v Sheodat* 30 All 41 *Muhammad Sharif v Dhanpat* 1914 P W R 15 *Bhure Khan v Fakira* 25 Cr L J 159 (Nag) *Maung Mauk v Maung Po Yon* 3 Rang 169

Warrant to compel attendance of party —Under this section the matter in issue is not the commission of an offence but the settlement of a dispute and it is entirely optional with the parties to attend or not therefore the issue of a warrant to compel the attendance of any party is illegal—5 C W. N 71

408 Clause (4)—*Inquiry* —An inquiry as to possession is made not for the purpose of strengthening the possession of one party or the other in the dispute between them but because such an inquiry is necessary for the making of an order under subsection (6) declaring the party in possession to be entitled to retain it until eviction by a Civil Court—30 Cal 112

The inquiry contemplated by this section is a personal inquiry. A Magistrate has no jurisdiction even with the consent of parties to make over an inquiry under this section to any other Magistrate Sub section

(4) makes it clear that the section contemplates only an inquiry by the person directed by the Statute to hold it and by that person and no one else. This section read as a whole does not give the person charged with the inquiry the power to delegate the duties which have been vested in him to any other person to hold an inquiry or to ascertain facts which the law requires the Magistrate to do himself—*Hamidul Haque v Sh Atait* 2 P L J 86 18 Cr L J 145 See also Note 414 *infra*

409 Procedure — It should be impressed upon Magistrates that the whole object of and only excuse for proceedings under Sec 145 is the prevention of a breach of the peace supposed to be imminent and that the procedure to be followed in disposing of such cases is that laid down in section 145 subsection (4) of the Code which must be strictly observed. It should be the primary aim of the inquiring officer therefore to arrive at his decision with the utmost promptitude consistent with an adequate investigation into the dispute before him and he should be specially careful not to permit the proceedings to assume the complexion of a civil suit or in any way to countenance an endeavour on the part of either party to secure any advantage for the purposes of civil litigation.

The trying Magistrate should be in a position to insist upon the taking up of the case on the date fixed for hearing and it should not be necessary to grant adjournment after adjournment simply because the parties are not given due notice of the proceedings or by reason of the proceedings themselves being inaccurate or incomplete. Once the case is commenced, the hearing should be continued *de die in diem* until the Magistrate is in a position to arrive at a decision but in doing so he must remember that the sole object of his inquiry is to determine if possible the fact of actual possession and that even in the case of an *ex parte* proceeding, there must be some recorded evidence to justify the order passed by him —*Cal G R & C O* pp 10 11 *Sastu Sahu v Nathani* 6 P L T 258 26 Cr L J 105

The sole procedure in an inquiry under section 145 by a Magistrate is as to who was in actual possession of the land in dispute and a Magistrate should not deal with such proceeding as if it were a civil suit by framing several issues and trying them—35 Cal 795

It is incumbent on Magistrates to dispose of proceedings under this section as quickly as possible and therefore the procedure of a summons case is to be followed and not that of a warrant case—*Moti Singh v Dhanukdhari* 24 Cr L J 595 see also *Biswanath v Shrinanand* 2 P L T 330 72 Cr L J 430 11 Cr L J 76 and *Ram Chandra v Monohur* 21 Cal 29 where the procedure of a summons case has been recommended. In another Calcutta case it has been remarked that in cases dealing with taking securities for keeping the peace or for good behaviour as to cases of public

parties and receive evidence—*In re Dyawappa*, 17 Bom L R. 382 16 Cr. L. R. 434. An order under this section without taking evidence is invalid and must be set aside—6 C W. N 923 *Jhenger v Baynath*, 11 A. L J. 586 14 Cr L J 277, 8 C W N. 719, *Tara Chand v. Behari*, 1916 P. R 22 18 Cr L J 36, *Fateh Sher Khan v Crown*, 17 Cr L J. 129: 1916 P R 4, *Palani v Kulandavelu*, 43 M L. J 716; *Velayuda v Narayan* 2 L. W 1208; *Marudanayakam v Md. Rowthen*, 17 Cr L. J 217 (Mad). *Basawan v Tilk*, 4 P L T 723 A decision of a Magistrate based upon mere local inquiry, and discarding the evidence altogether is bad as one made without jurisdiction—10 C W N 181, *Shahadul v Tajuddin*, 46 Cal 1056 *Srimanavedan v Parapravan* 38 M L. J 73, *Gagin v. Karimuddin*, 25 C W N 1007 23 Cr L J 199, 16 W R. 13. A Magistrate will be acting illegally in the exercise of his jurisdiction if instead of taking the evidence tendered by the parties he proceeds to the spot and decides the case only on the statements of witnesses picked up by himself—*Khubi v Darbari*, 2 P L T. 267 An order passed by a Magistrate on the basis of his own knowledge without recording any evidence, and relying solely on the evidence in another case is invalid—25 O C 148 So also, an order passed merely on a consideration of the written statements and without taking any evidence is invalid and must be set aside—34 Cal 840, 8 C W. N 642 Similarly an order under this section without giving either party an opportunity of adducing oral evidence as to possession is illegal and liable to be set aside—*Sakhajur v Athadi* 21 C W N 928 19 Cr L J 108 The Magistrate must consider both oral and documentary evidence in the case—*Kailash v Jas Narain* 1 P L T 291 21 Cr L J 601, *Hanuman v Sheo Chandra*, 2 P L T 333

It is not open to a Magistrate to refuse the evidence tendered to him—29 Mad 561 The Magistrate's act in preventing the objector from producing evidence to prove his case constitutes such a grave irregularity as to amount to an abuse of jurisdiction, and the Magistrate's order is in consequence open to revision—1902 P R 23 The Magistrate is bound to grant adjournment for the production of important evidence, if he refuses to do so, his order is liable to be set aside—*Biswambhar v Amiruddin*, 25 C W N 602, 22 Cr L J 335 If the evidence rejected is a material document affecting possession of a party, its rejection might furnish a good ground of grievance to that party—*Udit Narayan v Sundarman*, 20 Cr L J 234 (Pat)

The record must show the ground of rejection of evidence A general remark in an order that the oral evidence is not reliable, without referring to it and without giving any reason is not a proper disposal of the case on the evidence. It amounts to a refusal to exercise the jurisdiction vested in a Magistrate and is remediable by the High Court in revision—*Lakhpal v Emperor*, 4 P L T 579

The words '*receive all such evidence as may be produced*' have been substituted for the words 'receive the evidence produced'. This shows that the Magistrate is now bound to receive all the evidence produced by the parties and has no discretion to refuse any evidence. * In order to meet certain difficulties which have arisen in connection with the words 'receive the evidence produced by them' in section 145 (4) we have made an amendment adopting the phraseology of section 244 (1) — *Report of the Joint Committee* (1922)

Examination of witnesses — The Magistrate is bound to examine the witnesses tendered in support of the respective claims to possession of the land in dispute—6 M H C R App 4 9 W R 64. An order passed without examining the witnesses is without jurisdiction—*Marudanayakam v Md Rowthen* 17 Cr L J 217 (Mad) 17 C W N 771

So also an order passed on the evidence of a person who was not a witness of any of the parties is bad—8 C W N 719 *Fateh Sher Khan v Crown* 1916 P R 4

Under the old law a mere refusal by the Magistrate to examine a particular witness in a proceeding under this section was not necessarily a ground of interference by the High Court—30 Cal 508. A Magistrate was not bound to examine all the witnesses adduced by the parties but could limit the number for good and sufficient reasons. He had a discretion in the matter of examining witnesses—3 C L J 478 (explaining 31 Cal 685) 16 Cal 513. Therefore where a Magistrate after examining ten of the witnesses produced by a party refused to examine any further witnesses on the ground that the evidence sought to be adduced was worthless it was held that the Magistrate had not acted without jurisdiction—24 All 315

The present Amendment of this subsection however makes it obligatory on the Magistrate to examine *all* the witnesses produced by the parties, and leaves no discretion to him in this matter

But the Court has undoubted jurisdiction to curtail the number of unnecessary witnesses upon the ground that their examination will delay and possibly defeat the ends of justice though he cannot arbitrarily restrict the number of witnesses that a party wishes to examine—*Bisuanath v Shivanand* 2 P L T 330 -- Cr L J 430 *Bahidunnissa v Pichit Lal* 23 Cr L J 954 (Pat)

Summons to witnesses — See sub section (9) and notes thereunder

Admission by party — If one of the parties admits that the other is in possession, the Judge is not bound to take any evidence—*Gangadharani v Sankarappa* 9 M L T 91 1- Cr L J 47. Although it is necessary ordinarily to record evidence in a case under this section before passing final orders it cannot be said that it is indispensable to do so when the case is completely given up by the opposite party. An admission by the

Mukhtear that his client had no actual possession is sufficient to dispense with evidence—7 C W N 351

Withdrawal of proceedings —Where after proceedings under this section had been properly instituted the first party examined some witnesses and then represented to the Court that he would conduct the case in the Civil Court and gave an undertaking not to enter upon the said land until the matter should have been settled by the Civil Court whereupon the Magistrate passed an order reciting the terms of the petition and declaring the second party to be in possession held that the omission by the Magistrate to take evidence on behalf of the second party or to record a formal finding as to possession did not vitiate the order—*Yar Mohammad v Hayat Mohammad*, 18 Cr I J 1024 (Cal)

414 *Inquiry by Subordinate Magistrate* —The inquiry contemplated by this section is a personal inquiry by the Magistrate who makes the order. Therefore an order under this section based upon the report of a Subordinate Magistrate made after inquiry by such Magistrate is illegal—4 M H C R App 20. Though Sec 148 enables a Magistrate acting under this section to depute a Subordinate Magistrate to make a local investigation he ought not to depute to such Subordinate Magistrate the whole investigation under this section but on the receipt of the report of such Magistrate should himself take written statements from the parties and receive the evidence produced by them and conclude the investigation—7 Weir 218

If a Magistrate omits to take evidence as required by clause (4) but refers it to a Subordinate Magistrate to report thereon his order based on such evidence alone is made without jurisdiction and must be set aside—31 Mad 82. But in a later Madras case it has been held that the order based on the report of a Sub Magistrate is not without jurisdiction. The essential requisite to give jurisdiction to a Magistrate is that he must be satisfied about the existence of a dispute likely to cause a breach of the peace. His subsequent action is a matter of procedure and not of jurisdiction—*Jagannatha v Venkatasopalakrishna* 37 M L J 589 20 Cr L J 773 (dissenting from 31 Mad 82)

415 *Evidence recorded by predecessor* —Since a proceeding under this section is an inquiry within the meaning of Sec 4 (k) a Magistrate may act on evidence taken by his predecessor by virtue of sec 350. The decision in 23 W R. 62 is no longer good law

416 *Reference to arbitrators* —This section requires the Magistrate himself to receive the evidence adduced by the parties and on a consideration thereof to come to a decision. The procedure laid down by this section does not contemplate that the question as to who is in actual possession should be delegated even by consent of parties to arbitrators—*Banqary*

v. Hriday 32 Cal 552, *Hamidul v Sheikh Atail* 2 P L J 86, 18 Cr L J 145, *Jamuna Das v Hanuman* 25 C W N 719, 22 Cr L J 623. But where the parties themselves agreed that the question of possession should be decided by an arbitrator and the matter was thereupon referred to arbitration the Magistrate was bound to take into consideration the finding of fact by the arbitrators as to which party was in actual possession—*Taramoni v Gjanendra* 7 C W N 461. So also where the dispute was referred to arbitration by consent of parties both of whom accepted the award that followed it was not open to the Magistrate to insist on the production of evidence—*Haladhar v Bulaki* 3 P L J 248, 19 Cr L J 266.

Where the parties themselves applied that the matter should be referred to arbitration and the Magistrate made an order in terms of the award the parties were not entitled afterwards to object to the course and the High Court declined to interfere in revision—*Janki v Kalika Misra* 6 C W N cix.

In *Uttam Singh v Jodhan Rai* 3 Pat 288, A I R 1924 Pat 589, Foster J. considered all the above cases and came to the conclusion that a distinction should be drawn between cases in which the reference to arbitration was made for the purpose of deciding *existing and past* possession, and cases in which the reference was made for deciding *future* possession. The scheme of an inquiry under subsection (4) of sec. 145 is *retrospective* and not *prospective* that is the Magistrate is to consider who was in possession at the *date of the institution* of the proceedings or within two months prior thereto and not who is entitled to possession and will henceforth be in possession of the property in dispute. Therefore if the reference to arbitration is made for the purpose of deciding the question as to who *was* in possession at the date of the institution of the proceedings such a reference is not improper and the Magistrate can pass an order on the basis of the award of the arbitrators. But if the reference is made for the purpose of deciding future possession and the arbitrators give an award to the effect that the disputed lands will be divided among the parties the award is *prospective* and the Magistrate cannot pass any order on the basis of that award.

In the same case it has also been decided (at p. 794) that if the parties refer the disputes to arbitration and the arbitrators give an award it shows that the parties *have come to a settlement of their disputes* and that there is no longer any likelihood of a breach of the peace. In such a case the Magistrate should pass an order under subsection (5) dropping the proceedings and cannot pass a final order (declaring the possession of the parties in terms of the award) under subsection (6).

417 Decision as to possession — An order under this section merely declaring one of the parties to be in possession without deciding and giving

a finding as to who was in actual possession of the land in dispute on the date of the preliminary order is one made entirely without jurisdiction and consequently void—35 Cal 795 *Peria Subba v Sinna Subba* 45 M L J 56 23 Cr L J 670

Where the Magistrate made no attempt to deal with the question of possession but made some general observation in regard to the ownership of the property and declared the petitioner to be in possession *held* that the order was an obvious infringement of the provisions of this section—*Shukulathi v Gulam Moideen*, 1922 M W. N 689 16 L W 338 .

If it is difficult for a Magistrate trying a case under this section to come to a conclusion as to the fact of possession, the wise and proper course to be adopted is to pass an order under Sec 146 Where a Magistrate in such a case passes an order under Sec 145 the High Court in revision has the power to make the order which the lower Court ought to have made and to alter the order under Sec 145 into one under Sec 146 of the Code—14 Cal 361 22 Cal 297

418 Possession at the date of the order —The question of possession has to be determined with reference to a specified point of time viz the date of the initial order or in the case of forcible dispossession a date within two months next preceding such order—32 Cal 1093 The rulings in 11 Cal 365 12 Cal 521 12 Cal 539 20 W R 51 15 Bom 152 18 Mad 41 13 All 362 are no longer good law .

The *actual* possession of the land in dispute is the only subject for inquiry The fact of *symbolical* possession delivered under the C P Code has no bearing on the Magisterial inquiry—*Ramalingam v Raja of Ramnad* 16 Cr L J 736 (Mad) *Promoda v Khelra* 25 Cr L J 1104 (Cal) Where a party is given symbolical possession of certain lands, and shortly afterwards proceedings under sec 145 are instituted in respect of the same land it is incumbent on the Magistrate to go into the fact of actual possession between the two dates and consider the evidence tendered on that question before passing the final order—*Hazari Khan v Nafar Chandra* 22 C W N 479 18 Cr L J 718 Where it was found that notwithstanding the delivery of symbolical possession given to the auction purchasers (second party) the judgment debtor and his heirs and representatives (first party) had continued all along to be in possession and were in actual possession on the day on which proceedings under this section were instituted but the Magistrate made his final order in favour of the second party *held* that the order made in favour of the second party could not be supported as they were not in actual possession at the date of the order—*Shahabaj v Bhajahari* 49 Cal 177 (180) 24 Cr L J 875

A Magistrate should find/as to who was in possession at the date of the order, not at any date anterior to that although previous possession

may be a guide to his finding as to peaceful and actual possession on the date of the order—*T Hampanna v Gangamma* 16 Cr L J 239 (Mad)

Where the Magistrate found one party to have been in possession a few days before the date of the preliminary order, and confirmed his possession without finding who was in possession on the date of the preliminary order itself but the interval between the two dates was very short (*viz* 5 days only), and there was nothing on the record to show that there was any change of possession in that short interval and the party confirmed in possession had a decree of Civil Court declaring him entitled to possession held that the order of the Magistrate was valid—*Id Hussain v Pachayappa* 42 M L J 147 23 Cr L J 9. But where the Magistrate declared possession in favour of the opposite party as evidenced by certain documents of title relating to a period as old as 10 years prior to the proceeding without taking further evidence oral or documentary to see whether that possession continued up to the date of proceeding the High Court set aside the order as made without jurisdiction and contrary to the provisions of this sub-section—*Juthan v Ram Narayan* 18 C W N 700 15 Cr L J 202

Land under Water —Where the Magistrate made the final order in favour of one party finding that as there could not be any act of peaceful possession within two months of the date of the proceeding owing to the land being under water the possession in the current year was to be presumed in favour of the man who was in possession during the previous years it was held that the order was in direct contravention of this section and the Magistrate should have passed an order under Sec 146—*Satyendra v Arishnadhan* 20 C W N 1014 18 Cr L J 80

419 *Forcible and wrongful possession* —The Magistrate's duty is to find peaceful possession. Ouster of a person lawfully in possession by a trespasser does not confer on the latter any rights which can be recognised under this section. The Magistrate must look to the possession which may be termed peaceful. He must go back to the time when the present dispute originated and not to the result of the dispute itself—4 Cal 417. The recent occupation of a trespasser is not a possession which a Magistrate can direct the party to retain under this section. The possession is still with the person ousted by the trespasser and an order directing him to have possession and the trespasser to be dispossessed is the proper order to be made—1876 P R 8. Where it appeared that one of the parties within two months prior to the proceedings obtained sanction from the Municipality and proceeded to dig a tank on the land in dispute to the exclusion of another party who was then found to be in possession it was held that it was forcible and wrongful dispossession within the meaning

of this section, and possession must be deemed to be in the party dispossessed—*Manmatha Nath v Ganga* 20 C W N 978 17 Cr L J 449 But where the Magistrate finds that on the date when the proceedings under this section were instituted and for *more than* two months preceding that date the members of the first party have been and are in possession although the members of the second party obtained delivery of possession of the property through Court a year ago *held* that the Magistrate should pass his order in favour of the first party—*Shahabaf v Bhajahari* 49 Cal 177 (181) 24 Cr L J 875

If a person has been turned out of possession and *submits to the ouster*, and the other party whether rightfully or wrongfully is in peaceful possession a Magistrate will not go behind the period when possession may be found to have become peaceable—1 C L R 136 For the point for inquiry under this section is not whether any of the claimants has taken possession of the subject of dispute by force but whether the struggle for it has ceased leaving it in the hands of one of them If the struggle has ceased the party in whose hands it remains is in actual possession which the Magistrate is bound to recognise under this section—1897 P. R 5 If however the struggle for possession is still proceeding between the party who has taken forcible possession and the rightful owner or if neither party can show his complete control over the subject at the time when the proceedings are taken neither party is to be regarded as in possession and the Magistrate is to take action under section 146—*Ibid*

It is not necessary that actual force or violence should have been used to some person before the dispossession can be said to be 'forcible' when the dispossession of a person is effected by a *show* of criminal force that person is said to be forcibly dispossessed—*Sila Nath v Harvey* 25 C W N 601 22 Cr L J 637

This sub section contemplates that the dispossession should be *forcible as well as wrongful* the mere wrongful dispossession without any evidence to show that it was forcible as well does not come within the purview of this section The remedy of the party wrongfully dispossessed lies only in the Civil Court—*H v Low & Co v Manindra Chandra Nandy*, 3 Pat 809 (813 814) 26 Cr L J 268

The words *wrongfully dispossessed* mean dispossessed without due warrant of law or dispossessed otherwise than in due course of law even though the dispossessor be the rightful owner—*Bai Jiba v Chandulal* 27 Bom L R 1353 A I R. 1926 Bom 91

Date of forcible possession —It is not sufficient for the Magistrate to come to a general finding that certain fields are in the possession of one party and certain others in the possession of the other, and that the latter has taken wrongful and forcible possession The *date* of such forcible possession must be determined and unless there is a finding that the

forcible possession occurred in the case of all the fields at the time same there must be a finding as to the date of the possession with regard to each field separately—*Kaku v Harnaman*, 1917 P W R 28

420 Attachment —An order for attachment under the proviso to clause (4) would remain in force only pending the Magistrate's decision, and not until a decree or order of the Civil Court is obtained—*Farid v. Piru*, 8 S L R 207 16 Cr L J 235

Where a land was attached under this section and the crops standing on the land were sold and the sale proceeds kept in deposit in the Court, but the preliminary order was afterwards cancelled by the Magistrate on the ground that there was no immediate danger of a breach of the peace, the Magistrate could order the sale proceeds to be restored to the persons who raised the crops—*Suryanarayana v Ankinced* 47 Mad 713 (715) 146 M L J 565 25 Cr L J 978, *Mahalakshmi v Subbarajadu* 17 L W. 429, 24 Cr L J 783 or he could order the money to be kept in deposit in the Court until one party or the other obtained an order in his favour—*Suryanarayana v Ankinced* 47 Mad 713 (716), *Chenga Reddi v Ramasamy*, 16 Cr L J 104 (Mad)

Moveable property —This section does not authorise the Magistrate to attach moveables—*Ratanlal* 891 *Gopala v Krishnaswamy* 27 M L T. 234 21 Cr L J 73 *Arjun v Chandan* 24 O C 167 22 Cr L J 625 *Gajraj v Emp*, 20 A L J 906

Postponement of proceedings —A Magistrate has no jurisdiction to pass an order postponing *sine die* a proceeding under this section, at the same time retaining under attachment the property covered by the proceeding on grounds extraneous to the proceeding—13 C W N 104

421 Appointment of receiver —A Magistrate cannot appoint a receiver under proviso to clause (4) of this section before the commencement of the inquiry He can do so only under Sec 146 and after the conclusion of the inquiry—1910 M W N 821 *Meena Lal v Emp* 3 P. L J 147 19 Cr L J 249 *Dasrath v Tarachand* 21 N L R 191 26 Cr L J 1378 Even if a Magistrate appoints a receiver under this section such receiver will only be an agent or servant of the Magistrate acting under his order The right to attach carries with it the right to take the necessary steps for custody and management of the property, and the Magistrate may appoint a receiver for that purpose—*Srinivasa v Sathayappa* 13 Cr L J 295 (Mad) but the power of such receiver will not be the same as that of a receiver appointed under sec 146 *infra* His duty will be simply to take and keep possession of the properties attached and to make an inventory thereof—*Gopala v Krishnaswamy*, 27 M L T 234 21 Cr L J 73

A receiver can be appointed only by the Magistrate while the inquiry

is proceeding and only when he is satisfied that a dispute likely to cause a breach of the peace still exists. The High Court in revision cannot appoint a receiver, because the inquiry is already over and there is no longer any likelihood of a breach of the peace, as the Magistrate's order has put one party in possession of the property in dispute—*Marudayya v Shanmugasundara*, 49 M L J 593 A I R 1926 Mad 139

422. *Joint Inquiry* —(1) *One dispute as to several plots* —When the dispute is *one*, the fact that it embraces several distinct parcels of land does not necessitate an independent proceeding in respect of each. To require the Magistrate to hold separate proceedings in respect of each plot of land claimed by each of the disputants, would be to require him to undertake what would be almost impossible from the intricate character of such proceedings. His findings should naturally be directed to possession of particular plots but the fact that he did not take separate proceedings in respect to each plot would not invalidate his entire proceedings—*Krishna Kamini v Abdul Jubbar*, 30 Cal 155 (F B) at pp 185 200, , *Sajant Kanta v Shamsher* 24 Cr L J 235 (Cal). Although it may be desirable under such circumstances to deal with each dispute relating to each of several plots separately it is impossible to extend to such proceedings the strict rule of procedure observed in civil actions—6 C W N 206. To draw up one proceeding with respect to several plots of land claimed to be in the possession of different persons would not be bad if it was shown that none of the parties had been precluded from giving any evidence and no party was prejudiced by the Magistrate's action in not taking separate proceedings—5 C W N 544, *Gajadhar v Thakur Singh* 26 Cr L J. 424 (Pat)

(2) *Different disputes as to different subjects* —Where the parties are found to be in possession of different and separate pieces of land, *e. g.*, when the dispute is alleged to exist in 230 villages and each village stands on its own footing, the Magistrate does not exercise proper jurisdiction if he clubs together 230 subjects of dispute and treats them as one. The Magistrate should decide which party is in possession of this or that village, instead of arbitrarily finding that one party was in possession of all the villages—29 Mad 561, 1 S L R 25. When there are independent disputes relating to distinct parcels of land, they ought to be dealt with in separate proceedings—*Krishna Kamini v Abdul*, 30 Cal 155 (F B) at p 200.

(3) *Different claims* —In a dispute regarding possession of 708 bighas of land belonging to a Zemindari the parties to the dispute were persons interested as tenants under the Zemindari on the one side, and on the other side persons claiming under the same Zemindar to be interested in various portions of the land as their mawasi jote in different quantities and under interests acquired at different times, and the Magistrate tried the case

together and passed an order in favour of the former, directing that they as a body should remain in possession until evicted therefrom by order of a Civil Court it was held that the Magistrate ought not to have passed an order declaring one set of persons in possession as against another set but should have distinctly specified which persons were entitled as against which and to which portion of the land in dispute. Otherwise it would render it necessary for the party out of possession to make as defendants in the civil suit a multitude of persons who were by terms of the order held to be in possession. The proceedings were set aside—15 Cal 31

(4) *Where parties in all cases are not the same* —Where the parties in several cases under sec. 145 are not the same the Magistrate is not competent to try all the cases together although the parties consent to the adoption of such a procedure. Evidence already taken in one case may be accepted in the other cases but the cases must be tried separately—4 C W N 748

There should be separate and full inquiry in each case —Where two cases are inquired together the Magistrate must come to a separate finding after full inquiry into each case and the decision of one case should not be applied in coming to a decision in respect of the other. Where two investigations were before the Magistrate, who, after conducting a regular inquiry in the first case and coming to a proper decision remarked in the other case that because the lands were adjacent he had taken the evidence in the two cases together and found it unnecessary to continue the inquiry further it was held that the parties in the second case were entitled to a full inquiry—8 W R 63

423 Subsection (5)—Addition of parties —This clause provides for interested parties coming in even if they have not been served with notice—*Bhura Khan v Fakira* 25 Cr L J 159 (Nag). Clause (5) does not enable a Magistrate to add parties to the proceeding. It merely enables a stranger to come in and show that no such dispute likely to cause a breach of the peace concerning any land etc. existed. He does not become, nor can thereby be made a party to the dispute which he seeks to show has never existed—3 C W N 329. The person interested who is empowered under clause (5) to show that no dispute exists or has existed does not come in for the purpose of joining in the proceeding but for the purpose of bringing it to an end—*Krishna Kamini v Abdul Jubbar* 30 Cal 155 (F B) at p 199. A third person is allowed to come in under clause (5) only for the purpose of showing that no dispute likely to cause a breach of the peace really existed or exists but it is not clear whether such person can be made a party to the proceedings—5 C W N 900

Where a person applies on the ground that he is interested in the land in dispute as a tenant of a part of the property in dispute and there is

nothing to show that that is not the case, he should be allowed to come in and show under clause (5) that there is no dispute—37 Cal 285.

But as he does not become a *party* to the proceedings, no order can be passed under sub-section (6) in favour of such person, and the Magistrate has no jurisdiction to declare any land to be in the possession of such person—*Radhamohan v Naimuddin*, 19 Cr. L. J. 653 (Cal) : *Rasik v Jagabandhu*, 25 C. W. N. 214 22 Cr. L. J. 502.

For further notes on addition of parties, see Note 401 *ante*

424. Cancellation of preliminary order.—The apprehension of a breach of the peace is the first condition necessary to give the Magistrate jurisdiction under this section and if it is found that there is no longer any such apprehension, the Magistrate's jurisdiction ceases. He is then bound to cancel the initial order and stay all further proceedings under this clause—*Madhbandu v Sadakati*, 38 C. L. J. 284 A. I. R. 1923 Cal 577.

So also, the mere fact that in a prior criminal case between the parties a Magistrate expressed his opinion that one of the parties was in possession, is not conclusive as to possession and can in no sense be said to have settled the dispute between the parties; and on the basis of such a decision a Court cannot stay the proceedings started under this section—*Abdul Shakur v Abu Sajeed* 6 P. L. T. 710 26 Cr. L. J. 870 A. I. R. 1925 Pat 593.

A Magistrate can cancel his preliminary order only on facts being brought to his notice which are sufficient to satisfy him that no dispute likely to cause a breach of the peace exists, and therefore the cancellation of proceedings merely on the ground that one party admits that the other party was in actual possession of a land in dispute, is without jurisdiction and should be set aside—*Tara Charan v Bengal Coal Co. Ltd.*, 13 C. W. N. 125. The Magistrate can cancel a preliminary order only when the parties are in a position to give positive evidence that there is no likelihood of a breach of the peace. The mere absence of a finding by the Magistrate in respect of a likelihood of a breach of the peace is not sufficient—*Ranada Ranjan v Bharat Chandra*, 25 C. W. N. 215 22 Cr. L. J. 484. The information that there is no likelihood of a breach of the peace need not be confined to what the parties give under sub-section (5). If the Magistrate is satisfied, whatever the source of his information may be, that the likelihood of a breach of peace does not exist, he can cancel the order passed under sub-section (1) and stay the proceedings—*Manindra v. Barada Kanti*, 30 Cal. 112, *Kamalammal v. Vayu Routhier*, 4 L. W. 57 : 17 Cr. L. J. 138, *Santokh v Ram Singh*, 2 Lah. 364. 23 Cr. L. J. 292. The Magistrate's power to drop the proceedings is not limited to the circumstances mentioned in clause (5). He is entitled to drop the proceedings whenever

he is satisfied that there is no further likelihood of a breach of the peace, without giving an opportunity to the parties to show by evidence that there is a likelihood of a breach of the peace—*Donepudi Narasiah v Venkiah* 49 M L J 784 22 L W 524 A Magistrate will not be acting illegally if he drops the proceedings after being satisfied upon the information given by a third party that the dispute no longer exists—*Suryanarajan v Ankinced* 47 Mad 713 (715) 46 M L J 565 25 Cr L J 978. *Krishna Kamini v Abdul* 30 Cal 155 (161) And in so dropping the proceedings at the instance of a third party the Magistrate is not bound to record the evidence of the witnesses of one of the parties who might have shown by evidence that a dispute still existed If the Magistrate is able to act on a police report or other information in starting proceedings under this section there is no reason why he should not be able to stay further proceedings on similar information without being obliged to record such evidence as the parties may produce with the same formality as he would have done if he had gone on with his inquiry instead of dropping it—*Suryanarajan v Ankinced* 47 Mad 713 (715) 35 M L T 68 25 Cr L J 978

When a Magistrate cancels an order under this sub section he has no jurisdiction to allow one of the parties to reap the crops to the exclusion of the other—3 C L J 573 When the Magistrate has cancelled his preliminary order and dropped the proceedings he becomes *functus officio* and has no jurisdiction to direct the delivery of the property or of its sale proceeds (*e g* where the property is sold being perishable) to one of the contending parties The proper course under these circumstances is to retain the property or its sale proceeds in court, until one of the parties obtains an order of a Civil Court—*Donepudi v Venkiah* 49 M L J 784 22 L W 524 *Chenga v Ramasamy* 16 Cr I J 104 (Mad) *Dasrath v Tarachand* 11 M L R 191 26 Cr I J 1378

A Magistrate has jurisdiction to cancel the order of his predecessor—2 Weir 108 Where a proceeding under sec 145 has been drawn up by a Deputy Magistrate the District Magistrate can cancel the proceeding after transferring the case to his own file and on a consideration of the facts and after hearing the objections of the parties—*Tara Charan v. Bengal Coal Co Ltd* 13 C W N 125

Effect of cancellation —An order striking off proceedings under this section does not amount to an adjudication of the question of possession for the purpose of sub section (6)—30 Cal 117

Fresh proceedings —When proceedings under this section are struck off on the ground that there is no immediate apprehension of a breach of the peace the Magistrate has no jurisdiction to revise the proceedings He can only start fresh proceedings upon fresh materials which must be specific relating to the lands in dispute A general state of affairs in the

locality is insufficient—*Khuda v Darbari* 2 P L T 267 22 Cr L J 481
 If it is intended to take fresh proceedings upon new materials it is necessary for the Magistrate to record such materials in his order renewing the proceedings—6 C W N 923

425 Clause (6)—Final Order —

Contents —Whether sections 366 and 367 do or do not apply to proceedings under sec 145 the Magistrate in his final order must give reasons for his decision sufficient to enable the High Court to determine whether he has complied with the terms of sub section (4) and directed his mind to the consideration of the evidence adduced before him and whether he has acted with jurisdiction in making his final order. A statement in the final order that the witnesses have been examined pleaders have been heard on both sides and oral and documentary evidence of both parties has been considered is of a stereotyped nature applicable to any and every case and does not enable the High Court to understand what in fact the evidence was or to say that the mind of the trying Magistrate had been properly and sufficiently directed to its consideration. Such a final order is bad and the case must be retried—*Bhuban Chandra v Nibaran* 49 Cal 187 (189) 25 C W N 887 22 Cr L J 499 *Peria Subba v Sinna Subbaya* 31 M L T 312 45 M L J 36 23 Cr L J 670 *Mothahar Ali v Lslogue* 39 C L J 366 25 Cr L J 1115 *Ishan Chandra v Hridai* 29 C W N 475 26 Cr L J 915 41 C L J 357

Signature —A Magistrate should sign his name in full to a judicial order under this section and should also note his official position—12 C W N 771

Who can pass order —The jurisdiction to make a final order under this section is not personal to the Magistrate who initiates the proceedings and a District Magistrate may of his own motion transfer a case under this chapter to another Magistrate of the first class subordinate to him, and the latter can pass the final order—10 C W N 1095 22 Cal 898

But where a Magistrate who heard a case under this section handed over his charge to another Magistrate and was transferred to another district and subsequently delivered the final order in the case held that once he had handed over the charge and was transferred to another district he became *functus officio* and ceased to have any jurisdiction in the case. He therefore acted without jurisdiction in delivering the final order—*Jagabandhu v Jagabandhu* 38 C L J 201 25 Cr L J 192 (following 3 All 563)

Or should be treated as being —We think that this subsection should apply not only to the case of a party in actual possession but also to one who is to be treated as being in possession under the proviso to

sub-section (4), and we have amended sub section (6) in this sense — *Report of the Select Committee of 1916*

426 May restore to possession etc — Power has been given to restore to possession a party forcibly and wrongfully dispossessed — *Statement of Objects and Reasons (1914)* We think that this is a logical carrying out of the provision contained in the first proviso to sub section (4) — *Report of the Select Committee of 1916*

Prior to this amendment it was held in several cases that the only order which a Magistrate was competent to pass under this section was one declaring one of the parties to be entitled to possession but he had no jurisdiction to *deliver possession or to oust one person and place another* in possession of the property—*Tulshi Ram v Alwar Ahmed* 37 All 654 13 A L J 93 16 Cr L J 14 27 All 300 *Shcorani v Baij Nath* 14 A L J 146 17 Cr L J 145 1 C W N 696 14 C W N 78 4 Cal 339 These cases are no longer of any authority

427 Order in respect of joint possession —Where in a proceeding under sec 145 in respect of a dispute concerning some land the Magistrate finds that one party has been in possession of a portion of the land in dispute and the other party in possession of the rest and the possession of the one is not likely to interfere with the enjoyment of the possession of the remaining portion by the other the Magistrate can in the exercise of jurisdiction vested in him under this section maintain both parties in possession of their respective portions and an order of attachment under sec 146 is unnecessary—*Kangali Das v Muti Lal* 11 C W N 743 Thus where the Magistrate finds that each party was in possession of separate rooms in the same building he is competent to pass an order that the separate possession of each party should continue —*Devji v Golla* 2 Weir 108 Where the component parts of the subject of dispute are quite divisible from each other it is quite possible to make an order confirming the possession of one of the parties in regard to one of those parts and it is not competent for the Magistrate to make an order for attachment of the whole property—*Sadar Ali v Abdul Karim* 5 C W N 710 If however the subject matter of dispute is one and indivisible the proper order to make is an order of attachment under sec 146 Thus in a proceeding under sec 145 regarding a dispute between two parties in respect of certain collieries it appeared that the first party were in possession of the building which contained the office where the business of the collieries was conducted and the cashbooks and the papers of the business were kept and the second party were in possession of the pits wharves and tramway of the colliery The Magistrate passed an order in favour of the second party considering that party to be in actual possession It was held as the subject matter of dispute was indivisible and as the second

was not in possession of the whole of the colliery, the order of the Magistrate was bad, since its effect would be to place the second party in possession of that portion (*viz* the building) which was in the possession of the first party. The proper order of the Magistrate was one under sec 146 attaching the whole property—*Katras Jheria Coal Co v Sib Krishno Daw*, 22 Cal 297. Similarly where there was a dispute concerning certain immoveable and moveable property and the Magistrate took proceedings under this section and gave possession of the house to one party, except two rooms in which the Magistrate locked up the moveables until the rights of the parties in respect of the moveables were determined by the Civil Court, *held* that the order was illegal—*Mahadevi v Beni Prasad*, 42 All 214. 18 A L J 171 21 Cr L J 242

428 **Effect of order**—An order under this section does not bar a suit for ejectment under the Agra Tenancy Act. The expression *eviction* in the due course of law is equally applicable to ejectment proceedings under Ch V of the Agra Tenancy Act and to ejectment under a civil Court decree—*Iqbal Ahmed v Suraj Balli* A I R 1925 All 210. Although a Magistrate's order under this section confers no title, the fact of possession remains and the person in possession can only be evicted by a person who can prove a better right to possession himself—4 Bom L R 167, 29 Cal 187 (P C). The order throws upon the person contending its validity the burden of proving his title. The onus is not upon the person in possession to show that the judgment in his favour is right, it is for his opponent to show that it is wrong and where and why it is wrong—4 Bom L R 167. The onus is on the plaintiff to show that the person in possession under the order of the Magistrate has no right to possession—*Manindra v Saradindu*, 23 C W N 593.

Appointment of Receiver by Civil Court—The fact that there is an order under this section does not bar the jurisdiction of the Civil Court to appoint a Receiver under sec 503 of the C P Code 1882 (=O XL of the Code of 1908). The C P Code and the powers of the Civil Court under that Code are in no way fettered by an order that may be passed by a Magistrate under this section. The Magistrate's order under this section is only intended to control any period up to the time when the Civil Court takes seizin of the matter—*Barkatunnissa v Abdul Aziz* 22 All 214.

Mamlatdar's order as to possession—An order under this section does not take away the jurisdiction of the Mamlatdar or any other Civil Court to decide who was in actual possession before the date of the order—26 Bom 353.

Suit under Sec 9 Specific Relief Act—An unsuccessful party in a proceeding under this section cannot be said to have been *dispossessed*, and therefore he has no cause of action to bring a suit under sec 9 of the

Specific Relief Act—7 C L J 517 But where the plaintiff was forcibly dispossessed by the defendant before the institution of proceedings under this section and the trespasser's possession was maintained by the Magistrate the plaintiff is entitled to sue under sec 9 of the Specific Relief Act—30 All 331

Evidentiary value—Orders of Magistrates under this section are admissible in evidence to show the fact that such orders were made They are also evidence of the following facts all of which appear from the orders themselves viz who the parties in dispute were what the land in dispute was and who was declared entitled to retain possession For this purpose and to this extent such orders are admissible in evidence for and against every one when the fact of possession at the date of order has to be ascertained If the order refers to a map that map is admissible in evidence to render the order intelligible—29 Cal 187 (P C)

429 Orders which cannot be made under this section—The final order should declare which party is in possession and should state that he will continue in possession until evicted therefrom in due course of law, and should forbid all disturbance of such possession An order in these terms I warn the opposite party not to interfere with the possession of the first party in any way is not one in sufficient compliance with the law—*Khuli v Daruori* 2 P L T 267 22 Cr L J 491 Where possession is found to be in one party the Magistrate has no jurisdiction to grant to the other party permission to cultivate the lands in dispute pending any necessary action that might be subsequently brought—18 W R 27 A Magistrate has no jurisdiction to order a division of crops on the land between the parties—8 C L J 24 Nor can he order that a person shall be maintained in possession until he has reaped the crops and then he shall give way to another—1 C I R 136

Where a Magistrate found that the disputed land was in the possession of the second party and declared that party to be in possession of the land but directed that two pathways on the land should be made over to the first party held that there was nothing in this section which gave the Magistrate power to pass an order of this kind—*Asit Mohan v Sarat Chandra* 17 C W N 793 14 Cr L J 391 But the Bombay High Court dissents from this ruling and holds that in proceedings under this section, it is competent to the Magistrate not only to award possession of the land in dispute but also to grant a right of way to one of the parties If the Magistrate has power to put the petitioner in possession of a certain portion of a land he is also empowered (under sec 147 if not under sec 145) to give them a lesser right viz the right to pass over a strip in that land

In re Amarsang 48 Bom 512 (515) 26 Bom L R 436

In a dispute as to the right to tap a tree the Magistrate cannot

that a passage should be left, for the purpose of such tapping in a wall which was being built by the second party—*Jablat v Fmp* 3 P L J 316 19 Cr I J 656

A Magistrate is not competent to pass an order directing the *method* by which the possession is to be exercised or the agency by which the person in possession is to collect the profits—36 Cal 986 He cannot pass an order to the effect that one of several joint owners should not use the land in such a manner as to cause annoyance to another—2 C L R 62

430 **Supplementary order without notice** —Proceedings under this section were drawn up in respect of certain premises consisting of a *dalan* a hotel and a privy and the Magistrate made his final order with regard to the first two Subsequently the omission in respect of the privy being brought to his notice by one of the parties the Magistrate declared that party a possession of it without notice to the other party It was held that the order in respect of the privy should not have been made without hearing the other party—*Natalar v Bireskhar* 22 C W N 552 19 Cr L J 732

431 **Order in respect of land not covered by proceedings** —In a proceeding under this section the Magistrate is bound to ascertain and define the land in dispute and he has no jurisdiction to pass an order in respect of lands which were not covered by the initiatory proceeding—7 C W N 558 *Sukhari v Ram Khelauri* 4 P I T 372 21 Cr L J 309 *Uttam Singh v Jodhan Rai* 3 Pat 288 (295)

A Magistrate would also be exceeding his jurisdiction if his final order covers plots of land not included in the preliminary order passed under sub section (1)—11 C W N xlii

432 **Alteration of proceedings** —If a Magistrate after having initiated proceedings under sec 145 afterwards finds that the dispute is as regards a right of way over a land rather than regarding the possession of the land he can alter the proceedings under sec 145 into proceedings under sec 147 and pass an order under the latter section—*In re Amarsang* 48 Bom 512 (515) 26 Bom L R 436 *Anath Bandhu v Wahid Ali* 26 Cr L J 558 (Cal)

433 **Persons bound by the order** —Judicial proceedings cannot bind a person who is not a party to them—3 C W N 379 A final order under sec 145 is not binding on a party on whom no preliminary order was served and who was not given an opportunity to prove his possession over the subject of the dispute—*Mugimunnissa v Ahmedunnissa* 2 O W N 704 26 Cr L J 1581 An order under this section is binding only on the *actual parties* to the proceedings Where an order was made between A

on the one side and B and his three tenants on the other the subsequent tenants of B would not be bound by such order and would not be punished for disobeying such order—3 B L R A C 13 A person who is not a party either to the proceedings or to an order under this section is certainly entitled to challenge the propriety of it He may even defy it though only by lawful act and is clearly entitled to show that the existing possession is not of the same nature as it was determined to be in the proceedings—*Mahesh v K F* 11 O L J 743 26 Cr L J 398 A I R 1925 Oydh 251

But in *In re Nathubhai* 11 Bom L R 277 it has been held that the parties whom the Magistrate has to deal with are not merely the actual parties to but all persons who may be concerned in the dispute the object being to prevent a breach of the peace Therefore it is not only the actual parties but all parties who may have notice of the proceedings that are bound by the order

An order under this section binds not only the actual parties but their representatives also It is binding on a purchaser from the person against whom it was made and with knowledge of such order—13 Cal 175 It is binding upon all persons who may claim the property through the parties to the proceedings under a title derived subsequent to the order—23 Cal 731

But a person who was merely examined as a witness in the proceeding is not a party bound by an order under this section—*Q E v Kuppajyar*, 18 Mad 51

434 Duration of the order —An order of the Magistrate is meant to be a temporary order and is to be in operation until one or other of the parties applies for and obtains a determination of his rights in a Civil Court—7 C W N 558 29 Cal 208 It is intended to control only the period up to the time when the Civil Court takes seisin of the matter and passes such order as may be necessary for the protection of the property—22 All 211 This section does not empower a Magistrate to make an order permanently settling the difference of the parties—*Mad High Court Firs*, 23-6-1893

435 Subsection (7)—Continuation of proceedings —Before the amendment of 1923 this subsection stood as follows —

Proceedings under this section shall not abate by reason of the death of any of the parties thereto

The subsection has now been expanded The Magistrate is now authorised on the death of a party to make his legal representative a party to the proceedings and if necessary to decide whether the representative is—*Statement of Objects and Reasons* [1, 14

This clause supersedes the decision in 21 Cal 404 where it was held that a son could not be made a party in place of his deceased father

The words *may cause* show that the Magistrate is not bound to continue the proceedings on the death of a party. The provision in clause (7) is intended to keep alive the jurisdiction of the Court where the danger to the peace still exists inspite of the death of any party to the proceedings. If however the dispute no longer exists and the danger has disappeared the Magistrate has jurisdiction to discontinue the proceedings—*Kama'ammal v. Vavu Rowther* 4 L W 57 17 Cr L J 138

Death of Petitioner before High Court—The death of the petitioner (who applied for revision of an order of a District Magistrate) during the pendency of the application for revision in the High Court, causes the application to abate. This sub section only applies to proceedings before a Magistrate—*Kristen Deo v. Hari Singh* 1919 P R 23 20 Cr L J 720
Subharaju v. Ramachandra 4 L W 440 17 Cr L J 389

Sub-section (8) — The Magistrate has been empowered to pass necessary orders for the custody or sale of the property in dispute which is subject to speedy and natural decay—*Statement of Objects and Reasons* (1914). Thus if the subject matter of dispute is a crop growing on the land the Magistrate can cause the crop to be sold by auction and the price placed in deposit as was done in *Mir Singh v. Makhlan* 45 All 404

436 Sub section (9) We have added this subsection on the lines of section 244 (2) —*Report of the Joint Committee* (1922). Even prior to this amendment there has been a large number of decisions empowering the Magistrate to issue summons to witnesses which are given below

Summons to witnesses —If the parties cannot procure the attendance of witnesses it is the Magistrate's duty to issue summonses for their attendance even though the Code contains no provision for the issue of summonses in this case—18 W R 64 21 Cal 29. When an application for the issue of summonses to witnesses is made at a proper time the Magistrate should not arbitrarily refuse his assistance merely on the ground that the number of witnesses mentioned is large—11 Cal 76 or on the ground that the application for the issue of summonses is vexatious—*Gajjuddi v. Aminuddi* 18 C W N 94 15 Cr L J 79. This section enjoins on the Magistrate to receive the evidence produced by the parties and to take such further evidence as he thinks necessary. But this does not mean that the parties shall produce their own evidence nor does it absolve the Magistrate from the duty of assisting the parties in procuring the attendance of material witnesses, when it is shewn that their attendance cannot be enforced without such assistance—30 Cal 508. But it is not obligatory on a Magistrate to assist the parties in producing their witnesses and they cannot claim as a matter of right that processes should be issued by the Court to enable

them to bring forward their evidence—32 Cal 1093 38 Cal 24 *Arjun v Juggar Nath* 3 P L T 433 23 Cr L J 275 A Magistrate is not bound to exhaust the processes of the Court in order to enforce the attendance of witnesses that do not appear or cannot be found—*Haripada v Sanyasi* 17 C W N 144 14 Cr L J 40 Cf the words *may* if he thinks fit in the subsection

437 Sub section (10) —Power to proceed under Sec 107 —In 35 Cal 117, it has been held that the word *shall* in subsection 1 (he *shall* make an order in writing etc) is mandatory and therefore where there is a *bona fide* dispute likely to cause a breach of the peace the Magistrate is bound to proceed under this section and he has no discretion to act under sec 107 It was proposed by the Amending Bill of 1914 to substitute the word *may* for *shall* so as to give the Magistrate a discretion to proceed either under Sec 107 or under Sec 145 The Select Committee of 1916 instead of making the verbal alteration added the present subsection

There may be cases in which it would be necessary to bind parties over under section 107 in order to prevent a breach of the peace even though proceedings under sec 145 had been taken An order under section 145 is no bar to the passing of an order under sec 107—*In re Mulhia* 36 Mad 313 14 Cr L J 559 *K L v Bandi* 24 O C 21 22 Cr L J 384

Miscellaneous —

438 Effect of prior decree on a proceeding under this section —Where there is a decree of a Civil Court for possession in respect of the disputed land the duty of a Criminal Court proceeding under this section is to find which party held such Civil Court decree and then to maintain that party in possession—5 C W N 563 20 C W N 796 17 Cr L J 182 *Mad Husain v Pachayappa* 42 M L J 147 *Ram Arshi v Emp* 3 P L T 335 23 Cr L J 321 *Hedar Nath v Jaleswar* 4 P L T 215 6 Cal 835, 29 Cal 208 It is the duty of the Magistrate to maintain any order which has been passed by the Civil Court and therefore to take proceedings which must necessarily have the effect of modifying or cancelling such order or of interfering with the rights of parties determined by a Civil Court is to assume a jurisdiction that the law does not contemplate—26 Cal 625 *In re Pandurang* 24 Bom 527 2 V L J 774 *Brakmanath v Surdarnath* 17 A L J 134 20 Cr L J 410 *Behari Gir v Bhubaneswar* 1 P L T 9 5 P L J 104 21 Cr L J 200 *Abhay Manlal v Bisu Rai* 27 C W N 267 37 C L J 256 *Durganand v Hiranand* 25 Cr L J 83 (Pat)

Thus where a Nazir acting under the authority of the Civil Court puts the auction purchaser into possession of a *haus* as appurtenant to a certain mouza sold in execution of a decree the Magistrate is not competent

to direct the judgment debtor who raises the plea that the property is debutter to be returned in possession until ousted by a Civil Court but should see that the possession as given by the Nazir is maintained leaving it to the judgment debtor to substantiate his claim as shebait in a Civil Court—*In re Chutrapil Singh* 5 C L R 200 The Magistrate cannot ignore the decree of the Civil Court on the ground that that Court had no jurisdiction over the property The Magistrate cannot go behind the decision of the Civil Court in the matter and cannot ignore the decree even though the Court passing it had no jurisdiction over the land It is not for the Magistrate to question the validity of a decree that has not been set aside by a competent Court—*Abloy Mondal v Basu Rai* 27 C W N 267 *Tufan v Bibi Umatul* 5 P L T 535 A I R 1923 Pat 765 Where a decree holder has obtained delivery of possession under O 21 rule 35, C P Code in execution of his decree the judgment debtor is precluded from raising the question and a Magistrate acts illegally in starting a case under sec 145 of the Crim Pro Code and in not upholding the Civil Court's decree and the delivery of possession given by that Court—*Belari v Rani Bhubaneswari* 3 P L J 101 Where the Civil Court decree has defined the boundaries of a *jalkar* right the Magistrate in instituting proceedings under this section ought to follow that decree and not to attempt an explanation of it—6 C W N 161 Where one of the parties to a dispute regarding the land has been actually put in possession of the same by a Civil Court as a result of sale under its decree it is the duty of a Criminal Court to uphold the status of that party as established by the Civil Court—7 C W N 118 Where a decree has been passed regarding the whole or any portion of a disputed land it is the duty of the Magistrate to maintain the decree and he cannot institute proceedings under this section regarding the lands covered by it—16 W R 24 24 W R 17

Where a dispute between the parties had been terminated by an order under the provisions of secs 40 and 41 of the Bengal Survey Act and there had also been an entry in the Record of Rights in accordance with that order the Magistrate should in determining the question of possession between the parties in a proceeding under this section presume that the possession of the land was with the person who had title as determined by the decision under the Survey Act and which title was further to be presumed from the entry in the Record of Rights—*Prafulla v Hodding* 21 C W N 1059 26 C L J 39 18 Cr L J 988 An order under sec 41 of the Bengal Survey Act has the same effect as the decree of a Civil Court and must be maintained by a Magistrate acting under this section—*Srinath v Pravat Chandra* 18 Cr L J 301 (Cal) A summary decision under the Land Registration Act is entitled to the same respect as a Civil Court decree on the question of possession in a proceeding under this section—*Kulbans v Ramsidh* 1 P L T 501 21 Cr L J 735 *Babu Lal v Mana*

ger, Bettia Estate 1 P L T 588 21 Cr L J 785 But if in the land registration proceedings there was no adjudication of possession by the Revenue Courts and they refused to register the name of a particular party the Magistrate in a proceeding under this section is bound to determine as to which of the parties is in actual and physical possession of the property in dispute—*Babu Lal v Manager Bettia Estate* 1 P L T 598

If a Magistrate fails to decide the effect of a Civil Court decree between the parties on the question of possession he fails to decide an important issue and thereby fails to exercise jurisdiction—11 Cr L J 184 (Cal)

Again the Magistrate in giving effect to a decree of the Civil Court is not entitled to go behind it or to put his own interpretation or construction upon it—1 C L R 273 *Abhay Mondal v Basu Rai* 27 C W 267 Thus where in execution of a Civil Court decree in a suit in which only one of the members of a Mitakshara family was a party the whole of the family property was delivered over to the purchaser it was not competent to a Magistrate acting under this section to declare that the purchaser should be put into possession of a fractional share and that the shares of those persons who were not made parties to the suit ought not to have been included in the decree—6 C W N 841

But every previous decree of a Civil Court or order of a Criminal Court is not necessarily conclusive the evidentiary value to be attached to such decree or order must depend upon the circumstances of each particular case—33 Cal 33 No hard and fast rule can be laid down to the effect that a Magistrate in a proceeding under this section must give effect to a prior decision or order of a Civil or Criminal Court The Magistrate is not bound to maintain the decision blindly If he finds that after the passing of the decree the possession of the party to whom possession was delivered by the Civil Court has been disturbed or that the property has changed hands he has jurisdiction to pass orders irrespective of the Civil Court decree—*Parneswar v Kashtapati* 1 P L J 336 17 Cr L J 360 *Bhulan v Kumari* 5 P L T 69 25 Cr L J 91 *Kedar Nath v Jaleswar* 4 P L T 248 24 Cr L J 467 *Pim Barai v Sarda* 4 P L T 333 24 Cr L J 939 So also it is open to a Magistrate to go behind the order passed in favour of a party under the Survey and Settlement Act and the Bengal Tenancy Act It is also open to the Magistrate to hold that on the evidence the presumption arising from an entry in the Record of Rights has been rebutted—*Syed Sadek Razvi v Sachindra* 37 C L J 128 24 Cr L J 569

439. In order that the decree of the Civil Court may be binding on the Magistrate, three things are necessary, namely —

(1) *First the decree must be recent* —It is the duty of the Magistrate to maintain the rights of the parties when such rights have been declared

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439. In order that the decree of the Civil Court may be binding on the Magistrate, three things are necessary namely —

(1) *First the decree must be recent* —It is the duty of the Magistrate to maintain the rights of the parties when such rights have been dec

by a competent Court within a time *not remote* from that of his taking proceedings under this section—26 Cal 625 *Pratap v Sundarbans* 24 Cr L J 79 3 P L T 608 *Parameswar v Kailaspati*, 1 P L J 336, *Kedarnath v Jaleswar* 4 P L T 248 *Rambaran v Saguna* 4 P L T 333 Thus it is the duty of the Magistrate to have found possession in accordance with the decree of the Civil Court when a party had been put into possession by that Court *eight days* prior to the institution of proceedings under this section—32 Cal 796 or within three months or so—79 Cal 203 6 C W N 38 *Durganand v Hiranand* 25 Cr L J 83 (Pat)

But if the decree of the Civil Court is not recent but several years old it would be unsafe to act on that documentary evidence alone—6 W R 79 A decree which is 23 years old is not conclusive as to the question of possession because it is not absolutely impossible that the party who obtained the decree 23 years ago should have been subsequently dispossessed—8 C W N 719 So also with the case of a decree 17 years old—33 Cal 33 Even a decree four years old is not sufficiently conclusive and the Magistrate in disregarding that decree would not be acting without jurisdiction—11 C W N cxx

(2) *Secondly* the decree must have been passed between the same parties A decree passed *ex parte* under which only symbolical possession was delivered or one which was not *inter partes* is not binding on a criminal court in proceedings under this section—*Promoda v Khatra* 25 Cr L J 1104 (Cal) *Atul v Srinath* 23 C W N 982 20 Cr L J 840

(3) *Thirdly* the decree or order of the Court must give possession —Possession must have been given to one of the parties either by the decree itself or by an order of the Court in execution of the decree (e g to an auction purchaser)

Where the Civil Court deals only with the question of *proprietaryship* of land the decree of such Court will not bar a Magistrate from deciding the question of possession under this section—2 A L J 274 So also where the suit in which the decree was passed was merely one for damages in which the determination of title was incidentally necessary but the suit was neither for possession nor for declaration of title the decree in such suit was not conclusive as to possession and the Magistrate was competent to take proceedings under this section—16 M L J 51 So also where the question of possession was raised by the parties but was neither fought out between them nor decided by the Court the decree would not bar a proceeding under this section—*Annaswamy v Muthu Kumara* 15 Cr. L J 663 (Mad)

There must be actual delivery of possession under the decree or order of the Civil Court Where merely the sale was confirmed and the sale certificate issued but there was no delivery of possession actual or symbolical to the petitioners their rights were not protected from proceedings

under this section—31 Mad 416 *Symbolical* possession given to the purchaser would raise the presumption that the purchaser had possession, although it may be that slight evidence would suffice to rebut that presumption—14 Cal 169

Where an order (of a Criminal Court) under section 522 of this Code was passed, directing restoration of immoveable property, but possession as a fact was never delivered to the petitioners such infructuous order would not bar the jurisdiction of the Magistrate in taking proceedings under this section in respect of the same property—*Probbat v. Prosanna*, 18 C W N 1048 15 Cr L J 700

Effect of previous decree on third party —Where in a proceeding under this section, it appeared that the first party had previously brought a suit for rent against some persons (tenants) not parties to the proceeding and purchased the disputed properties at a sale held in execution of an *ex parte* decree obtained therein, and had been put in possession without the knowledge of the second party, and the Magistrate found that the rent suit brought by the landlord against the tenants in possession was not a *bona fide* one and declared the second party to be in possession of the disputed land, it was held that under the circumstances of the case the order of the Magistrate was not erroneous and was not liable to be set aside. A previous decree of the Civil Court relating to the proceedings in dispute may throw light upon the evidence on the matter, but the evidentiary value to be attached to such a piece of evidence must depend upon the particular circumstances of the individual case. Decrees of Courts so far as third parties are concerned may have different value in different cases. Where for instance there has been a real contest between the parties to a suit, and upon an *adjudication regarding title or possession* a party has been awarded a decree and has been put in possession in execution of such a decree, it would be conclusive upon any person even though he was not a party to the decree. But *money decrees* followed by sale of property would stand on a different footing. In these cases the sale in execution only passes the right, title and interest of the judgment debtor consequently there is no adjudication regarding title to property, and therefore it is not conclusive upon a third party as regards possession or title—*Atul v Srinath*, 23 C. W. N. 982 30 C L J. 123 20 Cr L J 810.

In estimating the value of delivery of possession against third parties, it is also material to see what is the true nature of the possession said to have been delivered—*Atul v Srinath*, 23 C W N 982

440. *Effect of possession given by Criminal Courts* —In proceedings under sec 145 the Magistrates have always upheld the possession given by Civil Courts. But possession given by Criminal Courts cannot be treated in the same manner in which possession given by the Civil Courts

is treated in cases under this section—2 C L J 147 A Magistrate does not act without jurisdiction merely because he does not accept the decision in a previous case of rioting as to possession—*Bhulan v Kumar* 5 P L T 69 25 Cr L J 951

441 Suit for damages for improper proceedings —Where proceedings are initiated under this section by a party who is eventually unsuccessful it is not open to the successful party to sue for damages The damages in such a case are remote and are sufficiently compensated by any order for costs that might be made in the proceedings—*Ram Das v Md Faqir* 20 A L J 205 A 1 R 1922 All 143

442 Effect of order under this section on a subsequent civil suit — An order under this section does not decide any question of title Therefore where a case under section 145 was compromised by the parties and the Magistrate passed an order in terms of that compromise it was held that the order simply settled the question of possession but did not determine the question of title and the parties were not therefore precluded by the order from having recourse to the Civil Court for the determination of that question—*Gopi Das v Madho Lal* 45 All 162 20 A L J 932

Limitation for subsequent civil suit —See Art 7 of the Indian Limitation Act

443 Striking off proceedings —Where proceedings under this section have once been started the Magistrate has no jurisdiction to strike them off He must pass an order either under subsection (5) or (6) of sec 145 or under sec 146—*Trilochan v Jogeswar* 20 Cr L J 464 (Pat) *Sastee v Natlum* 6 P L T 258 26 Cr L J 105

444 Fresh proceedings —When an order under clause (6) has been passed the proceedings terminate and a Magistrate cannot institute fresh proceedings so long as such order is in force—*Sadhu v Mahammad Ali* 15 C W N 568 12 Cr L J 32 When a final order has been passed and one of the parties has been declared to be in possession the order of the Magistrate is binding on all the parties and the unsuccessful party cannot be allowed to disturb the possession of the other party without having recourse to a civil suit It is not proper for a Magistrate to initiate fresh proceedings at his instance—*Aran Sardar v Hara Sundar*, 27 C W N 171 24 Cr L J 97 But where the parties compromised and filed a petition of compromise and according to the terms thereof the Magistrate ordered the land to be in the possession of both sides as stated in the petition of compromise such an order was one falling under clause (5) showing that no dispute existed and not an order under clause (6) and the Magistrate could therefore institute fresh proceedings—*Sadhu v Mahammad Ali*, 15 C W N 568 12 Cr L J 32

When a party has been declared to be in possession as a result of proceedings under section 145 fresh proceedings under the same section cannot be started against him unless it can be shown that the previous order has been duly vacated or possession has been amicably surrendered. But subsequent proceeding can be started and fresh order made in respect of properties *other than* the one comprised in the first order—*Bayit Lal v Harakh Singh*, 1 P L T 557 21 Cr L J 753

During pendency of High Court rule—During the pendency of a rule issued upon the District Magistrate to show cause why his order under sec 145 should not be set aside it is irregular and highly improper for a Subordinate Magistrate to institute fresh proceedings as the proceedings in the Lower Court with reference to the matter in dispute must be considered to have been stayed. When a rule is issued by the High Court on the District Magistrate staying further proceedings, all Subordinate Magistrates are bound by it, and would not be justified in instituting fresh proceedings during the pendency of the rule—4 C L J 418

Fresh materials—When an order striking off proceedings under this section is passed, its effect is to destroy the proceedings and anything done thereafter under this section must start afresh upon fresh materials, and not stand upon the basis of the earlier proceedings—20 Cal 867, 6 C W N 923 *Akhubi v Darbari* 2 P L T 267 22 Cr L J 481, *Ghulam Md v Crown* 3 Lah 401

Power of High Court—The High Court cannot direct the revival of proceedings under sec 145 when they have been stayed by the Magistrate—30 Cal 112

445 *Further Inquiry*—Sec 437 (now 436) allows a further inquiry into a complaint which means under sec 4 (k) a complaint of an 'offence', and since sec 145 is not directed to any offence at all sec 436 does not authorise a District Magistrate or Sessions Judge to order a further inquiry into a case under sec 145—20 Cal 729

446 *Review*—There is no authority for holding that a Magistrate can review a final order passed by himself under this section—35 Cal 350, 16 O C 192

447 *Revision*—Under sub-section (3) of section 435 before it was omitted by the Amendment Act of 1923 proceedings under this Chapter were not liable to revision by any Court whether by the High Court or by the Sessions Judge or by the District Magistrate so that the High Court in the exercise of its revisional jurisdiction under section 439 of this Code was not competent to revise an order passed under this Chapter—27 Cal 892, 25 Bom 179 *Kamal Kufy v Udayrama* 36 Mad 275; *Palani v Rathna* 26 M L J 208 *Krishnaappa v Alamelu* 5 L W 165; *Vaidyanatha v Suppalu* 1914 M W N. 792 26 All 144 31 All 150;

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Syeda v. Lal Singh, 36 All 233, 4 A L J 91; *Nathu Ram v Emp*, 15 A L J 270, 18 A L J 1140, 18 O C 69, *Nga Hpay v Nga Aung, U. B R* (1917) 35; 1 S L R 50, *Fand v. Piru*, 8 S L R 207; 17 C P. L R 133

And in order to exercise its revisional power in respect of orders passed under this Chapter, the High Court had to invoke the aid of sec 15 of the Charter Act (26 Cal 188, 27 Cal 892, 33 Cal 68, 27 Cal 259, 28 Cal 416, 24 All 315) or sec 107 of the Government of India Act (*Nathu Ram v Emp*, 15 A L J 270, *Parameshwari v Kailashpati*, 1 P L J 336; *Thylae v Srirangaraya*, 43 M L J 624; *Moiram v Mritjan*, 47 Cal 438; *Ali Md. v Piggott* 48 Cal 522) But this power could be exercised only by the Chartered High Courts, and not by the non chartered High Courts, *e g*, the Chief Courts and the Judicial Commissioners' Courts

The only cases in which the High Court could exercise its powers of revision under this Code (sec 439) were those in which the proceedings, though purporting to be proceedings under this Chapter were not really so, as for instance where there was an initial want of jurisdiction by reason of there being no dispute likely to cause a breach of the peace or by reason of the Magistrate not being a first class Magistrate or where the Magistrate exceeded his jurisdiction by exercising powers not conferred by this section—24 Bom 527 U B R (1917) 33, 35, 7 Bom L R 475, 25 Bom 179 25 All 537 *Thylae v Srirangaraya*, 43 M L J 624, 5 O C 1 *Udai Bhan v Ram Samujh* 19 O C 136 18 Cr L J 100

Now by the Amendment Act XVIII of 1923 sub-section (3) of section 435 has been omitted and the effect of this amendment is to confer on the High Court the power of revision under this Code in respect of orders under this Chapter

But though the High Court is invested with powers of revision, still orders under this section should not be lightly disturbed it is only in very exceptional cases that the High Court will interfere—*In re Lingaraja*, 17 Cr L J 143 (Mad), *Hardeo v Ram Charitar* 17 Cr L J 286 (Pat) Orders passed by a competent Magistrate are not to be lightly interfered with by the High Court first because the object of such orders is to preserve peace and secondly because the aggrieved party has his remedy by a civil suit—*Krishnappier v. Alamelu*, 5 L W 165; 18 Cr L J 23 Proceedings under this chapter are of a special nature, and are such that the Magistrates may be allowed greater liberty in carrying out those provisions than they are allowed in trying ordinary crime The provisions of this chapter are concerned with disputes relating to immoveable property which are likely to cause a breach of the peace, and give Magistrates power to deal with matters of quasi civil nature because upon the Magistracy and the police is thrown the burden of maintaining the public peace In this view, it is undesirable that such orders should be interfered with in revision,

unless they are made without jurisdiction and are obviously unreasonable or unjust—*Sudalaimuthu v Enan* 16 Cr L J 767 (Mad) Where a Magistrate duly empowered to act under this Chapter takes proper proceedings and passes an order the High Court has no power to revise the proceedings either under this Code or under section 15 of the Charter Act—31 All 150 or under section 107 of the Government of India Act—*Matlakdhari v Jaisari* 15 A L J 576 39 All 612 *Sundar Nath v Emp* 40 All 364, *Sakhawat v Emp* 17 A L J 321 41 All 302 Thus the High Court as a Court of Revision cannot interfere with the decision of a trial Court on the factum of possession so long as there is evidence in support of the finding—*Abdul Sabar v Udha Lal* 8 Lah L J 47 17 P L R 102

The District Magistrate cannot himself set aside the decision of the lower Court passed under sec 145 he must refer the case to the High Court under sec 438—*Es ruddi v Otaruddi* 26 Cr L J 1166 A I R 1925 Cal 1234

448 Grounds of interference —The High Court has the power to interfere where in a proceeding under this section necessary parties were left out or wrong persons were made parties—27 Cal 892 or where the Magistrate refused to receive the evidence tendered to him—29 Mad 561 *Jhengar v Daynath* 11 A L J 586 34 Cal 840 *Pailall v Ganapati* 19 Cr L J 579 (Pat) or where the Magistrate's finding of fact as regards possession was perverse and contrary to a mass of un rebutted evidence—*Emp v Sarju Prasad* 27 O C 290 25 Cr L J 1066 or where no order in writing such as is required by sub section (1) was recorded by the Magistrate—*Hakam v Raha Ram* 4 Lah 66 *Jaku v Harnaman* 1917 P W R 28 *Mad Hasham v Md Jilani* 20 Cr L J 174, 1907 A W N 49 *Budhan v Ram Ralla Mal* 1915 P L R 169 16 Cr L J 628 or where no copy of the preliminary order was served upon the parties or published in the manner laid down—*Budhan v Jani Rakha* —1915 P L R 169 16 Cr L J 68 33 Cal 68 or where the Magistrate adopted none of the procedure required under this section and passed an order without any reference thereto—*Deuan Chand v Emp* 1899 P R 2 *Dhanu Ram v Bhole Nath* 1902 P R 23 *Ibdulla v Gunda* 1907 P R 7 1915 P L R 169 *Tara Chand v Behari* 1916 P R 22 18 Cr L J 36 or where the order of the Magistrate was far too wide of the mark and opposed to law and justice—1912 P W R 33 or where the Magistrate refused to issue process for the attendance of material witnesses—30 Cal 508 (Note) or where no opportunity was given by the Magistrate to the applicant to produce his evidence—1 C L J 36n or where the Magistrate discarded the evidence altogether and based his decision merely upon his local inquiry —10 C W N 181 or where the proceedings were initiated by the Magistrate on a vague Police report—11 C W N 198, or where the Magistrate declared possession with a party who had long been

out of possession—*Shankar v Bhajaj* 20 Cr L J 445 (Nag), or where the Magistrate passed an order in respect of a property which was not in dispute and declared the property to be in the possession of a person who was not a party to the proceedings—*Radhamohan v Naimuddi* 19 Cr L J 653 (Cal)

449 What the High Court can do in revision —The High Court, in the exercise of its power of revision is competent to consider the whole evidence—*Reid v Richardson* 14 Cal 361 and to find out whether there was evidence on which the Magistrate could come to the conclusion which he arrived at—14 Cal 169 and can pass the proper order which the Lower Court ought to have made. Thus where it is difficult to come to a conclusion as to the fact of possession the wise and proper course is to pass an order of attachment under section 146 and if in such a case the Magistrate has passed an order under sec 145 the High Court in revision can alter the order under sec 145 into one under sec 146 of the Code—*Reid v Richardson*, 14 Cal 361 22 Cal 297 *Satyendra v Krishnodhone* 20 C W N 1014 18 Cr L J 80 The High Court in revision can alter an order of the Magistrate under sec 145 into an order under sec 147—*In re Amarsang* 48 Bom 512 (515) The High Court has inherent power to give directions as to the disposal of property which was attached and has been dealt with by a subordinate Magistrate in the course of proceedings instituted without jurisdiction under this section—*Abd Muhammad v Piggott*, 48 Cal. 522 (F B) 32 C L J 270 22 Cr L J 213

Costs in revision —See note 478 under sec 148

146 (1) If the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was subject of dispute then in such possession of the subject of dispute, he may attach it until a competent Court has determined the rights of the parties thereto, or the person entitled to possession thereof,

Provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute

(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit, and if no receiver of the property, the subject matter in dispute, has been appointed by any Civil Court, appoint a receiver thereof, who, subject to the control of the

Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure

Provided that in the event of a receiver of the property the subject matter in dispute being subsequently appointed by any Civil Court possession shall be made over to him by the receiver appointed by the Magistrate who shall thereupon be discharged

Change —The two provisos and the italicised words in sub section (2) have been added by sec 29 of the Criminal Procedure Code Amendment Act (XVII of 1923) For reasons see below

450 Conditions precedent —In order to give jurisdiction for an order under sec 146 it is necessary that there should be jurisdiction over the proceedings under sec 145 which again presupposes a dispute likely to cause a breach of the peace. If there was no dispute concerning any land there would be no jurisdiction of a Magistrate to proceed under secs 145 and 146—*Ballam v Lal Babu* 19 Cr L J 105 (Pat) Sec 146 is a continuation of sec 145 and therefore the initiation of proceedings under sec 145 is preliminary to an order under sec 146. Where the record showed that the Magistrate made an order under this section without following the procedure prescribed by sec 145 and without making an order in writing and that there was nothing to show that a dispute likely to cause a breach of the peace existed the attachment was set aside by the High Court—*Azizuddin v Fmp* 2 Cr L J 119

The legality of an order under sec 146 depends upon its having been preceded by legal proceedings under sec 145 and where the whole proceedings under sec 145 are illegal (e.g. by reason of the Magistrate's failure to comply with the requirements of clause 4 of sec 145) an order made in the case under sec 146 cannot stand on a better footing—*Subbarama v Mariyi Pillai* 16 M L T 5 15 Cr L J 559

451 Magistrate's duty to make inquiry and take evidence —It is the duty of the Magistrate before taking proceedings under this section to take evidence and make inquiry (see clause 4 of sec 145) in order to ascertain if possible who was in possession—*Parthuram v Shivajatan* 3 P L T 434 23 Cr L J 277 1 C I R 86. An order passed under this section without examining any witnesses although a number of them were present in Court is invalid—*Siba Nath v Ramkishore* 35 C L J 291 23 Cr L J 688. Unless and until a Magistrate has made the inquiry contemplated by sec 145 that is to say, unless he has received and considered the evidence produced by the parties the Magistrate has no jurisdiction to proceed under sec 146—*Inayatulla v Amanat* 10 L J. 242 15 Cr L J 470 *Akeda v Hussain* 15 P L T 15 *Ambika v Wazdali* 23 C W N 910. When sec 146 (1) speaks of the Magistra

being unable to satisfy himself as to which of the parties was in actual possession, it contemplates that the Magistrate has considered the evidence fairly and judicially for the purpose of arriving at a decision—*Khedan v. Hussain*, 2 P. L. T. 15 22 Cr. L. J. 323 Where a Magistrate in a proceeding under sec. 145 made an order under sec. 146 on the ground that it was doubtful which of the parties was in actual possession, without judicially considering the important documentary evidence of possession placed before him, it was held that the order must be set aside and the case re-heard by another Magistrate—*Ambica v. Wasedais*, 23 C. W. N. 910: 20 Cr. L. J. 342

Where the Magistrate did not make the slightest attempt to satisfy himself as to the factum of possession, and attached the land without taking any evidence and making any local inquiry—*Shoo Balak v. Bhagwan*, 40 Cal. 103 16 C. W. N. 1033, or where the order of attachment was passed without examining the witnesses cited by the petitioner—2 Weir 110, or where the Magistrate discarded and rejected practically every piece of evidence that might have led to a correct finding as to possession—26 C. L. J. 39 or where the Magistrate omitted to receive the evidence produced by a party and passed his order merely on a consideration of the written statements of the parties—34 Cal. 840, his order was without jurisdiction. So also, where in a proceeding under sec. 145, the parties appeared on the day of hearing but did not file any written statement nor produced any evidence, and the Magistrate without granting time to the parties for the production of evidence or for filing written statements, found it impossible to come to a conclusion as to the fact of possession and passed an order under this section, the order was made without jurisdiction and therefore invalid—12 C. W. N. 896 But where the parties failed to adduce evidence even though sufficient time was allowed to them to do so, the Magistrate could proceed under this section—14 C. W. N. 80.

But it is not incumbent on the Magistrate to make a local investigation as contemplated by sec. 145. A Magistrate who attaches the property without such an investigation does not commit an error in procedure—*Upendra v. Prasanna*, 20 Cr. L. J. 17 (Cal.).

Effect of prior decree of Civil Court.—Where the petitioner had been put into possession of certain lands in execution of a decree obtained by him in a Civil Court establishing his right to them, the Magistrate was not competent to attach the lands under section 146. It was his duty to have found possession in accordance with the decree—32 Cal. 796 See Note 438 under section 145

452. Inability to decide the fact of possession.—The doubt upon which a Magistrate can act under this section must be the result of his

inability to determine the question of possession upon the evidence offered by both parties and not a doubt in his mind entertained without receiving evidence and without inquiry—1 C L R 273 *Khedan v Hussaini* 2 P L T 15 *Sheobalak v Bhagnat* 40 Cal 105 *Ambica v Wazedali* 23 C W N 910 The Magistrate would not be justified in saying that it was not possible to ascertain who was in possession and in attaching the property merely because the parties did not appear. He ought to have made some inquiry into the question of possession—*Paraturam v Shihjatan* 3 P L T 434 In order to show the Magistrate's inability to decide the question of possession he ought to discuss the evidence in the case and give reasons for his inability—*Khedan v Hussaini* 2 P L T 15 Where the order under this section did not show that it was not possible on the evidence to decide as to the fact of possession but would rather seem to indicate that the Magistrate could not or would not decide whether the witnesses on either side were to be believed the order was set aside. This section is not meant to relieve the Magistrate from the duty of deciding the case on the merits but allows an order of attachment to be made only when it is not possible to decide which party is in possession—*Neelamegan v Moorogappa* 2 Wen 110 A Magistrate should be extremely reluctant to attach the property in dispute. In cases where the land is jungle or waste it is quite possible that the Magistrate may be unable to satisfy himself as to the possession of the parties. But where the land is admittedly subject to cultivation year by year and season by season the Magistrate will be only admitting his own weakness if he states that he cannot come to a decision. It is his duty to collect information and sift it and decide the fact of possession—*Ram Balal v Rang Baladur* 5 P L T 589 25 Cr L J 1295 A I R 1924 Pat 804 The Magistrate ought to make a reasonable effort to decide the question as to possession and ought not to attach the property so long as it is possible for him to decide which of the contesting parties was really in possession of the property and if he can decide that question in favour of one of the parties he should give effect to that decision by passing an order under section 145 (6)—*Wazezul v Shobrat* 4 P L T 441 74 Cr L J 754

Nature of possession—In a dispute between the wife of a lunatic and the manager of his estate as to the possession of certain property there was no doubt that the wife was in actual possession of the property but the only doubt existed as to the *nature of the possession* that is whether her possession was on her own behalf or on behalf of her lunatic husband. It was held that such a doubt as to the *nature* of the possession would not justify a Magistrate in taking action under this section—3 C I R 64

Portion of subject of dispute—Where there is a dispute as regards the possession of a fishery extending over several miles in length and the Magistrate is unable to satisfy himself as to the possession of the whole

length in question he should ascertain so far as he can the possession of some portion or portions thereof. As regards the portion as to which he is able to say that so and so is in possession he should proceed under section 145 and only as to the remainder should he proceed under section 146—*Upendra v. Prasanna* 20 Cr L J 17 (Cal)

Rights of parties—The Magistrate can attach property only when he decides that none of the parties is in possession or when he cannot satisfy himself as to which of the parties is in possession but he cannot take action under this section merely because he is unable to satisfy himself as to which of the parties is entitled to possession or has a right to the property. Inability to decide the right to the property cannot justify an order of attachment of the property—*In re Somnath* 6 Bom L R 723

'Then'—i.e. at the date of the preliminary order passed under section 145 (1). See notes under section 145 (4)

453 When attachment can be made—When it is difficult for a Magistrate trying a case under section 145 to come to a conclusion as to the fact of possession the wise and proper course to be adopted is to pass an order of attachment under this section and not to pass any order under sec 145—*Reid v. Richards* 14 Cal 361. To entitle a Magistrate to make an order of attachment he must either decide that none of the parties are in actual possession or that he is unable to satisfy himself as to which of them is in possession—*Nattu Ram v. Emperor* 15 A I J 270 18 Cr L J 557. This section was intended to apply to a case in which on the evidence before him a Magistrate could not find possession with either of the parties—*Jivanti v. Middleton* 27 Cal 785

Where the Magistrate finds neither the first party nor the second party in possession but finds that actual possession is with a stranger who does not claim a right to be in possession the Magistrate should proceed to attach the property—*Blagioin v. Imp* 20 Cr L J 215 (Cal)

When both parties are in possession of the disputed property no order under this section can be made—*Id. Koolayappa v. Shaikh Abdul Khadir* 27 M. L. J 169 15 Cr L J 572. Where the Magistrate found that both parties were at the time of the order collecting rents from the ralyats this amounted to a finding that both parties were in possession and consequently the Magistrate had no jurisdiction to order attachment under this section—*Rajendra v. Malomed Arzumand* 9 C W N 837

454 Order of Attachment—An order under this section cannot be made in the absence of the parties or *ex parte* the proper course is to pass the order in the presence of both parties—*Luchmee v. Bhusi* 19 Cr L J 225 (Pat)

A Magistrate in passing an order under this section must give reasons for making the order—*Ahmed v. Hussaini*, 2 P L T 15. But no hard

and fast rule can be laid down as to when the High Court will interfere with the judgment of a Magistrate under this section on the ground that the order is brief and does not state reasons *at length*. If the High Court is satisfied that the Magistrate has given full consideration to the evidence on the record it will not interfere merely on the ground that the order is a brief one—*Kanai v Hyder Ali* 37 C L J 177 24 Cr L J 575

Signature of Magistrate—Where in a proceeding under this section the Magistrate initialled the order instead of signing it it was held to be a mere irregularity not affecting the order—17 C L R 211

455 What property can be attached—In order that an order might be passed under sec. 145 or 146 the subject matter of the dispute must be clearly determined—11 C W N 198

The 'subject of dispute' referred to in secs. 145 and 146 must be read as referring to the whole or to any *component* part or parts of the property in dispute. If the component part in respect of which the dispute exists is distinct and separable from the rest the Magistrate is not bound to attach the whole property but may attach that part only. If however the subject matter in dispute is indivisible and must be dealt with as a whole it must be dealt with in such a way as to make in regard to it one order under this section—5 C W N 710 see also 22 Cal 497 cited in Note 427 under sec. 145

Where the dispute is as regards a narrow strip of land at present occupied by a hedge forming the boundary of contiguous lands belonging to the rival disputants the Magistrate should instead of attaching the land come to a decision on the evidence submitted to him with reference to the point of possession—4 W R 26

Temple—To attach a temple does not necessarily mean that the temple must be closed altogether. When third parties or the general community are interested in it it is the duty of the Magistrate when assuming charge of it in order to preserve the public peace to make the best arrangements possible to preserve the rights of such third parties or the public and to have the *pooja* of the temple performed—*Sundara v Vallinayaga* 2 Weir 110 *In re Muttusami* 2 Weir 112

Crops—The Magistrate has no jurisdiction to attach crops cut and stored the word 'crops' occurring in sec. 145 refers to standing crops alone—30 Cal 110

In a dispute between the rival landlords as to the possession of land, the Magistrate is not competent to attach the crops on the land belonging to the tenants—*Denomoni v Mazafar Ali* 5 C W N 105

Moveables—The Magistrate ordering attachment of immoveable property can take charge of all moveables found inside the immoveable property although he cannot attach the moveable property by itself under

this section. Therefore where the Magistrate attached a *muth* and took charge of all the cattle that were found by him in the *muth* at the time of attachment it was held that the Magistrate acted legally—*Mahant Bharat v Ram Charitar* 1 P I J 356 18 Cr L J 287

Cultivation of attached land—A person who cultivates immovable property which has been attached by a Magistrate under this section commits the offence of criminal trespass and he is liable to be punished under sec 447 I P C—8 M L J 753. No suit for damages for the loss of profits resulting from the non cultivation of land owing to an attachment under this section lies against any party—6 Mad 426

456 Powers of Magistrate—A Magistrate attaching a property under this section has the power to make any order regarding the management of the property. The High Court will not interfere with such order—49 Cal 382. He can lease the land attached—17 W R 38 or after cancelling a lease already granted can grant a fresh lease—79 Cal 382

A Magistrate passing an order under this section is entitled to refuse to hand over the value of the produce of the property to any of the parties to the dispute but he has no power to treat the profits as *derelict* and as the property of the Government—*Mohar Singh v Crown* 1011 P L R 123 12 Cr L J 103

A Magistrate attaching a property under this section cannot hand over possession of the property to one of the contending parties on failure of the other to institute a suit for possession in the Civil Court—*Rani Kurnar v Thakur Ojha* 3 P I T 618 3 Cr I J 562

457 Possession by Magistrate—When a Magistrate attaches lands under this section, the possession of the Magistrate must be taken to be a possession on behalf of such of the rival parties as might establish a right to possession by a civil suit—32 Cal 250. That is the Magistrate's possession is not adverse to the true owner. The legal possession of the property is said to be in the true owner during the period of attachment—*Raja of Venkatachiri v Isakapalli* 26 Mad 410 49 Cal 544 22 C L J 283, 20 C W N 481. *Sarat Chandra v Bibhabati* 34 C L J 302

458 Decision of a competent Court—The attachment is to continue until a competent Court has determined the rights of the parties and therefore it is the duty of a Magistrate to withdraw the attachment and release the property as soon as it is brought to his notice that a competent Court has determined the rights of the parties or of the person entitled to possession—*Maharaja of Venkatagiri v Srinivasa* 17 M L T 392 16 Cr L J 481. The Magistrate is bound to abide by the subsequent decision of a competent Civil Court and to withdraw the attachment, even though the suit in the Civil Court was not *inter partes* (as for instance where the suit was instituted by a third party and the first party and some members of

the second party were not made parties to it)—*Asesh Kumar v Kishori Mohan* 39 C L J 353 35 Cr L J 937 The fact that an appeal has been preferred against the decision of the Civil Court and is pending is no good reason for the Magistrate to keep the property any longer in attachment—*Crow v Abdul Aziz* 1917 P W R 46 19 Cr L J 261 *Ramisri v Sri Krishna*, 46 All 879 22 A L J 803 *Maung Tia Zin v Maung Ba Gale* 7 Bur L T 293 15 Cr L J 500

It is not necessary that there should be a decree in favour of all of the parties to enable the Magistrate to withdraw an attachment made under this section and if there is an adjudication by a Civil Court in favour of some at least of the parties that is sufficient for the purpose of enabling the Magistrate to wall out of the property—*Vithoba v Navasinga* 20 M L T 247 4 L W 55 17 Cr L J 331

A Magistrate is not entitled after the decision of the Civil Court to retain in his hands the profits derived from the attached property during the period of attachment—893 A W N 100

The expression *competent Court* means not only a Civil Court but includes a Survey Court—37 Cal 331

Under the Code of 1882 the words were Civil Court and therefore it was held in 15 All 394 that this section did not authorise a Magistrate to pass an order of attachment in a dispute between parties whose rights would have to be determined by a Revenue Court But this ruling is no longer good law and the Magistrate can release the property attached and hand it over to one of the parties as soon as the Revenue Court has given a decision in favour of that party—*Ram Sri v Sri Krishna* 46 All 879 (881) 22 A L J 803 25 Cr L J 1242 *Surendra Bihari v A E* 35 O C 212

But a mere entry in the Record of Rights does not amount to an adjudication by a competent Court of the rights of parties—*Kutubpur v Jitenbra* 26 Cr L J 1055 (Cal)

459 Persons bound by order of attachment—Judicial proceedings cannot bind a person who is not a party to them A final order under this section cannot be made against persons who were neither made parties to the proceedings under sec 145 nor were regarded as such by the Magistrate (though notices had been issued upon them to file written statements and they entered appearance but did nothing else)—3 C W N 329

460 Proviso—withdrawal of attachment—We have introduced a new clause which by an amendment of section 146 will enable a District Magistrate to withdraw the attachment of property at any time when he is satisfied that there is no longer any likelihood of a breach of the peace—*Report of the Joint Committee (1922)*

Where the petitioner presented an application to the Magistrate praying for the release of the attached house on the ground that the other claimant had died and that he (the petitioner) was his heir and the Magistrate refused the application as no judgment of a competent Court declaring the rights of parties was produced *held* that the Magistrate ought to have granted the application and released the property from attachment because by the death of the other claimant all likelihood of a breach of the peace had disappeared—*Khushi Ram v Crown* 1 Lah 451 This proviso now expressly provides for the case

But the Magistrate can cancel the order of attachment under the proviso only on the ground that there is no longer any likelihood of a breach of the peace. He cannot cancel the attachment on any other ground *e.g.* on the ground that the attachment is not practicable—*Ram Dulare v Ajudhya* 16 O C 192 14 Cr L J 605

461 Sub section (2)—Appointment of Receiver—A Magistrate is entitled to appoint a receiver under this sub section only after the termination of the inquiry as to possession conducted under sec 145 (4). The appointment of a receiver *before* the completion of the inquiry is without jurisdiction—*Lakshminarayana v Gnanaprasanna* 13 Cr I J 536 (Mad)

The passing of an order of attachment does not by itself justify the appointment of a receiver unless on a subsequent inquiry the appointment of a receiver is found necessary—*Raza Hussain v Mehdi Hasan* 25 O C 148 23 Cr L J 684

A receiver appointed under this section is entitled unless some special circumstance is established not only to the subject matter of the proceedings but also to all accretions to the property and can give good title to a tenant under him—14 C W N 681

Proviso — We recommend the addition of a proviso to section 146 (2) to meet the case of an overlapping appointment of a receiver by the Civil Court —*Report of the Select Committee of 1916*

462 Revision —By reason of the omission of sub section (3) of section 435 by the Criminal Procedure Code Amendment Act of 1923 orders passed under this section are now liable to revision under this Code. See Note 447 under sec 145

463 Review —An order under this section is in the nature of a judgment and cannot be reviewed by the same Court—*Lucina v Bhuss* 19 Cr L J 225 (Pat) *Raj Kumar v Thakur Ojha* 3 P L T 648 *Ram Dulare v Ajudhya* 16 O C 192 see section 369 When a property is attached under this section the Magistrate has jurisdiction to release it from attachment but he has no jurisdiction to review his own order releasing the attached property—*Ballam v Lal Babu* 19 Cr L J 105 (Pat)

147 Whenever any such Magistrate is satisfied as afore said that a dispute likely to cause a breach of the peace exists concerning the right of use of any land or water (including any right of way or other easement over the same) within the local limits of his jurisdiction he may inquire into the matter in manner provided by section 145 and may if it appears to him that such right exists make an order permitting such thing to be done or directing that such thing shall not be done as the case may be until the person objecting to such thing being done or claiming that such thing may be done obtains the decision of a competent Court adjudging him to be entitled to prevent the doing of or to do such thing as the case may be.

Provided that no order shall be passed under this section permitting the doing of any thing where the right to do such thing is exercisable at all times of the year unless such right has been exercised within three months next before the institution of the inquiry or where the right is

147 (1) Whenever any District Magistrate Sub divisional Magistrate or Magistrate of the first class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water as explained in section 145 sub section (2) (whether such right be claimed as an easement or otherwise) within the local limits of his jurisdiction he may make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend the Court in person or by pleader within a time to be fixed by such Magistrate and to put in written statements of their respective claims and shall thereafter inquire into the matter in the manner provided in section 145 and the provisions of that section shall, as far as may be applicable in the case of such inquiry.

(2) If it appears to such Magistrate that such right exists he may make an order prohibiting any interference

exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or occasions before such institution

with the exercise of such right: Provided that no such order shall be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry, or, where the right is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such institution

(3) *If it appears to such Magistrate that such right does not exist he may make an order prohibiting any exercise of the alleged right*

(4) *An order under this section shall be subject to any subsequent decision of a Civil Court of competent jurisdiction*

Change —This section has been redrafted by sec 30 of the Criminal Procedure Code Amendment Act (XVIII of 1923), and the substantial changes introduced by this redrafting have been shown by the italicised passages

The principal changes are — (1) The definition of the subject matter in dispute has been modified so as to avoid the difficulties which have been created by decisions raising doubts as to the applicability of the section to rights not resembling easements or to rights acquired by contract (2) the specific reference to rights of way has been omitted as it has been questioned whether it might not by implication exclude negative easements from the scope of this section, (3) the nature of the orders which a Magistrate may pass (see subsections 2 and 3) and their continuance pending the order of a competent Civil Court to the contrary (see subsection 4)

have been clearly defined —*Statement of Objects and Reasons* (1914) the words 'make an order in writing' respective claims" have been added in order to bring this section into a line with sec 145. Doubts have been expressed as to the procedure to be followed in cases under sec 147 and we have introduced amendments here to make it clear the procedure is to be that laid down in section 145 —*Report of the Committee* (1911)

464 Dispute —In order to establish the jurisdiction of a Magistrate to proceed under this section it is necessary that a dispute exist between two persons concerning the right to the use of any land or water. 22 W R 48. The dispute contemplated by this section must at any rate be some substantial dispute necessitating the interference, in some way or other, of the criminal authorities. It would not be sufficient that there should be a mere discussion or verbal altercation between persons claiming rights of the kind described. There must be an actual dispute. Cal 194. See Note 393 under sec 145.

If on entering on an inquiry a Magistrate finds that the rights of parties have been judicially ascertained by a decree of Civil Court he should not enter into any investigation as he cannot assume that a dispute will be continued on a question which has been set at rest by a judicial decision on the rights of parties—11 Bom 584.

465 Likelihood of breach of peace —An order cannot be passed under this section unless the Magistrate is of opinion that the dispute is likely to cause a breach of the peace—6 M I J 103 *Parasram v Govind* 25 Cr L J 344 (Nag). In order to give jurisdiction to a Magistrate under this section he must be satisfied from Police reports or other materials that there is an imminent danger of a breach of the peace resulting from the dispute between the parties concerned. Where the materials before the Magistrate did not disclose the fact that there was an imminent danger of a breach of the peace any evidence that he might have taken later in the course of the trial could not give him a jurisdiction which he did not otherwise possess—23 Cal 557. But see 33 Cal 33 cited at p 293 and

466 Right to use land or water —This section applies to disputes as to the right to use any land or water as distinct from disputes as to title to or possession of the land itself for which provision is made in sec 145—*Ram Dulare v Ajudhya* 16 O C 192. 14 Cr L J 605.

In a Madras case it was held that the words land or water used in this section should be taken in their ordinary significance without any extended meaning given to them by section 145—*Palaniyandi v Jeyappa* 17 Cr L J 235 (Mad). In a Calcutta case also it was held that the word land in this section did not include crop or produce as in sec 145—*Ali Mohammad v Fakrudin* 2 C W N 1030. 22 Cr L J

The present amendment however expressly lays down that those words are to have the same meaning as in sec 145

Since this section as now amended includes rights claimed as an easement it therefore applies to rights to the use of land or water belonging to others See also *Emp v Ganpat* 4 C W N 779 The contrary view taken in 29 Mad 97 is no longer correct

Right to take from a hat —A dispute as regards the right to collect *tolas* (small perquisites) from a *hat* on one day every year is one concerning the right of use of any land within the meaning of this section—*Sarat v Miralal* 21 C W N 439 24 C I J 137 18 Cr L J 113

Rights arising out of contract —Prior to the present amendment of this section it was held that a dispute between a landlord and his tenant regarding the right of the latter to reconstruct a *gola* which had fallen down was not a matter properly coming within the operation of sec 147 The settlement of such a dispute involved issues of right which could properly be determined by a Civil Court The right of use of land contemplated by sec 147 was one of an entirely different description resembling a right of easement and not one arising from the terms of a contract between landlord and tenant—*Emp v Ganpat* 4 C W N 779 See also *Arunachalam v Chidambaram* 29 Vad 97 But this is no longer the law By reason of the present amendment the rights arising out of a contract will also fall under this section See notes under Charge above Before the present amendment the words of the section were the right of use of any land and water (including any right of way or other easement over the same) The words of the present section are more general

Right to use of water —A Magistrate can take action under this section if he is satisfied that a dispute regarding the right to irrigate from a tank is likely to cause a breach of the peace—O S C 61 Where it was found that the plaintiff had a right to the flow of water for purposes of irrigation from a certain channel passing through a village of the defendant who obstructed such flow by erecting *bunds* it was held that the Magistrate was competent under this section to direct the removal of the obstruction—*Pasupati v Nandalal* 5 C W N 67 *Dalvir v Khodada* 36 Cal 923 14 C W N 179 13 W R 51

Where Christians were prevented by Hindus from the lawful exercise of their right to take water from a well it was held that the Magistrate had jurisdiction under this section to pass an order prohibiting the Hindus from interfering with the exercise of that right—*Hindus v Christians* 21 M I J 486 11 Cr L J 721

Right to let off water —The right to let off water by the natural course in which it has always flowed and would always flow so as to prevent inundation of one's own land is a natural right of every land holder to the use and enjoyment of his own land Where the second party erected a

bund on the boundary of the first party's village to prevent the flow of such water the Magistrate had jurisdiction to direct the removal of the *bund*—*Doulat v Sna Pershad* 15 C L J 267 12 Cr L J 319

Right to fish—There is nothing in this section which limits its operation only to easements. This section relates also to rights in the nature of easements for instance the right to fish in a *bhil*—*Dukhi Molla v Halway* 23 Cal 55 *Kali Kissen v Anund Chunder* 23 Cal 557

Right to ferry—A dispute regarding right to use a ferry comes within the scope of this section—*Hartull d h v Bajrang* 3 C W N 148

Right to take sandal paste from idol—A right to take sandalwood paste removed from the person of the idol is not a right to the use of any land or water within the meaning of this section and therefore this section does not apply to a dispute regarding such right—4 Bom I R 438

Right to worship—A right to perform the duties of a Pujari in a temple is not a right to the use of any land. It is the worship which is disputed and not the use of land. Therefore, a dispute regarding such a right can not be the basis of a proceeding under this section—37 Cal 578 *Surendra v Sashi Bhusan* 52 Cal 959 42 C L J 127. Where the matters in dispute cannot be adjudicated by a Civil Court (e.g. disputes relating to performance of worship and other religious ceremonies) Magistrates have no jurisdiction to deal with those matters under sec 147. In such matters if the Magistrate apprehends that there will be a breach of the peace he is to adopt the procedure prescribed by Chapter VIII and to take security—14 Bom 25. But in *Mad Musaliar v Kunji* 11 Mad 323, *Kader Balcha v Kader Balcha* 29 Mad 237 3 Bom L R 416, *Sinnarami v Palani* 48 M L J 528 26 Cr L J 1057 and *Chidambara v Seigoda* 27 M L J 587 15 Cr L J 671 a right to worship in a mosque or to officiate as Kazi therein or to perform a puja has been held to come within the operation of this section.

A dispute as regards the offerings made in a temple is a dispute as regards moveable property and therefore does not fall under this section—*Ram Sarin v Raghunandin* 38 Cal 387 13 C L J 445

Right of privacy—A right of privacy e.g. a right to enter upon the premises of another and close the windows and doors to ensure privacy is not a right to prevent the doing of anything in or upon any tangible immovable property within the meaning of this section. The remedy of the person claiming such right is by civil suit and by injunction—*In re Gerdhadas Ratanlal* 357

Right to use a ferry is not a right to the use of land and water and is not therefore contemplated by this section—*In re Shankar* 15 Bom I R 329 14 Cr L J 400. But it will now fall under this section.

Right of way—A Magistrate is competent to order the removal of an obstruction to a right of way caused by the owner of the land,

be a likelihood of a breach of the peace in consequence of such obstruction—*Lalit Chandra v. Tarini*, 3 C. W. N. 335 In a dispute as to the right of way, the Magistrate should decide whether the complainant had been in use and occupation of the road, and if so, for how long, and if he finds him to be in possession should retain him in it, leaving the owner of the land to refer the question of the right to the easement to the Civil Court The Magistrate should not decide against the complainant because he may have another right of way leading to the same place—2 W. R. 64

Right to use pub. way—This section can be applied even when the right of way claimed is a right to a public path The terms of this section are wide enough to cover the cases of public as well as private right of way The Magistrate has therefore jurisdiction under this section to direct a person who has obstructed a public pathway by a fence, not to obstruct such pathway—*Karuppanna v. Kandiam*, 26 M. L. J. 223; 15 Cr. L. J. 362 A right to take a car in procession along a public road to a temple is a right of user of land falling under this section—*In re Nasu-pa*, 27 Bom. L. R. 1055 26 Cr. L. J. 1422 The Magistrate has jurisdiction under this section to pass order even against the right of passage through a public street But he ought not to pass such a prohibitory order, unless it is clearly proved that there is a right by custom or by grant or by a statute in one section of the public to prevent another section of the public from using the public street on particular occasions or for particular purposes, when such use is ordinarily and *prima facie* lawful—*Sudhaimithu v. Inan*, 16 Cr. L. J. 707 (Mad.) When the subject of a dispute is a public highway, a Magistrate has no power to object to the lawful use of it by any class of persons Except when danger to the public health is occasioned the conveyance of a corpse along a highway is not an unlawful use of the highway Therefore an order that the Hindus should not carry corpses through a street to which the Muhammadans object, is illegal—7 Mad. 49 The right to use a public way for carrying corpses is a natural and ordinary right of citizens, and it is open to question whether section 147 applies to cases of dispute concerning the exercise of such a right—6 M. L. J. 193

Right to prevent procession.—A Magistrate is not authorised to pass an order prohibiting a religious procession under this section, where he has not found that the right to prevent such a procession exists in the complaining party—*Q. E. v. Madhadas, Ratanlal* 518.

467. Easements—This section is not confined to easements acquired by uninterrupted enjoyment for 20 years provided by sec 26 of the Limitation Act—13 C. W. N. 859 This term includes profits *a prendre*—23 Cal. 55

This section is not limited in its operation only to easements but relates also to rights in the nature of easements, e. g., a right to fish—*Dukhi*

v *Halway* 23 Cal 55 or a right to moor boats and dry fishing nets on the land of another—*Kalidumar v Bejoy* 21 Cr I J 697 (Cal)

This section applies to positive as well as to negative easements. See the *Statement of Objects and Reasons* cited under heading Change *supra*

468 Preliminary order in writing.—This section as now amended requires that the Magistrate must record as under section 145 a preliminary proceeding stating the ground of his being satisfied as to the likelihood of a breach of the peace. The contrary rulings in 2 C W N 670 and 27 M L J 587 are hereby overruled.

The preliminary order under section 147 just as in the case of an order under sec 145 directing the parties to appear for the inquiry must direct them to appear before the Magistrate himself who issued the preliminary order. An order directing them to appear before another Magistrate is without jurisdiction and all proceedings on an inquiry so conducted are invalid—*Misra Chaudhury v Narasingh* 3 P L T 186 22 Cr L J 483

469 Inquiry as under Sec 145.—A case under this section is to be decided by the same procedure and on the same principles as a case under sec 145—*Ravi Saran v Raghunandan* 38 Cal 387. Section 147 clearly says that the procedure under this section must be as under sec 145 which includes the filing of written statements taking of evidence and if necessary local investigation. Therefore an order under section 147 passed on proceedings taken under sec 133 without any action in accordance with sec 145 is without jurisdiction—*Abdool v Safar Ali* 15 C W N 667 12 Cr L J 43. Where the petitioners set up a right of easement over a road which the opposite party attempted to close and the Magistrate instead of following the procedure laid down in this section went over to the office of the opposite party examined certain documents and correspondences in respect of the road and then passed an order declaring the road to belong to the opposite party and forbidding the petitioners to enter upon the road held that the procedure was wholly unjustifiable as he made inquiries in the absence of the petitioners and without giving them an opportunity of adducing their own evidence and examining witnesses and passed the order without coming to a distinct finding as to the alleged right of easement set up by the petitioners—*Narendra v E I Jy*, 5 P L T 419 25 Cr L J 455 A I R 1924 Pat 717.

When proceedings are started under sec 145 on the basis of a report but during the trial the Court finds it is a matter falling under sec 147 he can convert the proceedings into one under that section—*Bandhu v Wahid Ali* 26 Cr L J 558 (Cal). *In re Anwar* 15 Cr L J 512 (515) 26 Bom L R 436.

Long and protracted inquiry.—Question of title.—This section is likely to involve a long and complicated inquiry.

presence of a large number of people the proper course for the Magistrate to follow is to bind down under sec. 107 such of the persons as are likely to disturb the peace—*Ka'ti Kissen v. Anand*, 23 Cal 357. So also, where the settlement of a dispute involves a question of right which can only be determined by a Civil Court the proper course for the Magistrate is to proceed under sec. 107—*Emp v. Ganpat* 4 C W N 779, *Anand Aslam v. Chidambaram* 29 May 97 36 Cal 923. This section does not convert the Magistrate into a Civil Court which is to determine the rights between the parties or to discuss and consider any *pre-judicial* damage done to individuals—22 W R 44.

Inquiry by subordinate Magistrate—Where a District Magistrate on being satisfied that there exists a dispute likely to cause a breach of the peace as regards the right to perform a religious ceremony refers the case to a Magistrate for inquiry the latter is bound under this section to inquire into the matter in the manner provided by Sec. 145—*In re Dhyaneshwar* 3 Dec 1 R 416. But see Note 414 under Section 145.

470. *Notice to parties*—The inquiry contemplated by this section is a judicial inquiry and the opinion to be formed must be a judicial one formed upon evidence legally before the Magistrate. The evidence before the Magistrate would not be legal if it were taken behind the back of persons who claimed or denied the right &c. if they had not been represented at the inquiry and had no notice of it—*Da-hoo Lal v. Domi Lal* 21 Cal 727. Where an order was passed under this section without giving notice to the party concerned the order was without jurisdiction and liable to be set aside—1909 F I R 103. Where the proceedings were originally started in respect of a portion of a pathway but subsequently the Court amended the proceedings by making them applicable to the whole pathway without notice to the party affected held that the final order was not binding on the party affected—*Janaki v. Monmohan*, 23 Cr L J. 674. A I R 1923 Cal 263.

Actual notice should be given to all the persons claiming or denying the right, notice to servants of such persons is not equivalent to notice to them—*Dathoolal v. Domilal* 21 Cal 727. The inquiry presumes not that one party only, but that both parties to the dispute will be afforded an opportunity of appearing and adducing evidence on all the material facts—*In re Alfred Lindsay*, 4 May 121.

471. *Parties*—In an inquiry under this section it is sufficient if persons who claim for themselves the right though that right be derived from others (e.g., right to fish in a *dhul*), are made parties. It is not necessary that the proprietors (of the *dhul*) should be added as parties—*Dudhi v. Halooj* 23 Cal 55.

A Magistrate is not competent to add parties to a proceeding under

Sec 147 after making a preliminary order. An order made after the addition of parties is null and void only as against the added party but is binding on those to whom it is properly directed—*Pasupati v Nando Lal* 5 C W N 67. The Nagpur J C Court holds that the addition of parties after making the preliminary order is a mere irregularity which does not vitiate the proceedings—*Parasira v Gopal* 25 Cr L J 353.

472 Evidence.—The inquiry contemplated by the section is a judicial inquiry and the opinion of the Magistrate must be a judicial one formed upon evidence legally before him—21 Cal 727. A party against whom proceedings are instituted is entitled to produce evidence to prove that the case does not fall within this section—1909 P L R 105.

An order passed merely on a written statement, without taking any evidence in proof of the allegation contained in the written statement, is bad in law—30 Cal 918. So also an order passed without giving the parties an opportunity of calling evidence is one without jurisdiction—20 Cr L J 120. See also 5 P L T 419 cited in Note 469 above.

But where the allegation of one party is admitted by the other no evidence is necessary in addition to the written statement—*Haromohan v Gobind* 7 C W N 351.

Local inspection.—In a matter under this section the Magistrate is bound to hear the evidence tendered by the parties. He cannot summarily deal with the case after local inspection—*Imp v Ganpat* 4 C W N 779. A decision of the Magistrate based substantially upon impressions obtained as a result of his local inspection is bad and liable to be set aside. But a decision based on the evidence as well as local inspection (the one corroborating the other) is not illegal—*Mohammad Musa v Shyam Surdar*, 2 P L T 681. 22 Cr I J 739. The Magistrate can make a local inspection even prior to taking evidence in the case. But the finding must be based on evidence duly recorded and not merely upon the impressions formed on local inspection—*Aldil Hamid v Hasan Raza* 4 P L T 297. 24 Cr L J 487.

473 User of right.—In the absence of a finding that the right has been exercised within the periods specified by the proviso to subsection (2) the final order under this section cannot be maintained—*Sirkawal v Bhujia Singh* 5 P L T 457. 25 Cr L J 996. Where the right is exercisable at all times of the year there must be a finding that the right was exercised within three months—*Guru Prasad v Lachman* 14 Cr L J 303 (Cal). 1909 P L R 105. *Grant v Padarath* 1 P L T 364. 22 Cr. L J 463. Where it is proved that the first party have had an uninterrupted use of water of a *ak* for a period of 20 years which they have enjoyed as an element and of right and the erection of a bund has led to dispute there is then a sufficient finding that the right in dispute has

exercised within either of the periods mentioned in the proviso—*Pasappa v Nanda Lal* 5 C W N 67 Where the non exercise of the right within the period specified in the proviso was due to circumstances beyond the control of the party claiming the right & g where the non exercise was due to obstructions caused by the opponents of such party, the proviso to subsection (2) does not apply The proviso obviously contemplates a non exercise for reasons within the control of the persons claiming the right—*In re Basappa* 27 Bom L R 1038 20 Cr L J 1422

Burden of proof — The right to restrain another from exercising the ordinary proprietary rights over his own land & g the right to restrain another from cutting a *bund* on his own land and thus getting a liberal supply of water on his own land is of the nature of an easement different from the ordinary rights of owners of land The burden of proof that such a right exists lies on the party alleging it 11 Cal 32

474 *Nature of order* — The order under this section is one permitting a thing to be done or directing that a thing shall not be done This section does not enable the Magistrate to make a purely *declaratory* order It only enables him to prevent arbitrary interruption by any person of rights actually enjoyed which have been exercised by the public or by a person or a class or persons—5 Cal 194 This section is not intended to provide a substitute for a civil suit to declare the rights of parties but only empowers the Magistrate to order that possession shall not be taken by any party to the exclusion of the public until that party establishes his right in a Civil Court—6 W R 74

The words of subsection (2) do not give the Magistrate any power of directing one of the parties to do a *positive act* by way of mandatory injunction The power given by this clause is analogous to the power of a Civil Court to grant a temporary injunction by issuing a *prohibitory* order restraining any person from doing any act which interferes with the right of another Therefore where the second party raised a wall on her own land blocking the windows in the house of the first party and thereby shut out light and air from a room in that house the Magistrate had no power to order the second party to demolish the wall—*Hari Mah v Hari Das* 41 C I J 568 26 Cr L J 1265 30 C W N 238

Under subsection (3) a Magistrate is competent to make an order for the removal of an obstruction to a right of way if there be a likelihood of a breach of the peace in consequence of such obstruction—*Lalit Chandra v Tarini* 5 C W N 335, or an order for the removal of an obstruction to the right to the flow of water caused by the erection of *lands*—*Pasappa v Nandalal* 5 C W N 67 36 Cal 923 *Manzur Hussain v Gouri Lal* 20 Cr L J 209 (Pat) If the obstruction is caused to a public way or thoroughfare the Magistrate has no power to order for the removal

of such obstruction under this section but should proceed under Chapter V (Sec 133)—*In re Iutchmah* 1 West 143 5 W R 5 *In re Alfred Lindsay* 4 Mad 171 16 M L J 33 and *Sudharmitsu v Euan* 16 Cr L J 767 (Mad) however it has been held that Sec 147 can be applied whether the right of way claimed is a right to a public path or a private path the terms of the section are wide enough to cover both cases and the fact that Sec 133 expressly provides for an order by the Magistrate directing the removal of obstruction to public pathways does not necessarily imply that a similar order cannot be passed in proceedings under Sec 147

This section does not enable the Magistrate to order the Police to remove the obstruction There is no indication in the Code that the Legislature intended the Magistrate to carry out an order under this section through the agency of the Police This section clearly contemplates orders directed to persons who are parties to the dispute—36 Cal 973 *contra—Doulat v Siva Prasad* 15 C L J 267 12 Cr L J 319 where it was held that the Magistrate had jurisdiction to direct the complainant party to remove the obstruction with the assistance of the Police

Under subsection (3) a Magistrate has jurisdiction to make a prohibitory order (order directing that such thing shall not be done,) against a party who is found not to have the right which he claims Where the party claimed a right of passage over certain land which the other party denied and the Magistrate found that the right of easement did not exist the Magistrate had jurisdiction to pass an order directing that the first party should not use the right of passage until he obtained the decision of a competent Court adjudging his right—*Pyari Acharya v Harish Chandra*, 23 C W N 956 20 Cr L J 251

Order must affect parties only—This section contemplates an order to be passed between parties to the proceedings only An order affecting persons who are not parties to the proceedings is not within the purview of this section and is therefore liable to be set aside as affecting jurisdiction—*Pillai v Darya* 20 Cr L J 110 (Nag)

Effect of order on subsequent suit—The fact that in a dispute relating to a right of way a Magistrate has passed an order in favour of the party claiming that right does not relieve that party from the onus of proving the claim in a subsequent civil suit brought to establish that right—L R 555

Duration of order—An order under this section is bad in form if it contains no restriction of time for which it is to operate—*In re Ahmednagar* 14 Bom 25

475 *Revival of proceedings*—Where during the proceedings under sec 147 the parties referred the dispute to a civil

whereupon the Magistrate made an order to the effect that further proceedings were unnecessary and they were therefore stayed but after the arbitration proceedings (which remained pending for one year) became ineffectual the Magistrate continued the proceedings under sec 147 *held* that the Magistrate's order staying further proceedings ousted his jurisdiction to continue the proceedings. Moreover the Magistrate could not revive the proceedings unless he had drawn up fresh proceedings and unless he was satisfied that there was a *fresh* dispute likely to cause a fresh breach of the peace after the arbitration proceedings ceased and he was not justified in assuming that the causes which originally existed still continued to exist—*Kalananda v. Ramaswami* 15 C W N 271 (273) 11 Cr L J 729

Revision.—See Note 417 under sec 145

148 (1) Whenever a local inquiry is necessary for the purposes of this Chapter, any District Magistrate or Subdivisional Magistrate may depute any Magistrate subordinate to him to make the inquiry and may furnish him with such written instructions as may seem necessary for his guidance and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid

(2) The report of the person so deputed may be read as evidence in the case

<p>(3) When any costs have been incurred by any party to a proceeding under this Chapter for witnesses or pleader's fees or both, the Magistrate passing a decision under section 145 section 146 or section 147 may direct by whom such costs shall be paid whether by such party or by any other party to the proceeding and whether in whole, or in part or proportion All costs so directed to</p>	<p>(3) When any costs have been incurred by any party to a proceeding under this Chapter [* * *] the Magistrate passing a decision under section 145 section 146 or section 147 may direct by whom such costs shall be paid whether by such party or by any other party to the proceeding and whether in whole or in part or proportion Such costs may include any expenses</p>
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be paid may be recovered as *incurred in respect of witnesses and of pleader's fees which the Court may consider reasonable*

Change —Subsection (3) has been amended by sec 31 of the Criminal Procedure Code Amendment Act (XVIII of 1923) For reasons see Note 478 below

476 Local inquiry — Local investigation should only be ordered in cases where they are absolutely required by the Courts on subordinate points for a determination of the main issue in the case for instance in cases in which it is necessary to ascertain by measurement the disputed areas of land or to ascertain whether particular lands are identical with the lands detailed in documents and in such cases only When however, any fact can be elicited by evidence, that evidence should be heard by the Court itself —*Cal H C Cir No 41 of 1866* The scope of local inquiry is extremely limited It should be restricted solely to some question relating to the feature of the property about which the dispute has arisen, and should not be directed to any matter which can be proved before the Magistrate by oral evidence such as the question of actual possession—*In re Bakhshi* 3 C L R 134 *Lachmi Narain v Mukhram*, 24 Cr L J 507 (Pat) The object of local inspection is to understand and appreciate the topography of the land in dispute in order to aid the Magistrate in appreciating the evidence offered by the Court but the local inspection cannot take the place of legal evidence much less the result thereof can be used as a basis for the decision—*Ram Ratan v Tarak Nath*, 25 Cr L J 412 A I R 1922 Pat 249 Thus in a case where the levels and the fall of water are concerned, local inspection is imminently necessary—*Dowlai v Siva Prasad* 15 C L J 267 So also where rights of irrigation and rights of taking water through particular reservoirs are concerned, a local inspection is immediately necessary—*Abdul Hamid v Hasan* 4 P L T 297 24 Cr L J 487

There is no hard and fast rule that in every case under this chapter a local investigation must be held whether the parties desire it or not—*Upendra v Prasanno* 20 Cr L J 17 (Cal) For instance it is not incumbent on the Magistrate to hold such an investigation whenever he is unable to ascertain as to which party is in possession—*Ibid*

The term 'local inquiry' in this section contemplates delegation of judicial functions the mere making a survey of the disputed land and preparing a map thereof do not amount to a local inquiry under this section because they are not judicial but purely ministerial acts and such acts can be entrusted to a person other than a Magistrate e g to a pleader Commissioner (or even an amin) The report of such a person cannot be read as evidence under subsection (2) but he must be called as a witness

whereupon the Magistrate made an order to the effect that further proceedings were unnecessary and they were therefore stayed but after the arbitration proceedings (which remained pending for one year) became ineffectual the Magistrate continued the proceedings under sec 147 held that the Magistrate's order staying further proceedings ousted his jurisdiction to continue the proceedings. Moreover the Magistrate could not revive the proceedings unless he had drawn up fresh proceedings and unless he was satisfied that there was a *fresh dispute* likely to cause a fresh breach of the peace after the arbitration proceedings ceased and he was not justified in assuming that the causes which originally existed still continued to exist—*I alananla v Rameshwar* 15 C W N 271 (273) 11 Cr L J 719

Revision — See Note 117 under sec 145

148 (1) Whenever a local inquiry is necessary for the purposes of this Chapter any District Magistrate or Subdivisional Magistrate may depute any Magistrate subordinate to him to make the inquiry and may furnish him with such written instructions as may seem necessary for his guidance and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid

(2) The report of the person so deputed may be read as evidence in the case

<p>(3) When any costs have been incurred by any party to a proceeding under this Chapter for witnesses or pleaders fees or both the Magistrate passing a decision under section 145 section 146 or section 147 may direct by whom such costs shall be paid whether by such party or by any other party to the proceeding and whether in whole or in part or proportion. All costs so directed to</p>	<p>(3) When any costs have been incurred by any party to a proceeding under this Chapter [* * *] the Magistrate passing a decision under section 145 section 146 or section 147 may direct by whom such costs shall be paid whether by such party or by any other party to the proceeding and whether in whole or in part or proportion. Such costs may include any expenses</p>
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476 Local inquiry — Local investigation should only be ordered in cases where they are absolutely required by the Courts on subordinate points for a determination of the main issue in the case for instance in cases in which it is necessary to ascertain by measurement the disputed areas of land or to ascertain whether particular lands are identical with the lands detailed in documents and in such cases only When however, any fact can be elicited by evidence, that evidence should be heard by the Court itself —*Cal H C Cir No 41 of 1866* The scope of local inquiry is extremely limited It should be restricted solely to some question relating to the feature of the property about which the dispute has arisen, and should not be directed to any matter which can be proved before the Magistrate by oral evidence such as the question of actual possession—*In re Bashunt*, 3 C L R 134 *Lachmi Narain v Mukhram*, 24 Cr L J 507 (Pat) The object of local inspection is to understand and appreciate the topography of the land in dispute in order to aid the Magistrate in appreciating the evidence offered by the Court but the local inspection cannot take the place of legal evidence much less the result thereof can be used as a basis for the decision—*Ram Ratan v Tarah Nath*, 25 Cr L J 412 A I R 1922 Pat 249 Thus in a case where the levels and the fall of water are concerned, local inspection is imminently necessary—*Dowlat v Siva Prasad* 15 C L J 267 So also where rights of irrigation and rights of taking water through particular reservoirs are concerned, a local inspection is immediately necessary—*Abdul Hamid v Hasan* 4 P L T 297 24 Cr L J 487

There is no hard and fast rule that in every case under this chapter a local investigation must be held whether the parties desire it or not—*Upendra v Prasanno* 20 Cr L J 17 (Cal) For instance it is not incumbent on the Magistrate to hold such an investigation whenever he is unable to ascertain as to which party is in possession—*Ibid*

The term "local inquiry" in this section contemplates delegation of judicial functions the mere making a survey of the disputed land and preparing a map thereof do not amount to a local inquiry under this section, because they are not judicial but purely ministerial acts and such acts can be entrusted to a person other than a Magistrate e g to a *peon* Commissioner (or even an *amin*) The report of such a *person* ~~cannot~~ read as evidence under subsection (2) but he must be called as a

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Revision — See Note 417 under sec 145

148 (1) Whenever a local inquiry is necessary for the purposes of this Chapter, any District Magistrate or Subdivisional Magistrate may depute any Magistrate subordinate to him to make the inquiry and may furnish him with such written instructions as may seem necessary for his guidance and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid

(2) The report of the person so deputed may be read as evidence in the case

<p>(3) When any costs have been incurred by any party to a proceeding under this Chapter for witnesses, or pleader's fees or both, the Magistrate passing a decision under section 145 section 146 or section 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole, or in part or proportion All costs so directed to</p>	<p>(3) When any costs have been incurred by any party to a proceeding under this Chapter, [* * *] the Magistrate passing a decision under section 145, section 146 or section 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion Such costs may include any expenses</p>
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be paid may be recovered as *incurred in respect of witnesses and of pleader's fees which the Court may consider reasonable*

Change — Subsection (3) has been amended by sec 31 of the Criminal Procedure Code Amendment Act (VIII of 1933) For reasons see Note 478 below

476 Local inquiry — Local investigation should only be ordered in cases where they are absolutely required by the Courts on subordinate points for a determination of the main issue in the case for instance in cases in which it is necessary to ascertain by measurement the disputed areas of land or to ascertain whether particular lands are identical with the lands detailed in documents and in such cases only. When however, any fact can be elicited by evidence, that evidence should be heard by the Court itself — *Cal H C Cr No 41 of 1866*. The scope of local inquiry is extremely limited. It should be restricted solely to some question relating to the feature of the property about which the dispute has arisen, and should not be directed to any matter which can be proved before the Magistrate by oral evidence such as the question of actual possession — *In re Baihunt*, 3 C L R 134. *Lachmi Narain v Mukhran*, 24 Cr L J 307 (Pat). The object of local inspection is to understand and appreciate the topography of the land in dispute in order to aid the Magistrate in appreciating the evidence offered by the Court but the local inspection cannot take the place of legal evidence much less the result thereof can be used as a basis for the decision — *Ram Ratan v Tarak Nath*, 13 Cr L J 412 A I R 1922 Pat 249. Thus in a case where the levels and the fall of water are concerned, local inspection is imminently necessary — *Doulat v Siva Prasad* 15 C L J 267. So also where rights of irrigation and rights of taking water through particular reservoirs are concerned, a local inspection is immediately necessary — *Abdul Hamid v Hasan* 4 P L T 297 24 Cr L J 487.

There is no hard and fast rule that in every case under this chapter a local investigation must be held whether the parties desire it or not — *Upendra v Prasanno* 20 Cr L J 17 (Cal). For instance it is not incumbent on the Magistrate to hold such an investigation whenever he is unable to ascertain as to which party is in possession — *Ibid*.

The term 'local inquiry' in this section contemplates delegation of judicial functions the mere making a survey of the disputed land and preparing a map thereof do not amount to a local inquiry under this section, because they are not judicial but purely ministerial acts and such acts can be entrusted to a person other than a Magistrate e g to a pleader Commissioner (or even an amin). The report of such a person cannot be read as evidence under subsection (2) but he must be called as a witness

and examined and cross examined as to his report—*Chulai Mahlo v Su vendra*, 1 Pat 75 3 P L T 17 23 Cr L J 152

Who can make the inquiry —The trying Magistrate can himself make the local inquiry Though as a rule it is better to have the local investigation carried out by some other person there is nothing in law to prevent the presiding Magistrate from conducting the inquiry himself, provided he records what he saw and does not act upon hearsay evidence—*Doulat v Sita Persad* 15 C L J 267 *Abdul Hamid v Hasan* 4 P L T 297

This section empowers the presiding Magistrate to depute a subordinate Magistrate to make the inquiry but the person deputed must be a Magistrate not a *Kanungoe*—7 C L R 352 If however the trying Magistrate deposes a *Kanungoe* to make an inquiry his report cannot be taken as evidence in the case like the report of a sub-Magistrate but the *Kanungoe* (like any other private person who has seen the place) must come into the witness box and depose on oath as to what he saw—*Achambit v Sarada* 12 Cr L J 480 (Cal)

The deputed Magistrate must make the inquiry himself he cannot delegate it to some body else—*Jaiwant v Rana Rao* 20 Cr L J 107 (Nag)

Recording evidence by the deputed Magistrate —The local inquiry authorised by this section is not merely a local inspection by the sub-Magistrate but includes the act of recording evidence by such Magistrate in the course of the inquiry But the recording of evidence by the sub Magistrate does not absolve the trying Magistrate from the duty imposed upon him by Sec 145 (4) of receiving any evidence produced before him by the parties and taking any further evidence he may think necessary Where a first class Magistrate recorded no evidence himself but acted solely upon the evidence taken by a sub Magistrate at a local inquiry the former must be deemed to have acted without jurisdiction but this defect or irregularity will be cured by sec 537 and the High Court will not interfere—*Muthusamy v Kalinga* 33 M L J 78 18 Cr L J 715

477 *Report of the deputed Magistrate* —Subsection (2) provides that the report of the deputed Magistrate may be read as evidence in the case but it is not necessary to examine such Magistrate on oath as a witness—*Achambit v Sarada* 12 Cr L J 480 (Cal)

When a local inquiry is instituted and the result reported such report becomes a part of the proceedings in the case and the party affected by it is entitled to be acquainted with the result of it and to have an opportunity of rebutting the report if he thinks necessary so to do—*Jaiwant v Rama Rao* 20 Cr L J 107 (Nag) 21 W R 25 If a Magistrate makes a local inquiry he must make a note of what he saw and must place it on the record so that the parties may be in a position to know what impression

the Magistrate has got by the local inquiry. It is possible that the Magistrate may have formed a wrong impression and if the results of his inspection are recorded, the parties would be in a position to know if there has been an error, and to remove the wrong impression formed by the Magistrate—*Abdul Hamid v. Hasan* 4 P L T 297, 24 Cr L J 487.

Decision based on report—A Magistrate cannot base his decision merely on the report of the subordinate Magistrate, without examining any witness—*Pilambar v. Saroda*, 13 Cr L J 777 10 A L J 465, *Ram-ratan v. Taraknath*, 25 Cr L J 412 (Pat). In *Muthusami v. Kalinga*, 17 Cr L J 478 (Mad) and *Piziruddin v. Totiyennissa* 14 Cr L J 302 (Cal) however, the Magistrate deciding the case on the basis of the report of the inquiry was held to have acted within his jurisdiction. Where the trying Magistrate based his order on the report of the sub-Magistrate and on the evidence recorded by him during the local inquiry, and both parties were quite content to abide by the result of the sub-Magistrate's inquiry, and no objections were advanced before the trying Magistrate against the sub-Magistrate's finding, it was held that the order of the trying Magistrate was not without jurisdiction and should not be interfered with in revision—*Muthusami v. Kalinga* 33 M L J 78 18 Cr L J 715.

478 Costs—Before this section was amended by the 1923 Amendment Act, it was held that the only costs which a Magistrate could award under this section were those incurred for witnesses or pleaders' fees or both. He could not make an order for *any other costs* e.g. costs on account of damage to crops—32 Cal 602. So also, he could not include in the costs the penalty paid by one party on behalf of the other under section 44 (3) of the Stamp Act in respect of an improperly stamped document produced in evidence in a proceeding under sec. 145 of this Code—*Popuri v. Tummalagunta*, 13 M L T 224 13 Cr L J 297.

Under the present section as amended the word "includes" shows that the Magistrate is able to award costs other than those incurred for witnesses or pleaders' fees.

In awarding costs for witnesses and pleaders' fees, the Magistrate should not include additional costs incurred for extra fees and for travelling and other expenses of a like nature incurred for bringing pleaders or counsels from a distance—9 C W N 887.

A Magistrate has jurisdiction to award only the *actual* costs incurred, and the order must give particulars as to how the Magistrate arrived at the figure, otherwise the order is bad—*Uday Narain v. Satish*, 14 C W N 1311. The order awarding costs is a judicial order and therefore must be based on proper materials, there must be materials on the record to show that the Magistrate arrived at the figure as the result of the calculation of the costs incurred by the party. An order arbitrarily awarding a round

sum of Rs 50 or Rs 100 as costs without there being anything on the record to show that the said amount was *actually* incurred is bad in law and must be set aside—*Jhama v Thakur* 1 P L T 369 21 Cr L J 675
Hira Mahton v Raj Kumar 3 P L T 484 23 Cr L J 508 *Akhu v Darbari* 2 P L T 267 So before making an order as to costs it is necessary and proper that the Magistrate should hold an inquiry as to what expenditure in costs was actually incurred—*Nemdhari v Ram Tahal* 17 Cr L J 348 (Pat)

If the costs are such as would fall within the scope of this section the High Court will not consider whether they are excessive or deficient—*Bansilal Syed Mohd Akbar* 15 C W N 811 12 Cr L J 376

The costs will be recoverable as fines See Sec 547 The words 'All costs' have been omitted as unnecessary because a general provision to that effect has been made in sec 547

Costs in revision —The costs referred to in this section are the costs incurred in the magisterial proceedings Magistrates have power under this section to direct by whom any costs incurred by parties in proceedings before them under this Chapter are to be paid So also the High Court in revision can pass any order which the Magistrate himself could have passed i e the High Court can in revision direct the costs incurred before the Magistrate to be paid by one party to another But the High Court cannot in revision of proceedings under Ch XII direct the costs incurred *before the High Court* in revision to be paid by one party to another Even the award of costs cannot be treated as incidental or consequential to the disposal of a revision petition within the meaning of sec 423 (1) (d) for it does not necessarily follow from an order passed in revision—*Verappa v Arudayammal* 48 Mad 262 (F B) 48 M L J 106 26 Cr L J 707 A I R 1925 Mad 438

But the Bombay High Court is of opinion that the High Court can award the costs incurred in the hearing of the revision petition such power is given by sec 439 read with sec 423 (d)—*Jiba Bai v Chandulal* 7 Bom L R 1353 A I R 1926 Bom 91

Who can order costs —Only the Magistrate who passes the final order under Sec 145, 146 or 147 can pass an order *awarding* costs though the actual *assessment* may be made by his successor This cannot be interpreted as authorising the successor of the Magistrate who passed the final order under sec 145 to *award* costs to the successful party Where the Magistrate making the final order declaring possession left the district and his successor made an order granting costs the order as to costs was set aside as made without jurisdiction—13 O C. 66

The Magistrate passing the order as to costs must be the Magistrate passing the decision in the case—*Nagar Chandra v Siddhartha* 47 Cal 974 24 C. W N 672 But he may or may not be the Magistrate who

initiated the proceedings under this chapter—Where the proceedings under this chapter are initiated by one Magistrate and the final order is passed by another it is the latter Magistrate who can award costs—9 Mad 373

Time of awarding costs—An order for costs should ordinarily be made at the time of the original order and in the presence of parties—4 Cal 757 13 O C 66 The award of costs under this section should be made by the Magistrate at the time of giving his decision unless for any reason the consideration of the matter is reserved for any future stage of the proceedings—22 Cal 387 There is no hard and fast rule which lays down that an order for costs must necessarily be made at the time the judgment is delivered—*Doulat v Siva Prasad* 15 C L J 267 The order for costs may be made within a reasonable time after the passing of the judgment—*Nafar v Siddhartha* 47 Cal 974 24 C W N 672 In the usual course an award should almost invariably be contemporaneous with the decision of the main question and the order passed thereon But the fact that the award of costs has not been made at the very time of the decision of the case does not necessarily render the award invalid and when the circumstances of a case really require it the disposal of the question of costs may be postponed—*Vythinaatha v Mayandi* 29 Mad 373

If the other awarding costs is not passed at the time of passing the decision in the case it must be passed within a reasonable time after the disposal of the case and in the presence of both parties—*Vythinaatha v Mayandi* 29 Mad 373 *Nafar v Siddhartha* 47 Cal 974 *Doulat v Siva Pershad* 15 C L J 267 What is reasonable time must depend upon the circumstances of each case—47 Cal 974 An order awarding costs made long (three months) after the original order and without giving notice to the parties affected and without allowing them an opportunity to appear and show cause is bad—24 Cal 757 *Palamandi v Sammandi* 16 L W 613 24 Cr L J 80 (Mad) But an order awarding costs made ten days after the passing of the order under sec 145 (6) is not illegal by reason of the delay—*Chadhari v Ramsingh* 19 Cr L J 390 (Pat)

478 A *Assessment of costs*—*If he can assess costs*—Where the Magistrate who passed the decision under Sec 145 had already awarded the costs it is not necessary that the costs should be assessed by the same officer who decided the case—22 Cal 384 Another Magistrate (e g his successor) has jurisdiction to assess the amount of costs—23 Cal 37 (dissenting from 21 Cal 609) 22 Cal 384 *Barsi v Sjed Mohd*, 15 C W N 811 *Sulbiah v Chokkalinga* 27 M L J 613 15 Cr L J 676 Though a Magistrate did not himself pass the order under sec 145 still he has jurisdiction to assess costs—10 C W N 1030

Time of assessing costs—An order awarding and assessing costs should be made at the time of the original order—24 Cal 757 This shows

the assessment of costs should be contemporaneous with the order awarding costs. But there is no inflexible rule that the costs must be assessed at the time of passing the decision in the case—22 Cal 384. Once an order as to costs is made, the amount of costs may be subsequently assessed—*Emp v Medapali* 14 M L T 195 14 Cr L J 570. But the assessment must be made within a reasonable time after the award of costs. An assessment of costs more than two years after the date of the order awarding the costs is bad in law—71 Cal 609.

Application by legal representative for assessment of costs—Where through the negligence of the Court's officers the amount of costs was not included in the final order directing payment of costs to the petitioner, and nearly three years after the legal representative of the petitioner (the petitioner having died in the interval) applied to the Magistrate's successor in office for the costs being assessed it was held that the application was sustainable and the applicant was entitled to have the costs assessed. Although this Code contains no special provision for bringing on record the representatives of the deceased parties still the Courts have power within reasonable limits to invent rules of procedure for that purpose unless the Legislature prohibits them from doing so. Courts should always lean in favour of that view of the law which would enable a party who has got an order in his favour to obtain the fruits of that order and not in favour of highly technical objections which render the Court's order infructuous and a mere piece of waste paper—*Subbia v Chockalinga* 27 M L J 613 15 Cr L J 676.

Notice to parties—An order awarding costs should be made in the presence of parties—*Vythinaitha v Majandi* 29 Mad 373. An order awarding and assessing costs without allowing all the parties affected an opportunity to appear and show cause is bad—24 Cal 757. A Magistrate has no jurisdiction to pass an order under this section making the party liable for a certain sum as costs without notice to him so that he may have an opportunity of contesting the same—28 Cal 302. *Bansi v Syed Mohd*, 15 C W N 811, *Dwarka v Nathani* 19 Cr L J 764 (Pat).

Even an order setting aside a previous order as to costs cannot be passed without giving notice to the opposite party—10 C W N 1030.

Revision—Orders under this section are now open to revision. See Note 447 under sec 145. The ruling in 9 C W N 887 is no longer correct.

CHAPTER XIII

PREVENTIVE ACTION OF THE POLICE

149. Every police-officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence

Police to prevent cognizable offences

478B Scope —This section provides for the prevention of *cognizable* offences only. Section 23 of the Police Act (Act V of 1861) appears to give wider powers for the prevention of offences in general.—S L B R 329

The word 'interpose' in this section connotes the idea of actively intervening and not merely a prohibition by word of mouth. The word is not wide enough to cover all orders given by police officers. It was not intended by the Legislature that the police officer would be empowered to order a certain thing to be done or not to be done with the consequence of the disobedience being punishable under sec 188 I P Code. To hold that under sec 149 Cr P Code a police officer can pass any order he thinks desirable would be to hold that his word is law. If his powers were to be so wide it would be unnecessary for the Magistrate or the police to take any precautionary measure in advance. It would be quite sufficient to send down a Sub Inspector to the scene and let him pass all sorts of sweeping orders the disobedience of which would entail conviction. Such wide powers vested in a police officer would interfere unreasonably with the ordinary liberty of private citizens and could not have been contemplated by this section.—*Emp v Raghunath* 47 All 205 6 Cr L J 599 A I R 19-5 All 165

150. Every police officer receiving information of a design to commit any cognizable offence shall communicate such information to the police-officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

Information of design to commit such offences

As to the powers and duties of a police officer see secs 82-85

151. A police-officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without warrant, the person so designing if it appears to such offi

Arrest to prevent such offences

that the commission of the offence cannot be otherwise prevented

By sec 151, a Police officer may arrest without warrant, if it appears to him that the commission of an offence cannot otherwise be prevented. Should he do so his subsequent procedure must be regulated by sec 60—*Bengal Police Manual*, 2nd Edition p 374

152 A police-officer may, of his own authority interpose
 Prevention of injury to prevent any injury attempted to be
 to public property. committed in his view to any public pro-
 perty, moveable or immoveable, or the removal or injury of any
 public landmark or buoy or other mark used for navigation.

153 (1) Any officer in charge of a police station may,
 Inspection of weights without a warrant, enter any place within
 and measures the limits of such station for the purpose
 of inspecting or searching for any weights or measures or
 instruments for weighing, used or kept therein, whenever he
 has reason to believe that there are in such place any weights,
 measures or instruments for weighing which are false

(2) If he finds in such place any weights, measures or
 instruments for weighing which are false, he may seize the
 same, and shall forthwith give information of such seizure to
 a Magistrate having jurisdiction

478C. This section expressly authorises an inspection of the weights
 and measures by an officer in charge of a Police station In comparing the
 weights used in the bazar some reasonable allowance should be made for
 wear and tear and of the rough and ready methods of bazar shop keepers—
Crown v Nanah Chand 1913 P R 20 15 Cr L J 11

This section does not apply to the Police in the towns of Calcutta,
 Bombay and Madras because similar provisions have been made in
 Calcutta by secs 55 and 56 of the Calcutta Police Act (Bengal Act IV of
 1886) in Bombay by sec 4 of the Bombay City Police Act IV of 1902, and
 in Madras by sec 32 of the Madras City Police Act III of 1888

See Act XXXI of 1871 relating to weights and measures of capacity,
 and the rules framed under sec 11 of that Act As to offences relating
 to weights and measures see Chapter XIII I P Code

PART V.

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE.

CHAPTER XIV

This Chapter, except sec 155, does not apply to the Police in the towns of Calcutta and Bombay. Sec 155 only applies to the Police of Calcutta and Bombay—*Q E v Nilmadhab* 1, Cal 595 *Q E v Visram Babaji*, 21 Bom 495. For Section 154, see Note 509 under that section.

154 Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in this behalf.

479 Scope—This section enables a Station House Officer to receive and record the information of the commission of a cognizable offence *outside* his station limits though he has no power under Sec 157 to conduct an investigation in respect of such offence—*Nandamuri v Emperor*, 1914 M W N 382 15 Cr L J 62. But see 1915 P R 12 (cited in Note 488 under sec 157).

480 First Information—The word information in this section means something in the nature of a complaint or accusation, or at least information of a crime given with the object of putting the police in motion in order to investigate as distinguished from information obtained by the Police when already investigating a crime. When the information which is first given to the police is of such a vague and indefinite character that it cannot be treated as coming under section 154 so as to make it incumbent upon the officer in charge of the police station to start an investigation, and he may reasonably require more information before doing any further information given to him in such circumstances may

within section 154 In such a case such further information will not fall within section 162 The information referred to in section 154 may come from more than one source and more than one such information may be recorded at or about the same time under this section but once the police have taken active steps to investigate any written statements taken by them fall within section 162 and are inadmissible in evidence—*Gansa Oraon v K E* 2 Pat 517 4 P L T 462 24 Cr L J 641

The information referred to in this section is the *first* information of the offence by whomsoever given The first information is that information which is given to the police first in point of time and not that which the police may select and record as first information—*K E v Bhutnath* 7 C W N 345 Thus where upon information given by the Chowkidar of an offence which was duly recorded in the station diary the Sub ins pector went to the Hospital to see the dying man and took down his dying statement and filed it as the first information it was held that the state ment of the Chowkidar and not that of the dying man, was the first in formation of the offence—*A E v Daulat* 6 C W N 921 Where a per son reported to a police officer that he had seen a certain woman with her throat cut and the officer did not make a record of the fact but subsequent ly treated an information lodged by the woman's father as the first informa tion in the case held that the unrecorded information and not the informa tion given by the woman's father was in fact the first information—*Clan Erika v K E* 1 Pat 401 3 P L T 771 A I R 1922 Pat 535 The information given by a Chowkidar to the effect that the mother of the ac cused had told him that the latter had assaulted his younger brother whilst under the influence of drink and that he (the Chowkidar) had seen blood stains on the younger brother's head was entered in the station diary but not signed by the Chowkidar and the police officer proceeded to the scene of occurrence and there took down the statement of the wife of the accused and took her thumb impression thereon held that the Chowkidar's information was the first information in the case and that the statement made by the wife of the accused to the investigating officer was not admissible in evidence (sec 162)—*Gansa Oraon v K E*, 2 Pat 517.

A statement made by a witness during investigation after the police off cer has actually arrived at the scene and himself seen what has happened is not first information—*Chittar Singh v Emp* 47 All 280 23 A L J 14 A I R 1925 All 303 A statement by a witness to the police officer in the course of an investigation under this chapter and recorded under sec 161 is not first information—*Sullan v Wellbourne* A I R 1925 Rang. 364 26 Cr L J 1532 The first information is the information given out immediately after the occurrence and reported to the Police and not the information which has been elicited in the course of the investigation The first information is the basis upon which an investigation under this chap-

ter commences. It is erroneously thought that the information on which an investigation is commenced is not the first information of the offence, and that when in the course of investigation something has been elicited which shows that an offence has been committed a first information can be recorded. This is certainly not what the law contemplates. In nearly every trial it is important that it should be known to the judicial officer what were the facts given out immediately after the occurrence and reported to the police, and the object of a first information is to render him so acquainted—*King Emp v Bhut Nath*, 7 C W N 345 *Peary Mohan v Weston*, 16 C W N 145 13 Cr L J 65 *Autor Singh v Emperor*, 17 C W N 1213 14 Cr L J 642. The first information is the basis of the case, and whether it be true or false, it at any rate usually represents what was intended by the informant to be the case set up by him at the time. All Criminal Courts should bear in mind the importance of examining, when there appears to be any necessity to do so, the first information of an offence reduced to writing in accordance with this section. In view of the notorious tendency in this country to improve upon the original statement of facts to strengthen the case as it proceeds and sometimes to add to the persons originally named as the offenders, it is of great importance to know what was said at first. This is specially the case where the Court has to deal with evidence of recognition or where the facts of the crime are established but the question whether all the persons charged with its commission actually participated in it appears to admit of doubt—*C P Cr*, Part II No 9.

Where the first information was recorded by a police officer some hours after he had begun investigation of the case, but there was no previous information recorded and reduced to writing by him the report falls under this section—*Dargahi v Emp*, 52 Cal 193 26 Cr L J 1213 A I R 1925 Cal 831. But a statement recorded several days after the commencement of the investigation and after there has been some development is not only not the first information but has very little or no value at all as the original story, because it can be made to fit into the case as then developed—*Emperor v Hampu*, 11 C W N 554 *Peary Mohan v Weston*, 16 C W N 145 (Midnapur Damage Suit) 13 Cr L J 65.

An information given to a village Magistrate which it was his bounden duty to pass on to a Police Station House officer who recorded it must be considered as having been given to the latter and recorded as first information under this section and cannot be regarded as a statement recorded during the course of an investigation under sec 16 — S Mad 565.

A statement which is merely the reproduction by the person making it of the statement said to have been made by another person is not first information and not admissible in evidence as such and although the evidence given by that person who furnished the information to the infor-

mant could be contradicted by the evidence of the latter, it could not under Sec 155 (3) Evidence Act, be contradicted by what the police recorded as the first information—*Emperor v Dina Bandhu*, 8 C W N 218.

481 Evidentiary value —The first information recorded by the police is of considerable value at the trial because it shows on what materials the investigation commenced and what was the story then told —*Emp v Kampu Auki*, 11 C W N 554 In every trial it is important that it should be known to the judicial officer what are the facts given out immediately after the occurrence and reported to the police, and the object of the first information is to render him so acquainted For that purpose the diary in which the first information was recorded as well as the memorandum, if any, made by the police of what the informant said, is admissible in evidence—*King Emp v Bhutnall*, 7 C W N 345

But although the first information is a document of considerable importance which is in practice always and very rightly produced and proved in criminal trials yet it is not a piece of substantive evidence and can be used only as a previous statement admissible to corroborate or contradict the author of it—*Autor Singh v Emp*, 17 C W N 1213 14 Cr L J 642 *Chillar v Emp*, 23 A L J 14 47 All 280 26 Cr L J 554 A report of the commission of an offence made at a thana may be used in a criminal trial to corroborate or cross examine a witness, though such reports are no evidence of the existence of facts therein mentioned —*Q E v Ram Sukh*, 1897 A W N 47

As the first information report can only be used by the prosecution for the purpose of corroborating in the witness box the person who supplied the information contained in the document, it follows that if the informant himself can only speak from hearsay, the report cannot be used to corroborate such inadmissible evidence of the witness—*Sajjan Singh v Emp*, 6 Lah 437 26 Cr L J 1489 A I R 19 5 Lah 418

Information relating to the commission of a cognizable offence given orally to an officer in charge of a Police station and reduced to writing by him under this section becomes a public document under section 74 Evidence Act, and its contents may be proved by a certified copy under Sec 77 of that Act—*Abdul Rahman v Q E*, U B R (1892—1896) 24

Officer in charge of a police station —As to the powers of superior Police officers under this section, see Sec 551 In the absence of the Sub Inspector or Head constable a constable left in charge of a Police station cannot accept any complaint or prepare and submit the first information report of any crime reported to him unless the Local Government shall have given him powers under section 4 (p)

482 Shall be reduced to writing —The object of a first information being to show what was the manner in which the occurrence was related

when the case was first started, it should always be carefully and accurately recorded—*Peary Mohan v Weston*, 16 C W N 145 If the information be given orally, it must be recorded in plain and simple language, as nearly as possible in the informants own words The use of technical or legal expressions or high flown language or of lengthy and involved sentences is forbidden—*Beng Pol Code*, p 372 It is of the utmost importance in recording the first information, that the actual words of the complainant should be used and not an *Urdu* translation of them The recorder should take down the complaint as it is made and not merely his own impression of what the complainant meant to say—*Reg and Ord N W P*, p 268

Power to question the informant —If the information whether given orally or presented in writing be not complete in itself the Police officer should elicit by interrogation such further information as may be necessary—*Beng Pol Code* p 372 See also *C P Pol Man* p 147

483 Shall be signed —The informant's statement when complete should be read over to him and he must sign it The report should show that this has been done In heinous cases the statement should be read over to the informant in the presence of one or more respectable and uninterested witnesses who should also be asked to sign it—*Beng Pol Code* p 372

Procedure in the case of written informations —If the information be tendered in writing it will be endorsed with the date of presentation, and the person tendering should be required to sign it (if he has not already done so) If the written information relates to facts with which the person tendering it is acquainted and which he is able and willing to state orally the mere incident that a written report is presented does not make it unnecessary to take down the information from the reporter's own lips If the person who brings the written information knows nothing of the facts to which it refers he should be required to state the circumstances under which he brought it—*C P Pol Man*, p 147

484 Punishment —As to punishment for giving false information to the Police see secs 182 203 211 I P C Even if the information is not reduced to writing under this section the person giving the false information may be convicted for preferring a false charge under sec 211 I P C—27 Mad 127

A police officer refusing to enter in the Diary a report made to him concerning the commission of an offence and making instead an entry totally different from the information given is punishable under sec 177 I P C—*Q E v Md Ismail Khan* 20 All 151

As to punishment for refusal by the person giving information to sign the statement made by him see sec 180 I P C

155 (1) When information is given to an officer in charge of a police station of the commission, within the limits of such station, of a non cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information and refer the informant to the Magistrate

(2) No police officer shall investigate a non cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police-station may exercise in a cognizable case

484A Scope —This section applies to the Police in the towns of Calcutta and Bombay see *Queen Emp v Nilmadhab* 15 Cal 595 *Q E v Visram Babaji* 21 Bom 495

485 Investigation into non-cognizable cases —Under this section a Police officer cannot investigate a non cognizable case and can not submit a report with reference to it without the order of a Magistrate. If he receives information relating to the commission of a non cognizable offence he should enter the substance of it in the diary and refer the informant to a Magistrate. If a Police officer of his own motion as where he has seen the alleged offence committed makes a formal report or complaint in respect of a non cognizable offence it will amount to a *complaint* within the meaning of sec 4 (h) for there is no provision by which he can in such a case make a Police report—*H E v Sada* 26 Bom 150. But see Note 16 to section 4 (h) under heading Report of a Police officer

A Police officer who has been ordered by a Magistrate to investigate a non cognizable offence cannot legally *delegate* the duty of making the investigation to a chief constable—*Q E v Kalidas Ratanlal* 488

It is incumbent upon a police officer who investigates a non cognizable case under the orders of a Magistrate to keep the *diary* for which provision is made in sec 172 *infra*—*Hira Lal v Crown* 1918 P R 16 P. L R 63 19 Cr L J 517

The power to *arrest without warrant* is expressly taken away by this section from the Police in the investigation of a non cognizable offence —U B R (1897 1901) 31

After the investigation is over it is the duty of the Police to submit a report to the Magistrate under sec 173. Where information was given to the Police of the commission of a non-cognizable offence and the Magistrate ordered the Police to investigate the case and report and the Police without submitting any report instituted proceedings against the informants under sec 211 of the I P C for giving false information and the accused were convicted it was held that the conviction was illegal the Police should not be allowed to prosecute without submitting the report of the original case to the Magistrate and without having that case disposed of by the Magistrate—*Emp v Appa Rao* 17 Bom L R 69 16 Cr L J 161

486 Magistrate's power to direct investigation.—In 12 Bom 161, it is laid down that this section is conversant only with the powers of Police officers but it confers no power or authority on Magistrates to direct a local investigation by the Police or to call for a Police report. Magistrates can do so only under sec 202 after taking cognizance of the case. But this view is quite unintelligible and renders sub section (2) meaningless. In *Emp v Ishuauath* 8 Bom L R 589 4 Cr L J 183, it has been correctly held that a Magistrate has jurisdiction under sub section (2) of this section to refer a matter to the police for investigation and report even without a complaint and without examining the complainant. So also in *In re Asadulla* 6 M I T 259 11 Cr L J 156 the Magistrate was held competent to order an investigation without first taking cognizance of the offence under sec 190.

156 (1) Any officer in charge of a police station may, without the order of a Magistrate investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate

(3) Any Magistrate empowered under Section 190 may order such an investigation as above mentioned

487 Scope.—The reference to Chap XV in this section does not limit the application of this section to offences only but the investigat

may extend to cases within the scope of section 55—*Emp v Bhasan*, 1893 A W N 174

This section only empowers the *Magistrate* to direct investigation and a Court of Session has no power to do so—*A E v Al* 1910 P R 11

If there is a delay in the investigation by the Police it is the duty of the committing Magistrate and failing him of the Sessions Judge to inquire fully into the circumstances of the delay and to consider its bearing on the prosecution story—*Q E v Majest* 2 Bom L R 109

157 (1) If from information received or otherwise, an officer in charge of a police-station has cognizable offence reason to suspect the commission of an offence which he is empowered under Section 156 to investigate he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person or shall depute one of his subordinate officers *not being below such rank as the Local Government may by general or special order prescribe in this behalf* to proceed to the spot investigate the facts and circumstances of the case *and if necessary to take measures for the discovery and arrest of the offender*

Provided as follows —

(a) when any information as to the commission of any such offence is given against any person by a person who is not a police officer and the case is not of a serious nature the officer in charge of a police-station need not proceed in person or depute a subordinate officer to make an investigation on the spot,

(b) if it appears to the officer in charge of a police-station that there is no sufficient ground for entering on an investigation he shall not investigate the case

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1) the officer in charge of the police-station shall state in his said report his reasons for not fully complying with the requirements of that sub-section, *and in the case mentioned in clause (b) such officer shall also forthwith notify*

to the informant if any, in such manner as may be prescribed by the Local Government the fact that he will not investigate the case or cause it to be investigated

Change —The italicised words have been added by sec 32 of the Criminal Procedure Code Amendment Act VIII of 1923

Not below such *behalf* —This provision did not exist in the Bill of 1914 but the Select Committee which sat on the Bill in 1916 added the words *not below the rank of a Sub Inspector*. This amendment however did not meet with the approval of the Joint Committee and they made the present amendment. In view of the general objection to the amendment which confines investigations to officers not below the rank of a Sub Inspector we have made an amendment which enables Local Governments to specify a lower rank. We recognise that police work in some provinces might be severely hampered by the above restriction — *Report of the Joint Committee (1922)*

And if necessary to take measures —These words have been substituted for the words *and to take such measures as may be necessary*. Under the old law the taking of measures necessary for the discovery and arrest of the offender was *incumbent* on the police officer under the present law the police officer has an option to take measures for the arrest of the offender if necessary. This amendment makes it clear that the Police have a discretion in arresting a person accused in a cognizable case — *Statement of Objects and Reasons (1914)*

And in the case *investigated* — This amendment provides that if the Police do not investigate a complaint the complainant shall be informed to that effect — *Statement of Objects and Reasons (1914)*. The words *in such manner as may be prescribed by the Local Government* have been added by the Select Committee of 1916.

Secs 154 and 157 —Whereas every information covered by the former section (154) must be reduced to writing as provided in that section it is only that information which raises a reasonable suspicion of the commission of a cognizable offence within the jurisdiction of the Police officer to whom it is given which compels action under the latter section (157) although of course a report would be sent to the Magistrate — *Puny Cir Chap XLV page 171*

From information received —These words refer to the information given in Sec 154 — *Jagdan v Mahadeo 14 C W N 326 Andamuri v Emp 1914 M W N 382 15 Cr L J 622*

488 Investigation of offence outside jurisdiction —There is nothing in this section to prevent the police of one police station from conducting an investigation within the jurisdiction of another police station

Therefore where the police Inspector of T circle during the investigation of a burglary sent some constables to the house of the accused situated in another police circle and the constables locked the house in question and kept guard of the house it was held that the Inspector of T circle did not act *ultra vires*—*Natha Singh v Crown* 1915 P R 12 16 Cr L J 551

489 Report —The report required by this section is the first report of the offence which an officer in charge of a Police station is required to make to a Magistrate as soon as he receives information of an offence and before entering on its investigation. It is to be made direct to the Magistrate in order that he may have an early information and be in a position to act if necessary under Sec 159—*Bombay Police Manual*, page 91

A report under this section is necessary for taking proceedings under sec 159—*Mouli v Naurangi* 4 C W N 351. The Police report under this section would give the Magistrate jurisdiction to enter upon an inquiry. But he may determine as he thinks fit either to take no further steps or to take cognizance of the offence under Sec 190 (b) or to proceed under Sec 203—*Anonymous* 2 Wcir 119

Failure to send a report as required by this section is a serious breach of duty which may lead to failure of justice. Such conduct on the part of the police would lead to a grave suspicion that the police were collecting false evidence—*Crown v Bal el Khan* 4 S I R 38 11 Cr L J 498

Report whether a complaint —A report submitted in the usual way under secs 157 and 173 is not intended to be and could not be a complaint within the meaning of Sec 195—6 O C 1

Report whether public document—*Right of accused to get copies before trial* —The report made by a Police officer in compliance with this section is not a public document within the meaning of sec 74 of the Evidence Act and consequently an accused person is not entitled before trial to have a copy of such report—*Arumigam v Karuppayi* 20 Mad 189

158 (1) Every report sent to a Magistrate under S 157 Reports under S 157 shall if the Local Government so directs, how submitted be submitted through such superior officer of police as the Local Government by general or special order, appoints in that behalf

(2) Such superior officer may give such instructions to the officer in charge of the Police station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate

159 Such Magistrate, on receiving such report, may direct an investigation or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in manner provided in this Code.

490. **Magistrate's power to hold investigation or inquiry**—An inquiry can be made under this section only on a police report submitted within the terms of section 157, i. e. on a preliminary report made *before* the completion of the police investigation or inquiry, but if the report is submitted *after investigation*, the Magistrate is not empowered to act under this section. Thus, where information was laid before the police charging a person with criminal trespass into a house with intent to have improper intercourse with a female therein, and the police reported that they did not believe that the object was to commit the offence stated but that they were not disinclined to believe the charge of trespass, it was held that as the report was made after investigation into the offence, the Magistrate had no jurisdiction to act under this section—*Mauli v. Naurangi*, 4 C W N 351

The inquiry which a Magistrate is competent to hold under this section is a *preliminary inquiry*. Therefore where a report of the commission of an offence has been made by the police *after full inquiry* into the truth of the information given them as to the commission of the offence, the Magistrate has no jurisdiction to make any further inquiry into the same offence—*In re Kandhiya Lal* 1899 A W N 87

An inquiry under this section can be made only on the submission of a police report, if, however, a complaint is made to the Magistrate he is bound to proceed under sec 200—*Loke Nath v. Sanjasi Charaz*, 7 C W N 923

Where a case comes before a first class Magistrate under the provisions of secs 157 and 159, he can depute a sub Deputy Magistrate to hold an investigation or a preliminary inquiry. The latter can also, under sec 164 (1), record a statement of a witness made before him in the course of the police investigation—*Harendra v. Emp* 40 C L J 313 26 Cr. L. J 307

491. **When Magistrate cannot try the case**—When a Magistrate took an active part in the capture of parties charged with the commission of an offence, and then tried them himself on that charge, he is not competent to try the case again—*State v. ...*

Magistrate whose evidence should be recorded and form part of the record in the case. The proper course however for the Magistrate to have taken in such a case would have been to decline to try the case and to ask that it should be taken up by some other Magistrate—20 W R 76

160 Any police officer making an investigation under this

Chapter may by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise appears to be acquainted with the circumstances of the case and such person shall attend as so required

492 Order in writing —The order to attend under this section must be in writing. In the absence of an order in writing a person required orally to appear before a police officer as a witness cannot be convicted under section 174 I P C for disobedience of such order—*In re Veerasamy* 1 Weir 86. So also where a Police Inspector sent a constable to bring two persons for inquiring of them about an offence and the order was not in writing the persons need not accompany the constable. If the persons accompanied the constable they could not be said to have been in lawful custody of the constable and any person inducing those two persons not to accompany the constable could not be held guilty of rescuing them from lawful custody—Q E v Pursholam Ratanlal 850

493 Require the attendance —An officer in charge of a police station may require the attendance of persons whose evidence is necessary and the persons summoned are bound to obey the order but in no case can the police compel a witness by force to attend before him—7 W R 3 Ratanlal 850. See also *Bengal Police Manual* 2nd Ed p 378

Detention —A police officer has no power to arrest or to detain even for a single moment any person whose evidence is required for the purpose of investigation—7 W R 3

Security bond to appear —There is no provision in this Code authorising a police officer to take security bond for the production of any person before the police, and the Magistrate has therefore no power to alter it and impose fresh conditions under it—11 Cal 77. But see 1913 P R 22 cited under secs 497 and 499

494 Who may be required to attend —*Accused* —This section applies only to the case of persons who appear to be acquainted with the circumstances of the case : i.e. witnesses or possible witnesses only. An order under this section cannot be made requiring the attendance of an *accused* person, with a view to his answering the charge made against him. The

intention of the legislature seems to have been only to provide a facility for obtaining evidence and not for procuring the attendance of the accused who may be arrested at any time if necessary—*Q E v Saminada* 7 Mad 274 *Emp v Ratan* 4 Bom L R 644 Therefore where the accused person refused to obey an order under this section and was therefore taken into custody by the police it was held that the Police was guilty of wrongful confinement although the police was justified in arresting without warrant upon the original charge made against the accuse 1—2 Weir 121

Woman —It is an unusual course for the Police to take a number of women away from their village to the police station on the pretext that they wished to examine them The examination should be properly conducted at the women's own houses—9 C W N 199

Shall attend —If a person fails to attend before a police officer making an investigation under this chapter he is liable to be prosecuted for an offence under section 174 I P C —24 Cal 320

495 *Magistrate's power to interfere or issue warrant* —A Magistrate has no power to issue a warrant for the arrest and production of a person in order that such person may give evidence before the Police during an investigation under this chapter—24 Cal 30 He cannot interfere with the exercise of discretion given to a police officer to summon witnesses though he might offer his suggestions or advise the Police officer as to a particular course of action—*In re Sankalchand Ratanlal* 133

161 (1) Any police officer making an investigation under this Chapter or any police officer not below such rank as the local Government may by general or special order prescribe in this behalf acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

Change —The italicised words have been added by sec 33 of the Criminal Procedure Code Amendment Act (XVIII of 1923) This amendment is similar to that made in section 157 (1)

Scope —The provisions of this section should not be utilised in any but heinous cases Heinous cases include cases triable exclusively by a Court of Session and those cases in which special diaries are submitted

through the Magistrate either to the Commissioner only or both to the Commissioner and to the Deputy Inspector General or Inspector General of Police—*Beng Pol Code* p 43*

496 Examination of accused before arrest —When a police officer has evidence before him upon which he is bound to arrest a person he should not preliminary to his arrest obtain a statement from that person professedly under this section and reduce it to writing—27 Cal 295

497. Statements of witnesses —*Not privileged under sec 172* — Where a Police officer making an investigation under this section took statements from the persons who were afterwards called as witnesses the accused person would be entitled to call for and inspect such documents and cross examine the witnesses thereon as such statements would not amount to a portion of the diary referred to in sec 172—*Bika v Q E*, 16 Cal 610 *Sheru Sha v Q E* 20 Cal 642 *Emp v Rudra Singh* 1896 A W N 193 9 C P L R 33 U B R (1897 1901) 29 *Contra—Q E v Mannu* 19 All 390 *Q E v Nasiruddin* 16 All 207

Statements not the property of Police —There is no prohibition against any person present at the time when depositions are being taken or confessions made to take down in writing what either a prisoner or a witness says—*In re Aristo Lal Nag* 10 Cal 456

498 Recording of statements —Statements made by a witness to a police officer under this section during an investigation may be reduced to writing But it is not obligatory on the Police officer to reduce to writing any statement made to him He may do so only if he likes—*Reg v Utamchand* 11 Bom H C R 120 The words and may reduce into writing any statement made by the person so examined which occurred in the Code of 1882 at the end of the first para have been omitted from the Code in 1898

The statements of witnesses should not be recorded in the special diary mentioned in sec 172—*Dadan Gazi v Emp* 33 Cal 1023

It is not necessary that the statements of witnesses recorded under this section should be in the form of alternative question and answer It is enough if the statement so recorded is substantially an answer to the questions put to the witnesses—*Q E v Bagwanthia* 15 All 11, 1896 P R 7

The statements need not be signed by the witnesses It is not illegal for a police officer obtaining the signature of witnesses to a statement under this section to authenticate his record of such statement but there is nothing to compel them to sign it—*Q E Bagwanthia* 15 All 11

499 Privilege of witnesses —A statement made by a witness in answer to a question put to him by a police officer in the course of an

investigation under this section is privileged and cannot be made the foundation of a charge of defamation—16 Mad 235 nor can he be made liable in an action for damages for any words spoken during such investigation—28 Cal 794

Witness not bound to speak the truth —Under the Code of 1882 a witness was bound to answer *truly* all questions put to him under this section but the effect of the omission of the word *truly* from the Code of 1898 has been to do away with the legal obligation to speak the truth—*Nga Pyn v Emp*, 10 Bur L T 259 18 Cr L J 844 Therefore witnesses cannot be prosecuted for giving false evidence under this section—23 Mad 544 *Nga Po v A E* 9 Bur L T 203 18 Cr L J 98 The Select Committee (1898) observed — It seems to us unfair that a man should be liable to be convicted of giving false evidence on the strength of or by the aid of a statement supposed to have been given to a Police officer but which is not given on oath which he has not signed and which he has had no opportunity of verifying such statement may be hurriedly taken down as rough notes the police officer is not trained in taking evidence and the notes are often faked out by another officer They bear no resemblance to depositions and ought to have no weight as such attached to them The provisions of sections 202 and 203 of the Penal Code appear to us to afford a sufficient safeguard against false information

This change in the law supersedes the following cases decided under the Code of 1882 and earlier Codes —10 Cal 405 8 C L R 236 20 W R 41 8 Bom 216 11 Bom 659 15 All 11 1896 P R 7

Since a person making a statement under this section cannot be said to give information within the meaning of sec 182 I P C he cannot be prosecuted under that section for giving false information if the statement made by him be false—*Mangu v Crown* 1914 P L R 227 15 Cr L J 650 nor under section 211 I P C—31 Mad 506

500 *Refusal to answer question* —Under this section a person answering questions put by a police officer is not bound to answer truly Therefore a refusal to answer such questions is not punishable under sec 179 I P C —*In re Savant* 1 Weir 111 *Q E v Sankarlga* 3 Mad 544, 1908 P R 27 *Crown v Mahmad* 6 S L R 277 14 Cr L J 302

Incriminating questions —Under subsection (2) a witness is not bound to answer questions put to him by a police officer the answer to which would have a tendency to expose him to a criminal charge—*Q E v Annia Ratanlal* 518 *Q E v Kaldas Ratanlal* 488 A person examined under this section by the police with respect to an offence with which he may himself be charged and convicted is not bound to speak the truth and in such a case a conviction for giving false evidence would be illegal—*Q v Usuphkhhan Ratanlal* 619

162 (1) No statement

Statement to be made by any person to a police officer in the course of an investigation under this Chapter shall if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence. Provided that when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof and such statement may be used to impeach the credit of such witness in the manner provided by the Indian Evidence Act, 1872

162 (1) No statement

Statement to be made by any person to a police officer in the course of an investigation under this Chapter shall if reduced into writing, be signed by the person making it, nor shall any such statement or any record thereof whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at an inquiry or trial in respect of any offence under investigation at the time when such statement was made

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid the Court shall on the request of the accused refer to such writing and ***direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 Where any part of such statement is so used, any part thereof may also be used

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid the Court shall on the request of the accused refer to such writing and ***direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 Where any part of such statement is so used, any part thereof may also be used

in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross examination :

Provided, further, that if the Court is of opinion that any part of any such statement is not relevant to the subject matter of the inquiry or trial, or that its disclosure to the accused is not essential in the interests of justice, and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of Section 32, clause (1), of the Indian Evidence Act, 1872

Change —Sub section (1) of this section with its proviso has been thoroughly redrafted by sec 34 of the Criminal Procedure Code Amendment Act XVIII of 1923

Legislative history of the section and reasons for the change —
 "The amendment of section 162 has been discussed at great length by the Committee. It has been the subject of amendment before and of constant difficulty in the Courts. We therefore propose to recast the section, and we think that a note as to its previous history will be instructive

Under the original Code of 1861 (section 145) a Police officer could examine potential witnesses and reduce their statements to writing but the *writing* was not to be part of the record or used as evidence. The Code of 1872 maintained the above provisions merely adding (section 119) that no person when examined by the Police should be bound to answer incriminating questions. The only material change made by the Code of 1882 (section 162) was that instead of the provision that the statement when so reduced to writing should not be used as evidence, it

provided that no statement made by a witness if reduced to writing should be used as evidence *against the accused*, thus making it clear that the provision in question was intended for the benefit of the accused

"The new section did not lay down in terms that the accused might not use the written record of a witness' statement for the purpose of his defence, and indeed it rather suggested that he was entitled to do so. Accordingly cases occurred in which the accused demanded to see the statements which the police had taken down, in order that he might use, for the purpose of his defence, anything that appeared therein to his advantage, and the Calcutta High Court ruled that he was entitled to do so. The Allahabad High Court, on the other hand, held that the writings in effect formed part of the police diary and were therefore privileged from inspection, and this was the position which stood to be dealt with when the Amending Act of 1898 was under consideration. There was evidently a good deal to be said on both sides as will appear from the report of the Select Committee (1898) on the Bill which is quoted *in extenso* below.—

"The question involved (namely, whether the accused is entitled to inspect statements taken down by the police under section 161) is full of difficulty. In the first place, it is essential in the interests of public justice that the sources of police information should be kept secret. If the names of informers or detectives and the nature of their information be disclosed, the detection of crime would be seriously crippled. In the second place, it is unfair to a witness that his evidence should be discredited on the strength of an alleged statement made to a policeman, which he may have had no opportunity of verifying or correcting. Such statements must necessarily be often taken down hurriedly and may be incorrectly copied out. They are not taken down as depositions, or with regard to the rules of evidence, but merely to aid the police in the course of their investigation. But in the third place, it may be most important for the accused to show that a witness called for the prosecution is telling a story substantially different from that which he told when first questioned by the police. We have endeavoured to reconcile these conflicting interests by reverting to the language of the Codes of 1861 and 1872, and adding a proviso compelling the Court, on the application of the accused, to refer to such statements, and then empowering it in its discretion to allow him to have copies of them. We then provide for the mode in which these statements are to be used. It is clear that a witness ought not to have his credit impeached on the strength of a statement alleged to have been made to a policeman, unless and until it is shown that he has made that statement'.

"The result was not altogether a happy one. It will be noticed that the section deals mainly with the *writing* and enacts that it shall not be used in evidence, with a proviso that the Court may in its discretion direct the accused to be furnished with a copy of it—presumably only in order that the accused may know that there is something in the writing which may help his defence—and goes on to say that the statement (*i. e.* what the witness said to the Police officer) may be used in the ordinary course to impeach the credit of the witness, obviously implying that for this purpose it must be duly proved.

"It seems clear that all that the amendment of 1898 intended to effect was to make it clear that the accused had no right to call for or see the record of any statements taken down by the police under section 161, unless the Court thought that in the interests of justice he should be allowed to do so. It did not purport to deal with, and has left untouched, the further question whether or not a statement made by a witness under section 161, as apart from the written record of the statement, might be used by the prosecution for the purpose of corroborating one of their witnesses under section 157 of the Evidence Act and this is at all events one of the principal difficulties with which we have to deal now.

"The re draft of the section which we propose will make it clear that the statements taken under section 161 (and not merely the written records of such statements) are not to be used in any way or for any purposes except as allowed by the proviso. Having regard to the fact that the making of such statements is compulsory under section 161 and to the way in which and the circumstances under which, they are usually recorded we do not think that they are of any corroborative value where the witness merely repeats the same statement in Court, and that they ought not therefore to be allowed to be used for the purpose of corroboration under section 157 of the Evidence Act. If the really material fact to the prosecution is that a *statement* was made to the police on a particular date or at a particular place this fact will of course still be provable in the ordinary course and it will be open to the Courts or to a jury to make any proper deduction from this fact and the action which was taken on it. The amendment will also we think, make it clear that if the accused wishes to rely on anything in the previous statement of a witness to the police, of which he has been allowed by the Court to have a copy, he will have to prove it in the ordinary way. If the witness admits this in cross-examination, it will of course be sufficient, if he denies the contradiction and the police officer who took it down is called by the prosecution, the previous statement of the witness on the point may be proved by him, if he is not called by the prosecution, the Court would no doubt itself in most cases call him, or if the accused is calling evidence in his defence, it may be worth his while to call the Police officer."

it is clear that unless the previous contradictory statement is proved in some way in accordance with law, it ought not to depreciate the witness's statement on oath. It will be observed that under our amendment if any part of the previous statement of the witness is used for the purpose of cross examination by the accused any other part of it may be used by the prosecution within the proper limits of re-examination. This is we think the only way in which the previous statement ought to be allowed to be used by the prosecution.—*Report of the Select Committee of 1916*

501 Use of statement.—Prior to the present amendment a distinction was drawn between *writing* and the *statement* embodied in the writing—36 Cal 281 and the result was that the *writing* i.e. the document containing the statement could not be used as evidence against the accused, but the *statement* could be proved against him—*Lalji v Emp* 1886 P R 15, *Emp v Hanmaraddi* 39 Bom 58 16 Bom L R 603, *K L v Nilahanta* 35 Mad 247 22 M L J 490 *Rus'ani v King Emp* 7 A L J 468 (per Karamat Husain J) In 32 Bom 111 it was remarked that the distinction between the writing and the statement was a distinction of form rather than that of substance and that therefore a statement could not be admitted or used in evidence against the accused.

The present section as now amended prohibits the *statement* also to be used for any purpose except as expressly provided in the first proviso and the above rulings are no longer good law. See the observations of Macpherson J in *Badri Choudhury v A L* 6 P L T, 620 A I R 1926 Pat 20 27 Cr L J 362.

Under the old section the police officer who recorded the statement could use it to *refresh his memory*—19 All 390 21 All 159 11 Bom 637 32 Bom 111 (per Batty J) 22 Bom 596 11 B H C R 120 9 Cal 455 *Ratanlal* 503 (Contra—33 Cal 1023) Under the present law such use of a statement is not permitted.

A statement made by a witness to the police can be used only to *contradict* the witness, it cannot be used to *corroborate* his evidence before the Court, such a procedure is distinctly opposed to the provision of the law in this behalf—*Emp v Jyibhai*, 22 Bom 596, *A L v Kumaramuthu*, 25 M L T 379 20 Cr L J 354, 13 O C 7. Section 157 of the Evidence Act lays down that in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact is admissible in evidence but this general rule is controlled by the special provisions of sec 162 Cr P Code. This section as it existed prior to its amendment in 1923 expressly prohibited the use of the record containing the statement of a witness to the police as evidence against the accused, and the controversy as to the admissibility of such statement by oral evidence has now been set at rest by the amendment made in 1923 which

has substituted the words "nor shall such statement or any record thereof be used for any purpose at any inquiry or trial" for the words "nor shall such writing be used as evidence." The result is that not only is the record of the statement of a witness taken under sec 161 excluded from evidence, but also the proof of such statement by oral evidence for the purpose of corroborating the testimony of the witness for the prosecution—*Rakha v. Crown*, 6 Lah 171 26 P L R 304 A I R 1925 Lah 399

This section does not prevent the prosecution, after a witness has made a statement, from asking him simply whether he made that statement to the police, or when a witness has made a statement in his evidence, from asking the Sub-Inspector whether in fact the witness had made that statement to him. In doing this, there is no use of the statement recorded by the police during their investigation. the witnesses or the sub Inspector are merely asked as to a certain fact—*Guhli Afian v Emp*, 4 Pat 204. A I R 1925 Pat 450

Where a Magistrate used the statements made before the chief constable during the police inquiry, without conforming to the provisions of this section and without affording the accused an opportunity of cross-examining the constable, and considered those statements as corroborative of the evidence given by the witnesses at the trial, and convicted those whose names were mentioned both in Court and in those statements, and acquitted those whose names were not mentioned therein, it was held that such use of the statements being grossly irregular and having seriously prejudiced the accused, the whole trial was bad, and that the irregularity was not cured by sec 537—*Emp v Babaji*, 9 Bom L R 366. 5 Cr L J 353

Statements of witnesses taken in the course of police investigation must not be signed, even if they are signed contrary to the provisions of this section, they do not thereby become statements taken under sec 154 and do not become admissible as first information. The police by violating the provisions of section 162 and thus committing an illegality cannot make admissible statements which are inadmissible under the law—*In re Narayana Menon*, A I R 1925 Mad 106 25 Cr L J 401

It is also illegal for a Magistrate to use as evidence against the accused the statements made by prosecution witnesses before the police by comparing them with their depositions and as a result of that comparison, to convict him—*Emp v Laxman* 9 Bom L R 895 *Emp v Narayan*, 32 Bom 111, 1886 P R 17

The statement cannot be used to make up for the deficiency in the evidence of the prosecution witnesses—*Q L v Haribai*, Ratanlal 935; 28 Cal 348

A statement taken from an accused person under this section in course of the police investigation is no evidence against him and he

not to be made to sign it—*Mallela v Emp* 1917 M W N 875 19 Cr L J 38

501A Statement of accused —This section refers only to statements of persons examined as witnesses by the police in the course of investigation and not to statements made by accused persons as such—*Rannun v K E.* A I R 1926 Lah 88 *Garpati v Emp* 6 N L R 180 12 Cr L J 60. A statement made by an accused person to the police which is not in the nature of a confession is not inadmissible in evidence—*Sikandar v Crown* 1918 P R 36 10 Cr L J 83 *Jogwa Dianup v Emp* 5 Pat 63 In a recent Nagpur case it has been held that this section covers statements made by the accused to the police officer before his arrest. Such statements are inadmissible and the investigating officer cannot be made to disclose them in his examination as prosecution evidence—*Sircosainarayan La. v Emp* 8 N L J 217 A I R 1926 Nag 1. The Sind Court holds that the words statement of any person refer to the statement of a person examined as a witness in the course of police investigation and do not include the statement of an accused person in respect of whom such investigation is being held—*Adho v Emp* 26 Cr L J 897 A I R 1925 Sind 257 *Umer Daraz v Emp* 26 Cr L J 778 A I R 1925 Sind 237

502 First Proviso—Scope —The proviso deals with one case and one case only the case of witnesses called for the prosecution whose statements have been taken down in writing as aforesaid. And the only concession it makes to the accused is to allow him upon his request and subject to the Court's discretion (under the second proviso) to have access to a copy of the recorded statement and thereupon to use it for one purpose and one purpose only viz to break down the evidence of the prosecution witnesses already standing against him. On the face of it the proviso does not cover the case of a witness for the defence whose statements may have been recorded by a policeman nor allows the prosecution to impeach the credit of such a witness by examining him upon any written statement he may have made to the police—*Emp v Narayan* 37 Bom 111 1, All 25 U B R (1918) 84 *A E v Vithu* 26 Bom L R 965 A I R 1924 Bom 510. According to the recently amended provisions of section 162, statements of witnesses recorded by the investigating officer can only be used to assist the accused in particular by showing that a witness who in Court deposes to certain facts has in such a statement at an earlier stage given an account or made statements which are contradictory to the testimony which he gives in Court. They cannot be used in cross examining the witnesses not merely to show contradictions but at large for the purpose of showing that the statements did not corroborate or assist the story as put forward in the first information report—*Badr's Chowdhuri v A E* 6 P L T 620 A I R 1926 Pat 20 27 Cr L J 362

The first proviso to this section makes an exception in favour of the accused but it is an exception most jealously circumscribed under the proviso itself. Any part of such statement which has been reduced to writing may in certain limited circumstances be used to *contradict* the witness who made it. The limitations are strict (1) only the statement of a prosecution witness can be used and (2) only if it has been reduced to writing, (3) only a part of the statement recorded can be used (4) such part must be duly proved (5) it must be a contradiction of the evidence of the witness in Court (6) it must be used as provided in section 145 of the Evidence Act that is it can be used only after the attention of the witness has been drawn to it or to those parts of it which it is intended to use for the purpose of contradiction and there are others. Such a statement which does not contradict the testimony of the witness cannot be proved in any circumstances and it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the investigating officer—*Ibid* (per Macpherson J)

The words 'if duly proved' in the proviso clearly show that the record of the statement cannot be admitted in evidence straightway but that the officer before whom the statement was made should ordinarily be examined as to any alleged statement or omitted statement that is relied upon by the accused for the purpose of contradicting the witness—*A. E. v. Vithu* 26 Bom L R 965 A I R 194 Bom 510

There is no presumption as to the genuineness of the statements of witnesses entered in the police diaries and unless they are duly proved, the evidence given in Court cannot be contradicted by them—*Labb Singh v Emp* 6 Lah 24 26 Cr L J 1153 A I R 1925 Lah 337

The words 'such statement' means the statement *reduced to writing* and does not cover any statement—*Lenkatasubbia v Emp* 48 Mad 640 48 M L J 195. The application of the new section is confined as the old section was to the *written* record the new section is designed to confer on the accused person a legal right which the old section did not give of having a copy of such written statement for the purpose of using it to contradict the witness and as regards proof and use of oral statement the law is unaltered and is as it was before. All oral statements which were previously admissible under the Indian Evidence Act and the use of which was not prohibited by the Cr Pro Code are still admissible and may be used—*Ibid*

503 Right of accused to get copy of statement —Under the first proviso as it stood before the present amendment the words 'may if the Court thinks it expedient' (see the old section cited parallel) show that the accused was not entitled as a matter of right to obtain access to a copy of the written statement. His right to obtain such copy was left to the dis-

cretion of the Court—*Emp v Narayan* 32 Bom 111 *Q E v Nasiruddin* 16 All 207 The accused could get a copy only if the Court thought it expedient in the interests of justice to furnish him with such copy—*Dadan Gazi v Emp* 33 Cal 1023 *In re Thiruvengada* 26 M L J 182 15 Cr L J 289

Under the present law, the words *shall direct* would seem to give the accused a right to obtain the copies See *Venkatasubbiah v Emp* 48 Mad 640 48 M L J 195 But such right has again been curtailed by the second proviso

The application to get a copy of the recorded statement must be made at the time when the prosecution witness whom it is desired to test by reference to his recorded statements appears on the box But if after all the prosecution witnesses have been examined the defence applies to the Court to summon the Inspector of Police to appear with his diary, the application may be refused But even in such a case the Court ought to send and peruse the statements recorded in the diary and if on such perusal it thinks that it would be expedient in the ends of justice (and that otherwise a gross miscarriage of justice may result) to allow the accused to use such statements it would be open to the Court to furnish the accused with copies of the statements even at such a late stage and recall the witnesses and permit cross examination—*Dadan Gazi v Emp* 33 Cal 1023 The stage at which an accused person is entitled to ask for copies of statements made by the prosecution witnesses to the police in the course of the investigation is the stage when the witness had made a statement which lays him open to contradiction by his former statement to the police Consequently the accused is not entitled to the copies before cross examination is opened at all—*In re Peramasami* 22 L W 784 27 Cr L J 100 A I R 1926 Mad 183

Where the accused was furnished with materially inaccurate copies of the statements of a prosecution witness recorded in the police diary, and on discovering the mistake he applied to have that witness recalled for the purpose of re cross examination in order generally to impeach his credit but the Court refused the application *held* that the accused was entitled to have the witness recalled and the Court committed an error of law in refusing the application—*Sadananda v Ramasray*, 21 Cr L J 289 (Pat)

504 Second proviso —This proviso did not occur in the Bills of 1914 and 1921 nor in the Reports of the Committees but was added during the Debate in the Assembly It has been noted above that the first proviso removed the discretion of the Court to grant copies of statements to the accused and made it *obligatory* on the Court to show such statements to the accused to help him in his defence As soon as that

proviso was passed Government viewed it with grave concern and apprehended that the proviso would make the prosecution of an accused person most difficult and would hamper justice in as much as a statement made before the police by a witness might contain such highly important matter that its disclosure to an accused might be prejudicial to the State. The Government therefore strenuously opposed the proviso and Sir Henry Moncreff Smith moved for its deletion leaving the whole section unamended. Mr Rangachariar and other non official members opposed the motion and said that by passing the proviso they had done nothing but to give the accused fair justice grant him a right which had been denied to him for so long and put a stop to what amounted to secret trial if there was any confidential matter it might be entered in another diary by the investigating police officer.

The official members maintained that the disclosure of the full statement would in the majority of cases be harmful. It contained the sources of police information and also more than was involved in the case of the accused. For instance if a dacoit was caught a witness might give evidence which might lead to the detection of other members of a gang. Would it not be harmful to the interests of the State to disclose such evidence in full to an accused? The recording of evidence in separate diaries would be dangerous because it would result in an incomplete statement and the Magistrate would not have the benefit of the police investigation as a whole.

A hot debate then ensued and both sides were equally uncompromising. At last Sir Henry Stanyon who disagreed with the view of the Government suggested that if the Government could propose an amendment which while granting the above right to the accused also provided safe guards against the disclosure of the contents of a statement which it might be prejudicial to the State to reveal the House would accept such a compromise.

The second proviso is the result of this compromise. See the *Legislative Assembly Debates* February 14 1923 pages 2224 2243.

505 Subsection (2) —Dying declarations —The dying statement of a deceased must be taken in the presence of the accused person if not so taken the writing cannot be admitted to prove the statement made. The statement may however be proved in the ordinary way by a person who heard it and the writing may be used for the purpose of refreshing the witnesses' memory.—*Emp v Samiruddin* 8 Cal 211 6 C W N 921 1886 P R 13.

It is advisable where a dying declaration is elicited by questions to set out the questions and answers and if possible it should be taken in the presence of the accused who should then be allowed to cross examine if he likes.—*King Emp v Madura* 6 C W N 111 1886 P R 13.

Where the document containing the dying declaration was not signed by the deponent and the Police officer was not bound by law to take it down in writing *held* that the proper method of proving the oral statement of a dying man was by the oral evidence of any person who heard it that person being allowed to refresh his memory by reference to the notes he made or read at the time—*Bhagwan v Emp* 10 N L R 19 15 Cr L J 243

163 (1) No police officer or other person in authority shall offer or make or cause to be offered or made any such inducement, threat or promise as is mentioned in the Indian Evidence Act, 1872 Section 24

(2) But no police officer or other person shall prevent, by any caution or otherwise any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will

506 Person in authority —This term is not defined in the Act But [it must not be used in any restricted sense so as to mean only a person who has control over the prosecution of the accused The test would seem to be whether the person had authority to interfere with the matter and any concern or interest in it would be sufficient to give him that authority—*Reg v Navroji* 9 B H C R 358

The following are persons in authority —Honorary Magistrate—1 W R 24 a Magistrate or Sessions Judge recording a confession—*Emp v Asghar* 2 All 260 Q E v *Uzzer* 10 Cal 775 Village Magistrate—26 Mad 38 Police Patel—3 Bom 1 40 Bom 20 Panchayatdar—9 C W N 474 11 C W N 904 a travelling auditor of a Railway Company is a person in authority as regards one of its booking clerks—*Re v Navroji* 9 B H C R 358

507 Inducement, threat or promise —Section 24 of the Evidence Act runs thus —

A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement threat or promise having reference to the charge against the accused person proceeding from a person in authority and sufficient in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him

'All oppression and trickery in regard to obtaining confession are to be avoided by the Police under pain of the severest penalties and the

practice of employing private individuals to worm out confession from accused persons is strictly prohibited. Nothing so clearly shows want of detective tact, talent and resource and of patient industry in a Police officer as the resort to foul means to obtain confession. The most ignorant and clumsy can make out a case if he can torture the culprit till he tells him all about it. True detective talent and sagacity manifest themselves in patient and unremitting industry in weaving round the culprit such a network of undoubted facts and damning circumstances gathered from a variety of sources that he cannot escape.—*Mad Pol Man* p 9.

An admission obtained from a prisoner by persuasion and promise of immunity by the Police ought not to be received in evidence.—9 W R 16

A confession which is the direct outcome of the confessing accused being given to understand that if he confessed there was a reasonable prospect of his receiving a pardon is irrelevant under section 24 of the Evidence Act. It cannot be used either against the person making the confession or against his co-accused. But where after making such a confession the accused again makes a statement under sec 364 during the trial in which after stating that he has now no hope of obtaining a pardon he affirms the confession previously made such statement is relevant and may be used against himself.—*Imp v Tari* 43 All 633 21 A L J 385 24 Cr L J 785

Instances of inducement threat etc — I will get you released if you speak the truth — 8 W R 13 188 P R 8 9 W R 16 If you speak the truth we would speak to the constable and arrange — (*Mad* 39 You had better tell the truth — 10 Cal 775 1 B I R O C You had better pay the money than go to jail and it would be better for you to tell the truth — 9 B H C R 358 Tell me what you know about it if you will not, I can do nothing for you and I will send for the constable — *Mukherji v Q E*, U B R (1897 1901) 147 If you confess the truth nothing will happen to you — *Q E v Lucloo* 5 N W P H C R 86 If you confess to the Magistrate you will get off — *Q v Ramthai* 1 W R 24 Tell me what happened and I will take steps to get you off — 3 Bom 12 It is of no use to deny it for there are the man and the boy who will swear that they saw you do it — *Mukherji v Q L U B R* (1897 1901) 147

What are not inducements etc — Exhortation to speak the truth — *Gulaba v Emp* 1894 P R 9 11 C W N 904 holding out hopes of divine forgiveness — 5 M L J 29 (Journal) threatening excommunication from caste for life — *Ibid* I know the whole thing — *A E v Rango* 3 Bom L R 404 Take care, we know more than you think we know these words amount only to a caution and not to a threat — *Ibid*

164 (1) Every Magistrate not being a police officer may record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial

Power to record statements and confessions

164 (1) Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the 2nd class specially empowered in this behalf by the Local Government may, if he is not a police officer, record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial

Power to record statements and confessions

(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in S 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried

(3) *A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him, and no Magistrate shall record any such confession unless upon questioning the person making it, he has reason to believe that it was made voluntarily, and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect —*

"I have explained to (name) that he is not bound to make a confession and that if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him

(Signed) A B,
Magistrate "

Explanation—It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case

Change—The changes in the section as shown by the italicised words have been introduced by section 35 of the Criminal Procedure Code Amendment Act (XVIII of 1923) The reasons have been thus stated :

'We think that confessions and statements should not be recorded under the section by third class Magistrates at all or by second class Magistrates unless specially empowered We consider that a statutory obligation should be laid on a Magistrate acting under the section to warn an accused person about to make a confession that the same may be used against him and we think that the certificate prescribed by sub section (3) should record the fact that the warning had been given —*Report of the Joint Committee (1922)*

508 *Object of section*—The object of police proceedings is to collect information as a preliminary step to the production of evidence in judicial proceedings against an accused person For this purpose, any person may be examined and any statement may be reduced to writing by the Police But no statement made to the Police can be used in evidence against the accused To these provisions the present section seems to be supplementary The Magistrate may prepare what the Police may not a record of any statement be it a confession or not which is made to him before judicial proceedings commence—*Lalu v Emp*, 1893 P R 2

This section does not enable a police officer who has obtained a statement incriminating the accused made by some person to send such person to a Magistrate practically under custody to have him examined and his statement recorded before the judicial inquiry or trial for fixing him down to that statement in the subsequent judicial proceedings—*Q E v Jadub*, 27 Cal 295

509 *Scope of section*—This section under the old law did not apply to the Police in the town of Calcutta Therefore it did not apply to a statement made by a person in custody to a Magistrate in Calcutta in the course of an investigation made by the Police in the town of Calcutta—*Q E v Nilmadhab* 15 Cal 595 Nor did this section apply to the town of Bombay—21 Bom 495

The present section has been made applicable to confessions recorded in Presidency towns by reason of the reference to Presidency Magistrates at the beginning of the section But it should be noted that even in spite of this amendment the application of this section to Presidency towns is extremely limited Sub-section (2) (a) of sec 1 of this Code expressly lays down that nothing contained in this Code in the absence of any specific provision to the contrary shall apply to the police in the town of Calcutta

(or Bombay) The only sections in Chap XIV which are applicable to the Police of Calcutta (or Bombay) are sec 155 and sec 156 (3) and sec 164 so far as Presidency towns are concerned applies only to confessions recorded under those two sections. That is section 164 applies to confessions made in the course of investigations held by the Calcutta Police only where the Police investigation is either an investigation in a non cognizable case held under the orders of a Presidency Magistrate as contemplated by sec 155 or is an investigation into a cognizable case held under the orders of a Presidency Magistrate as contemplated by section 156 (3) —*Emp v Panch Kari* 29 C W N 300 52 Cal 67 26 Cr L J 782

Native State —A confession made to a Magistrate of a Native State who duly recorded and certified the same according to the provisions of this Code would be admissible in evidence in a British Court—*Badan v K E* 1909 P R 2 *Q E v Nagla* 22 Bom 235 12 All 595 In *Bhola v A C* 1907 P R 8 it was held however that a confession so recorded by a Magistrate in a Native State was not entitled to the same weight as a confession recorded by a Magistrate in British India in strict compliance with the terms of this Code and Courts should hesitate to convict the accused upon such a confession standing alone. See also 2 Weir 125 where it is held that a confession made before a Foreign Court even if it is certified according to the provisions of this section cannot be used in evidence unless it is sworn to like confessions made to private individuals. See also *Emp v Dhanka* 16 Bom L R 261 15 Cr L J 433, where it is held that the Magistrate of a Native State recording a confession must be examined to prove the confession before it can be used as evidence.

A Magistrate having jurisdiction in a district in British India cannot record a confession in a place in a Native State in connection with an offence committed in his district—*Mahar Singh v Emp* 19 A L J 355 22 Cr L J 567

510 Who can record statement or confession —The power to record statements and confessions under this section is given to Magistrates not being Police officers. Magistrates who are also police officers (e.g. patels in Bombay) are not competent to record statements or confessions —*Q E v Bhima* 17 Bom 485. So also Police officers having magisterial powers have no power to record statements—*Q v Huribole* 1 Cal 207

Where a Tahsildar having powers of a Magistrate and being invested by the Local Government with power to take cognizance of offences upon complaint or police report was conducting an inquiry on complaint received, held that he must be deemed to have been doing so as a Magistrate and not as a police officer—*A E v Gulab* 11 A L J 286 35 All 260

A third class Magistrate has no power to record a statement under sec 164. A statement so recorded by him is not evidence in a stage of judicial proceeding, and if it is contradicted afterwards before a Magistrate having jurisdiction and holding a preliminary inquiry, it will not furnish an alternative charge of giving false evidence in a judicial proceeding—*Emp v Shettappa*, 14 Bom L R 753 13 Cr L J 709

An Honorary Magistrate, who is a member of an independent Bench with third class powers cannot record a confession or statement—29 Cal 483. The ruling in *Ghinna v Emp*, 3 P L J 291 19 Cr L J 135, in which it was held that an Honorary Magistrate of the third class not empowered to sit singly had nevertheless power to record a confession, is rendered obsolete by the present amendment.

Where a case comes before a first class Magistrate under secs 157 and 159, he can depute a Sub Deputy Magistrate to hold an investigation or a preliminary inquiry. The latter can, under the provisions of this section, record a statement of a witness made before him in the course of the police investigation and therefore this is admissible as a statement made in the course of an investigation—*Harendra v Emp*, 40 C L J 313 A I R 1923 Cal 161 26 Cr L J 307

A Magistrate who directs the police investigation is not incompetent to record a statement or confession under this section. On the other hand, it is the duty of the Magistrate who directs a police investigation or holds a preliminary inquiry under this Code to record statements under Sec 164, it is his duty to see that the accused confesses voluntarily, and to record his confessions truly—*Emp v Maisri*, 5 S L R 31 12 Cr L J 489

A confession or statement under this section may be recorded by a Magistrate who afterwards conducts the inquiry or trial—*Barindra v. Emp* 37 Cal 467. A Magistrate is not debarred from recording the confession of an accused person under this section merely because it may be afterwards his duty to hold a preliminary inquiry—*Ratanlal* 121. A confession freely made to a Magistrate and recorded under this section is not inadmissible if the Magistrate thought proper, or if it so happened that he was the only Magistrate to take the case and commit it to the Sessions Court—*Emp v Lal Shesha* 3 C W N 387. The decision in 5 Cal 954 is no longer good law.

511 May record?—The Magistrate may record the statement or confession. It is not obligatory on the Magistrate to do so. There is nothing in law to support the proposition that in order to make an oral extrajudicial confession admissible in evidence it must be reduced to writing. The confession may be proved by the evidence of the Magistrate—*Feroz v Crown*, 1918 P R 11, *Emp v Maruti* 21 Bom L R, 1064

(*per* Hayward J. Shah J. *contra*) 21 Cr L J 65 *Tangudupalli v Emp.*, 45 Mad 230, 42 M L J 37, 23 Cr L J 680. *Contra*—*Legal Remembrancer v Lalit Mohan* 49 Cal 167 where it is held that a confession not recorded as provided by this section cannot be proved by the evidence of the Magistrate.

512 Statement or Confession—The word 'statement' means the statement of a witness and does not mean the statement of an accused person. This section does not provide for recording any statement of an accused person other than a confession: the reason is that the section relates to a stage of the case viz the Police investigation stage at which statements of the accused which are other than voluntary confessions and which are to be elicited by his examination are not intended to be obtained from him—*Q E v Bhairab* 2 C W N 702. In other words this section provides for the recording of two classes of things viz (1) the statement of a person who appears before the Magistrate as a witness and (2) the confession of a person accused of an offence—2 Bom 643, 5 S L R 174.

Contra—The Punjab Chief Court has held that the distinction that is made in this section is between statements that are confessions and statements that are not and not between persons by whom statements of either character are made and this distinction is made merely to prescribe the different modes of recording (subsec. 2) and that it is nowhere expressed or implied in this section that the statement of an accused person cannot be recorded unless it is a confession—*Lalu v Emp* 1893 P R 2. The Calcutta High Court also has recently laid down that the word statement is not limited to a statement made by a witness: a statement made by an accused and not amounting to a confession is a statement within the meaning of this section—*Abdul Rahim v Emp* 41 C L J 474, 26 Cr L J 1279. See also *Legal Remembrancer v Lalit Mohan* 49 Cal 167 where it is laid down that under this section there can be no distinction between a statement made by an accused and a confession made by him and that a statement made by an accused that he had committed a murder must be recorded as provided by this section. The Patna High Court is also of opinion that this section contemplates a statement made by an accused person before a Magistrate which is not a confession but is wholly of an exculpatory nature—*Golam Abd. v Emp* 4 Pat 327, 6 P L T 598, 26 Cr L J 878.

513. At what stage can statement and confession be recorded—A statement or confession must be recorded under this section in the course of an investigation under this chapter or at any time afterwards but before the commencement of the inquiry or trial. Therefore, where the Magistrate recorded confessions of the accused before he took cognizance of the case and before the examination of the prosecution witness began, it was held

that the confessions were duly recorded under this section—*Barindra v. Emp.*, 37 Cal 467. This section refers to a confession or statement recorded during an inquiry before the Police and not during an inquiry by the Magistrate. Therefore, where during an inquiry under section 202, the Magistrate recorded a statement made by a person against whom the complaint was filed, it was held that the statement could not be regarded as having been recorded under this section, because the statement was made during an inquiry by the Magistrate and not during an inquiry before the Police. Such a statement was not admissible against the accused without further proof—*Sat Narain v. Emp.*, 32 Cal 1085 (1089).

514. Procedure.—Under this section, in the course of the investigation, the Magistrate is entitled to record any voluntary statement made by the accused person, but he is not entitled to examine the accused person in respect of the facts of the case. That power is given by sec 342—*Gya Singh v. Mohamed*, 5 C. W. N. 864. Nor is the Magistrate competent to put constant questions to the deponent as though he were a witness, in order to elicit the truth out of his mouth—*Emp. v. Baji*, 5 C. P. L. R. 13.

It is an improper procedure for a Magistrate, during the investigation of a criminal case by himself, to take the statements of witnesses on solemn affirmation out of Court and in the absence of the accused, with the avowed object of proceeding criminally against the witnesses in case they should subsequently deviate from such statements in open Court—*Reg. v. Jetha Ganesh*, Ratanlal 66.

A Magistrate should not, before recording a confession, look into a police report to see what the accused had stated to the Police—*Jogibvan v. Emp.*, 13 C. W. N. 861.

The Magistrate should not hold out any inducement. Where after the prisoner had made a long confessional statement, he was told by the Magistrate that if he stated all that he knew, he would then be examined as an approver and witness, it was held that the conduct of the Magistrate was highly improper—*In re Kosa Govindan*, 2 Weir 137. See also 45 All 633 cited under sec 163.

The Magistrate must not put any question to the accused tending to incriminate him—*In re Rayappan*, 2 Weir 136.

A statement cannot be said to be properly recorded under this section if a police officer is present at the time and is allowed to put questions to the accused—*Indarsain v. Emp.*, 21 Cr. L. J. 418 (Lah.). *Jogibvan v. Emp.*, 13 C. W. N. 861. "It is not proper to allow the Police officer who brought the prisoner to be present while the confession is being recorded by a Muharrir and to suggest questions to be put to the confessing prisoner"—*Cal. G. R. & C. O.* page 8, *Emp. v. Ramanand*, 1885 A. W. N. 221.

There is no warrant or justification for the intervention of a third

party (e g a police officer or another Magistrate) as the questioner, directly or indirectly, of a confessing prisoner—*Jogjiban v Emperor*, 13 C W N 861

Confessions should be recorded in open Court. A Magistrate acts improperly in recording the confession at a late hour in the night (viz at 11 30 p m) after the accused had been subjected to interrogation by a police officer for 3 or 4 hours and had broken down under the continued questioning—*A L v Pramzha* 30 C L J 503 21 Cr L J 266 But of course the fact of the confession being recorded late at night is by itself not a sufficient proof against its voluntariness—*Abdul Salim v Emp*, 42 Cal 573 (598)

Power to administer oath —The person making a statement under this section is a witness within the meaning of Sec 5 of the Oaths Act and therefore one to whom oath might be administered and a charge of perjury can be framed under sec 193 I P C against the person making a false statement on oath under this section—16 Mad 421 *Emp v Tasa aduh* 1908 A W N 73 29 Mad 89 *Contra*—7 Cal 455 1893 P R 2 (per Plowden J) 10 C P I R 16

Mode of examination of accused —The proper mode for a Magistrate to examine an accused person under this section is to ask him if he wishes to make any statement or confess or. If he says no the Magistrate should not proceed to interrogate him but if such person wishes to make any statement the Magistrate should write down the statement or confession and ask the accused such questions as may be necessary to ascertain clearly what his meaning is—*Impress v Baji* 5 C P L R 13 *Kesho Singh v A L* 20 O C 136 18 Cr L J 742

The examination of an accused person must not be conducted after the manner of cross examination of an adverse witness by Counsel. It must not be inquisitorial forcing the prisoner to make incriminating statements—*Empress v Agra* 1887 A W N 166 Nor should the examination be made with a view to elicit the truth out of his mouth by constant questions as though he were a witness—*Emp v Baji* 5 C P L R 13. It is not permissible to question the accused closely and at great length for the purpose of extracting statements to be afterwards used as evidence—*Kesho Singh v A L*, 20 O C 136

515 *Retracted confession* —A retracted confession cannot be given any weight unless it is well corroborated by reliable evidence—*Rama v K L* 3 Pat 872 A I R 1925 Pat 191 But in some other cases it has been laid down that a retracted confession if proved to have been voluntarily made can be considered along with the other evidence of the case. No binding rule can be laid down such as that a retracted confession must be supported by independent reliable evidence corroborating it in material

particulars The Court should treat the value of a retracted confession as a matter of prudence rather than of law—*Q E v Gharya* 19 Bom 728 *Q E v Gangia* 23 Bom 316 21 Mad 83 *Jawan v Crown* 1914 P R 30 *Limp v Indra Chandra* 2 C W N 637 *Manna Lal v K E* 27 O C 40 A I R 19 5 Oudh 1 It is not illegal to base a conviction upon the uncorroborated confession of an accused person (subsequently retracted) provided that the Court is satisfied that the confession was voluntary and is true in fact—*Jawan v Crown* 1914 P R 30 15 Cr L J 626 Experience and common sense show that in the absence of corroboration in material particulars it is not safe to convict on a confession, unless from the peculiar circumstances on which it was made and judging from the reasons of the retraction there remains a high degree of certainty that the confession notwithstanding its having been resiled from is genuine—*Jawan v Crown* 1914 P R 30 18 All 78 If a Judge believes that a confession though subsequently withdrawn contains a true account of the prisoner's crime, the Judge is bound to act so far as the prisoner is concerned on the confession which he believed to be true—29 All 434, 20 All 133 The weight to be given to such a confession depends upon the circumstances under which it was generally given and the circumstances under which it was retracted including the reasons given by the prisoner for his retraction—1903 P R 16 21 Mad 83 *Manna Lal v K E*, 27 O C 40 25 Cr L J 49 Thus where a confession was made under police coercion and subsequently withdrawn it is certainly inadmissible in evidence—*Motifan v Crown* 6 C W N 380 *Sriram v Limp v A L J* 100 2 Cr L J 59

Where a confession is retracted it is the duty of the Court that is called to act upon it especially in a case of murder to enquire into all the material points and surrounding circumstances and satisfy itself that the confession cannot but be true—*K L v Durgota* 3 Bom L R 441

Where in the course of the investigation of an offence a witness makes a statement of a confessional nature which is recorded by the Magistrate under this section as a *statement* and not as a *confession* and subsequently in the course of the preliminary inquiry before the committing Magistrate he retracts that statement it is admissible in evidence against that witness on a prosecution for perjury—*In re Maddala Ramanujamma* 39 Mad 277

516 Subsection (2) —Mode of recording —The confession is to be recorded in the manner provided by sec 364 & c in the form of questions and answers The Magistrate is bound to record every question that he asks It is of great importance that this provision of the law should be obeyed otherwise it may be impossible to tell how far a witness voluntarily deposes to a matter and how far it was extracted from him by questioning

even in the nature of cross examination. If the confession is not recorded in this manner, the record is defective—*Hasan Ali v K E* 23 A L J 719 26 Cr L J 1209 A I R 1906 All 22. Where a confession is recorded not in the form of questions and answers as required by section 364 but in a narrative form the defect is *not a fatal one* and the confession is admissible in evidence provided that the accused is not prejudiced by the irregularity. Section 533 would cure the defect—*Fekoo v Empress* 14 Cal 539 *Emp v Munahi* 8 Cal 616 *Ahid rai v E p* 9 C L J 55 *Emp v Sagambar* 12 C L R 120 *Emp v Deo Dat* 45 All 166 20 A L J 915 *Emp v Anta* 1890 A W N 60 *Nga Po Sin v Emp* U B R (1897 1901) 47.

Where however the confession was not recorded in the manner prescribed in section 364 but there was only a summary record of what the accused said as to his defence after pleading not guilty and where it more over appeared that the confession was not voluntary it was held to be inadmissible in evidence—*Nga San v Emp* 11 Cr L J 41 (Bur).

Language—This section read with section 364 is imperative as to the language in which a confession is to be recorded, and section 533 does not provide for any non compliance with the law in this respect. Sec 364 lays down that the confession is to be recorded in the language in which it was made or if that is not practicable in the language of the Court or in English. And it would be for the prosecution to establish the impracticability of recording the statement in the language in which it was made—*Jai Narain v Q E* 17 Cal 86 15 Cal 595 *Bawa v A L* 10 O C 112 *Q E v Ramjan* L B R (1893 1900) 70. Thus where the Magistrate could not write well the language in which the confession was made and there was no Mohurrir with him the record of the confession in English was held to be valid and admissible in evidence—2 Cal 817 *Empress v Bachanna* 1891 A W N 55 see also *Ahid ram v Emp* 9 C L J 55. Where the confession was recorded in a language different from that in which it was made it should be *presumed* in the absence of anything to the contrary that the Magistrate found it impracticable to record the confession in the language in which it was made—*Lal Chand v Q E* 18 Cal 549 *Contra*—*Bawa v A E* 10 O C 112 6 Cr L J 94 where no such presumption was made.

In 21 Bom 495 it was held that although it was practicable to record the statement in the language of the accused the failure to do so would not make the statement inadmissible in evidence if the accused was not injured as to his defence on the merits by such irregularity. So also is the view taken in *Emp v Fernand* 4 Bom L R 785 and *En peror v Deo Dat* 45 All 166 (188) 20 A L J 915.

When a Magistrate is unable to record a confession in the language in which it is made he should not employ a *Police officer* to write it down

The employment of a Police officer even as a scribe in recording a confession is objectionable—*Ahudiram Bose v Emp* 9 C L J 55

If the statement of the accused is conveyed to the Court through an interpreter it is not necessary that the Magistrate should record the statement in the language used by the accused the record must be in the language in which it is interpreted—5 Cal 826

Although the terms of sections 164 and 364 are imperative still if the Magistrate instead of recording the confession himself employed a clerk to do so, it was held that the irregularity would be cured by sec 533 by examining the Magistrate—*Badan Singh v A E* 1909 P R 2

Where the confessions were neither recorded in the language of the accused nor were signed by the accused nor certified by the Magistrate, held that there was a total non compliance with the provisions of this section and sec 533 would not cure such grave irregularities—*Q E v Iran*, 9 Mad 224

See also Note 1038 under sec. 364

Signature —The object of requiring the signature of an accused person to the record of his confession is probably to furnish a strong test as to whether the confession was voluntary and free and to afford him a *locus penitentiae* before the completion of the record of indicating that the confession was not voluntary or was made under improper influence—*Reg v Bai Ratan*, 10 B H C R 166 The signature is taken as a voucher of the authenticity of the statement and not as an admission of its correctness—*Ahudiram v Emp* 9 C L J 55

The confession of the accused if not signed by the accused or attested by his mark is not admissible in evidence—*Reg v Bai Ratan* 10 B H C R 166 but under sec 533 parol evidence may be given of the terms of the confession and those terms if and when proved may be admitted and used as evidence in the case if the defect (non signature) is such that it has not affected the merits of the defence—*Q E v Raghu* 23 Bom 221 So also, if the accused subsequently signed the confession without objection as soon as the non signature was noticed the defect would be cured by sec 533 by the evidence of the Magistrate as to the authenticity of the statement—*Ahudiram v Emp* 9 C L J 55

If the accused is able to write his thumb impression will not be sufficient—*Sadananda v Emp* 32 Cal 550

The Magistrate must sign the record of confession as well as the memorandum—*Emp v Lal Shaikh* 3 C W N 387

517 Subsection (3)—Confession must be voluntary —A confession in order to be admissible in evidence must be made voluntarily and without pressure—*A E v Gurbu* 11 A L J 286 35 All 260 *In re Pisani*, Weir 137 No statement should be recorded under this section unless the

even in the nature of cross examination. If the confession is not recorded in this manner, the record is defective—*Hasan Ali v. K E*, 23 A L J. 719 26 Cr L J 1209 A I R 1926 All 22. Where a confession is recorded not in the form of questions and answers, as required by section 364, but in a narrative form, the defect is *not a fatal one*, and the confession is admissible in evidence, provided that the accused is not prejudiced by the irregularity. Section 533 would cure the defect—*Fekoo v Empress*, 14 Cal 539, *Emp v Munahi* 8 Cal 616 *Akudiram v Emp*, 9 C L J 55, *Emp v Sagambar* 12 C L R 120 *Emp v Deo Dat*, 45 All 166 20 A L J 915, *Emp v Anta*, 1892 A W N 60, *Nga Po Sin v Emp*, U B R (1897 1901) 47.

Where, however, the confession was not recorded in the manner prescribed in section 364, but there was only a summary record of what the accused said as to his defence after pleading not guilty and where it moreover appeared that the confession was not voluntary, it was held to be inadmissible in evidence—*Nga San v Emp*, 11 Cr L J 41 (Bur).

Language—This section read with section 364, is imperative as to the language in which a confession is to be recorded, and section 533 does not provide for any non compliance with the law in this respect. Sec 364 lays down that the confession is to be recorded in the language in which it was made or if that is not practicable, in the language of the Court or in English. And it would be for the prosecution to establish the impracticability of recording the statement in the language in which it was made—*Jai Narain v Q E*, 17 Cal 86, 15 Cal 595 *Bawa v A L*, 10 O C 112, *Q E v Ramjan* L B R (1893 1900) 70. Thus where the Magistrate could not write well the language in which the confession was made, and there was no Mohurrir with him the record of the confession in English was held to be valid and admissible in evidence—23 Cal 817 *Empress v Bachanna* 1891 A W N 55 see also *Akudiram v Emp* 9 C L J 55. Where the confession was recorded in a language different from that in which it was made, it should be *presumed* in the absence of anything to the contrary, that the Magistrate found it impracticable to record the confession in the language in which it was made—*Lal Chand v Q L*, 18 Cal 549 *Contra*—*Bawa v A L*, 10 O C 112 6 Cr L J 94, where no such presumption was made.

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The employment of a Police officer even as a scribe in recording a confession is objectionable—*Khudiram Bose v Emp* 9 C L J 55

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Where the confessions were neither recorded in the language of the accused nor were signed by the accused nor certified by the Magistrate held that there was a total non compliance with the provisions of this section and sec 533 would not cure such grave irregularities—*Q E v Iran*, 9 Mad 224

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The confession of the accused if not signed by the accused or attested by his mark is not admissible in evidence—*Reg v Bai Ratan* 10 B H C R 166 but under sec 533 parol evidence may be given of the terms of the confession and those terms if and when proved may be admitted and used as evidence in the case if the defect (non signature) is such that it has not affected the merits of the defence—*Q E v Raghu* 23 Bom 221 So also, if the accused subsequently signed the confession without objection as soon as the non signature was noticed the defect would be cured by sec 533 by the evidence of the Magistrate as to the authenticity of the statement—*Khudiram v Emp* 9 C L J 55

If the accused is able to write his thumb impression will not be sufficient—*Sadananda v Emp* 32 Cal 550

The Magistrate must sign the record of confession as well as the memorandum—*Emp v Lal Shaukh* 3 C W N 387

517 Subsection (3)—Confession must be voluntary —A confession in order to be admissible in evidence must be made voluntarily and without pressure—*K E v Gulabu* 11 A L J 286 35 All 260 *In re Pisari*, Wcir 137 No statement should be recorded under this section unless the

person making it is a free agent and voluntarily agrees to have his statement taken down—1918 P R 16 A Magistrate acting under this section must question the accused in order to be affirmatively satisfied of the voluntariness of the confession and in case of doubt he ought not to record it or give the certificate—25 Bom 168 *Nehal Emp* 15 Cr L J 116 (Lah) The Magistrate should ascertain whether the confessional statement is made voluntarily at the beginning of the statement and not at the end—*In re Rayappan* - Weir 136 A Magistrate should not proceed to record a confession unless he first has reason to believe that the person is about to make it voluntarily and he should therefore *begin* by enquiring into the point whether the confession is voluntarily made Where a Magistrate recorded a confession of an accused without first satisfying himself as to its being voluntary and then at the *end* of it put one comprehensive question as to the nature of the confession it was held that he had not complied with the provisions of this section—*Queen Emp v Appa*, 1 Bom L R 357, *Kandhai v Emp*, 1 O L J 407 15 Cr L J 633 In *Pulin Tanti v Emp*, 40 Cal 873 (876) it was held that the fact that the Magistrate instead of asking the accused about the voluntary nature of the confession at the commencement of the confessional statement asked him at the end was merely a defect of form which did not alter the character of the confession

'It is desirable that Magistrates should act with deliberation in examining persons brought before them for the purpose of making confession and should as far as possible satisfy themselves that the confession is voluntary—and this not merely from the declaration of the accused, but from an attentive observation of his demeanour'—*Cal G R & C O* page 8

When a confession made by the accused is alleged by him to have been obtained by ill treatment or other improper inducements the Court should carefully inquire into the truth of such allegation—*Reg v Kashi Nath*, 8 B H C R 126 and it will not be presumed that it was so induced—*Reg v Balaant* 11 B H C R 137 and if the Court sees any ground of exclusion mentioned in sec 24 Evidence Act (inducement threat promise), it may reject the confession though at the time of record it appeared to be a voluntary confession—*Umar v Emp* 1887 P R 51 *Emp v Dewan Kahar* 4 P L T 186 But the Court cannot, merely on surmise or conjecture hold that the confession was procured by inducement threat or promise There must be in the confession itself or in the evidence or in the surrounding circumstances something to justify the inference that the confession was really not a voluntary one—*Emp v Dewan Kahar*, 4 P L T 186

When it appeared that an accused person was illegally confined in solitary confinement for about a fortnight that the police had access to him

that pressure was brought to bear upon him through his father mother and brother that the desirability of a confession was pressed upon him by the District Magistrate as a means of saving himself and his relatives from threatened pains and penalties that his father was illegally detained in *kajut* for a long time without any charge that he then made a confession which was recorded without legal precautions and in the immediate presence of a police officer who put incriminating questions to the accused and helped in amplifying the confession held that such confession was not voluntary and was not admissible in evidence—*Jogjnan v Emp* 13 C W N 861 10 Cr L J 125

Mere subsequent retraction of a confession duly recorded and certified is not enough to show that it was not made voluntarily—*Q F v Basanta* 25 Bom 169

Questions to be put to accused—Under the present Amendment the Magistrate should not only question the accused about the voluntariness of the confession but should also warn him that he is not bound to make any confession and that if he makes any it will be used as evidence against him This Amendment supercedes the ruling in *Q F v Ure v* 10 Cal 775 (in which it was held that the Magistrate ought not to give any warning to the accused to the effect that what the accused was going to say would be evidence against him)

If the procedure of this section is not followed prior to the recording of a confession the statement of the accused cannot be admitted in evidence against him or his co-accused—*Balan Singh v Emp* 1 Lah I J 39 17 Cr L J 731 Unless it is proved that the Magistrate explained to him that he need not make any confession and that it might be used against him the confession is not admissible in evidence—*Bahadur v Crown*, 6 Lah 183 26 Cr L J 1238 4 I R 195 1 Lah 432

The Magistrate should not be content with a few formal questions The section contemplates that the Magistrate shall hear the confession first without making any record and shall then put questions to ascertain whether the confession is voluntary and then if he has reason to believe that it is voluntary he may record the confession writing out in full every question put by him and every answer given by the accused and following the provisions of sec 364 The questioning of the accused before recording a confession is a matter of substance and not of mere form and if it has been omitted the omission is a fatal one and cannot be cured by any evidence under sec 533—*Ananda v Parbat* 3 I B R 173 *Shree Sin v K* 1 3 I B R 113 4 Cr L J 385 *Farid v Crown* 1 Lah 375 (3 Cr

No Magistrate shall record any such confession unless upon questioning the person making it he has reason to believe that it was made voluntarily It is the invariable practice of the Deputy Magistrates in this to ignore entirely this provision of the Code It is considered as

to make use of a stock phrase which in this instance runs 'I am a Magistrate, if you want to make any statement of your own accord you may do so, do not make any statement which you have been tutored by others to make' and then follows the story of the crime without any answer whatever to the Magistrate's formula. To my mind a Magistrate might just as well say to the accused "*hocus pocus*" or "*abracadabra*" Such phrases would be as much a compliance with the terms of S 164 (3) as any formula now in vogue. What is meant by the Code is that the Magistrate should ask the accused some such question as 'Why are you confessing? Are you sorry for your crime or is it that some one has told you that you will gain something by a confession?' and refuse to proceed with the recording of the confession until he has had a satisfactory answer to his question. The attention of the Magistrates has been drawn several times to this defect in the procedure but the comments of the Court have invariably been completely ignored. In my view the Local Government should take steps to see that Magistrates understand the requirements of S 164 (3) and that if Magistrates fail to observe them, they are severely reprimanded—*per* Roe J in *Ragho v Emp* 18 Cr L J 721 (Pat). Where a Magistrate questioned the accused person thus 'It appears that you have committed murder and absconded by escaping from custody, you have now come what have you to say?' *held* that the question was extremely improper—*In re Pisari* 2 Weir 137.

In order to ascertain whether the confession is voluntary, the Magistrate is bound to question the accused closely as to his motive in making a confession, and if he fails to do so he has no jurisdiction to say that he is satisfied as to the voluntary nature of the confession—18 Cr L J. 721 ((Pat). In a more recent case of the same High Court, however, it has been held that it is not necessary that the Magistrate should have questioned the accused as to his motives in making the confession, though as a rule of prudence it is better that he should do so—*Emp v Deuan Kahar*, 4 P L T 186 24 Cr L J 497.

It would be going much too far to say that a Magistrate recording a statement or a confession under this section cannot and should not ask a single question of the deponent. But it is equally certain that his position when recording such statement or confession is merely that of a recording Magistrate, and that he is in no sense inquiring into the case and that he is not an investigating officer. He would be justified in, and ought in the ordinary performance of his duties, to clear up any matter which is ambiguous on the face of the statement, but he is wholly unjustified in exacting, by questions from the deponent any facts which the deponent has not spoken to in his Court. Everything must depend on the nature of the questioning and the object of it and the mere fact that an answer was elicited by a question does not make the proceedings improper or the

statement inadmissible as a confession—*Hasan Ali v A E* 23 A L J 719 26 Cr L J 109 A I R 1906 All 2.

No express form of question is prescribed and the extent to which the Magistrate should question the accused must largely depend on the particular facts of each case. There are cases which on the face of them attract the suspicion of a Magistrate and there are others which do not attract any suspicion at all and it is impossible to lay down any hard and fast rule on the subject. The Court must in each case satisfy itself that the Magistrate honestly believed and took steps to ascertain that the confession was a voluntary one—*Thibu v Emp* 4 P L T 279 24 Cr L J 649. It is desirable that the Magistrate in recording the confession should put various questions to the accused to enable him to decide whether the confession is a voluntary one or not but there is nothing in law which lays down that a Magistrate cannot satisfy himself as to the voluntariness of the confession by putting a single question to the accused—*Emp v Dewan Kahar* 4 P L T 186 24 Cr L J 497.

518 Police custody.—A confession obtained after the accused had been in custody for some time is always open to grave suspicion—9 All 528 *Mohjan v Crown* 6 C W N 380. When a Magistrate records the confession of a person who has been in police custody he should ascertain and record the period during which the accused had been in custody to satisfy himself whether the confession is voluntary or not—*Q E v Naranjan* 25 Bom 543. But where an accused was actually produced before the Magistrate as soon as he was arrested and was produced before him the next day for recording the confession *Ibid* that the confession should not be ignored on the ground that the Magistrate did not ask him how long he was in Police custody—*Emp v Dewan Kahar* 4 P L T 186. The fact and duration of Police custody has a material bearing on the question whether a confession is voluntary or not—*Jogindan v Emp* 13 C W N 861. The unjustifiable violence used by the Police to the accused for his arrest his illegal detention in police custody for more than 24 hours after his arrest and the marks on his person—all these must be held to have vitiated the voluntary character of his confession and it was therefore inadmissible in evidence—*Q F v Appa* 1 Bom I R 357. But a confession cannot be rejected on the sole ground that the accused had been a long time in police custody—*Q E v Mahadhu Ratanlal* 720. The Punjab Chief Court holds that even if the accused is in the custody of a police officer when he makes the confession yet the confession being made before a Magistrate is not excluded from being given in evidence by anything contained in sec 26, Evidence Act when proved by the evidence of the Magistrate—*Feroz v Crown* 1918 P R 11 19 Cr L J 651 (following 1881 P R 21).

A prisoner in police custody who was brought before a Magistrate to

have his confession recorded did not cease to be in police custody merely because at the time of recording the confession there was no police officer in the room when it was found that a police officer was waiting outside the room where the confession was being recorded—*O E v Lakshmya Ratanlal* 853 (856)

it is highly improper if not illegal for a Magistrate to examine an accused person who comes fresh from the hands of the police who made the inquiry Any confessional statements made by the accused in such examination are of little value—*Emp v Kura* 1887 A W N 166

519 Memorandum —A confession without a memorandum that it is voluntarily made is bad in law and cannot be admitted in evidence—6 Bom 288 1 Bom 19 *Emp v Radle Hall* 7 C W N 220 and the want of a memorandum can be cured if at all only by the Sessions Judge taking evidence during the trial that the accused had made the statement—5 Cal 938 *Q E v Ariga Lakayan* 27 Mad 15

Where the Magistrate has made a memorandum that the confession was voluntarily made it may be presumed that it is a correct record of a voluntary confession Nevertheless if it is found that the confession was procured by any inducement threat or promise it must be treated as irrelevant—*Emp v Dewan* 4 P L T 186 74 Cr L J 497

The memorandum annexed to a record of confession is not a conclusive evidence of the fact that the confession was voluntarily made so as to preclude the Court of Appeal from inquiring into the nature of the confession to see whether it was voluntary or not—*Jogulan v Emp* 13 C W N 86r 10 C I J 125

The memorandum is required only in case of confessions made by the accused A statement of a witness need not be appended by a memorandum that such statement was made voluntarily—*O F v Jadub* 7 Cal 295

A confession does not become unworthy of evidence merely because the memorandum required by law to be attached thereto has not been written in the exact form prescribed—3 All 338 It is sufficient if it is in substance the same as that given in this section

It is most advisable although the law does not require it that the Magistrate should record a memorandum of enquiry showing what steps he has taken to fully satisfy himself that an accused person is confessing voluntarily—*Umar din v Crown* 2 Lah 179 73 Cr L J 388

If the memorandum omitted to state that the confession was voluntarily made, it was held that the Magistrate omitted to observe a most important provision of this section and the confession was therefore not admissible in evidence—*In re Kattubadi Narasingha* 7 Weir 140 *Q E v Bhairab* 2 C W N 702 (717) but in some cases it has been held that the

defect would be cured by sec 533 if the Magistrate afterwards deposed that he believed that the confession was voluntarily made—*Emp v Deo Dutt* 45 All 166 20 A L J 915 *Ramu v King Emp* 3 Pat 872 (877) 26 Cr L J 314 *Maksud v Emp* 2 P L T 773

Under this section as now amended the Magistrate must explain to the accused that he is not to make any confession and that the confession may be used as evidence against him and the memorandum also should record the fact that the explanation was given. But omission to record the fact that the accused was so warned would not make the confession inadmissible in evidence if the Magistrate who recorded the confession was afterwards examined (sec 533) and deposed that he gave the required warning to the accused and the accused understood it—*Ramas v Emp* 3 Pat 872 (877) 26 Cr L J 314 A I R 1925 Pat 191 *Baua Singh v Emp* 7 Lah L J 250 26 P L R 379 26 Cr L J 1458 *Ahe man v Emp* 6 Lah 58 26 P L R 346 26 Cr L J 1074. But if as a matter of fact no such explanation was given by the Magistrate to the accused the defect is not merely one of form but of substance, and sec. 533 cannot cure it—*Parlap Singh v Crown* 6 Lah 415 7 Lah L J 482 A I R 1925 Lah 605 *Mt Rao v Crown* 26 P L R 173 26 Cr L J 1175

But the memorandum need not set forth the circumstances under which the confession was made. Thus an omission to state in the memorandum that the accused was not in police custody at the time when the confession was made does not make the confession invalid—*Ratanlal* 534

An English memorandum is required by sec 304 is not necessary in respect of a confession under this section—*Eckoo v Empire* 14 Cal 539

Refusal to make a memorandum—Where a Magistrate who recorded the confession of an accused refused to make the memorandum on the ground that the confession did not seem to be voluntary it was held that under sec 533 the confession could be admitted in evidence during the trial when the Magistrate who recorded it proved that it was made voluntarily—*Harbans v K L* 8 O C 395B. Where the Magistrate refused to make a memorandum on the ground that the accused had been in police custody for 5 days before he was produced before him and that there was a proposal on the part of the police to treat the accused as an approver but there was no evidence that the proposal was communicated to the accused it was held that this ground was not a valid ground and the Sessions Judge ought to have proceeded in the absence of the memorandum to take evidence under sec 533 whether the confession was duly made—*Q L v Anga Valayan* 22 Mad 15

520 Explanation—Magistrate without jurisdiction—The Explanation to this section lays down that a statement or confession can be recorded by a Magistrate although he has no jurisdiction in the case. But a Magis

have his confession recorded did not cease to be in police custody merely because at the time of recording the confession there was no police officer in the room when it was found that a police officer was waiting outside the room where the confession was being recorded—*Q E v Lakshmya Ratanlal* 855 (856)

It is highly improper if not illegal for a Magistrate to examine an accused person who comes fresh from the hands of the police who made the inquiry. Any confessional statements made by the accused in such examination are of little value—*Emp v Kura* 1882 A W N 166

519 Memorandum.—A confession without a memorandum that it is voluntarily made is bad in law and cannot be admitted in evidence—6 Bom 288 1 Bom 19 *Emp v Radhe Halat* 7 C W N 220 and the want of a memorandum can be cured if at all only by the Sessions Judge taking evidence during the trial that the accused had made the statement—5 Cal 958 *Q E v Aiga Lalayan* 27 Mal 15

Where the Magistrate has made a memorandum that the confession was voluntarily made it may be presumed that it is a correct record of a voluntary confession. Nevertheless if it is found that the confession was procured by any inducement threat or promise it must be treated as irrelevant—*Emp v Dewan* 4 P L T 186 24 Cr I J 497

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It is most advisable although the law does not require it that the Magistrate should record a memorandum of enquiry showing what steps he has taken to fully satisfy himself that an accused person is confessing voluntarily—*Umar din v Crown* 2 Lah 129 23 Cr L J 388

If the memorandum omitted to state that the confession was voluntarily made, it was held that the Magistrate omitted to observe a most important provision of this section and the confession was therefore not admissible in evidence—*In re Ka tubadi Narasingha* 2 Weir 140 *Q E v Bhairab*, 2 C W N 702 (717) but in some cases it has been held that the

defect would be cured by sec 533 if the Magistrate afterwards deposed that he believed that the confession was voluntarily made—*Emp v Deo Dutt* 45 All 166 20 A L J 915 *Raman v King Emp* 3 Pat 87 (877) 26 Cr L J 314 *Malsud v Emp* 2 P L T 773

Under this section as now amended the Magistrate must explain to the accused that he is not to make any confession and that the confession may be used as evidence against him and the memorandum also should record the fact that the explanation was given. But omission to record the fact that the accused was so warned would not make the confession inadmissible in evidence if the Magistrate who recorded the confession was afterwards examined (sec 533) and deposed that he gave the required warning to the accused and the accused understood it—*Ramas v Emp* 3 Pat 87 (877) 26 Cr L J 314 A I R 1925 Pat 191 *Bawa Singh v Emp* 7 Lah L J 150 26 P L R 579 26 Cr L J 1458 *Khe man v Emp* 6 Lah 58 26 P L R 316 26 Cr L J 1074. But if as a matter of fact no such explanation was given by the Magistrate to the accused the defect is not merely one of form but of substance, and sec. 533 cannot cure it—*Partap Singh v Crown* 6 Lah 415 7 Lah L J 482 A I R 1925 Lah 603 *Mt Rao v Crown* 26 P L R 173 26 Cr L J 1175

But the memorandum need not set forth the circumstances under which the confession was made. Thus an omission to state in the memorandum that the accused was not in police custody at the time when the confession was made does not make the confession invalid—*Ratanlal* 534

An English memorandum as required by sec 361 is not necessary in respect of a confession under this section—*Fekoo v Empr* 14 Cal 539

Refusal to make a memorandum—Where a Magistrate who recorded the confession of an accused refused to make the memorandum on the ground that the confession did not seem to be voluntary it was held that under sec 533 the confession could be admitted in evidence during the trial when the Magistrate who recorded it proved that it was made voluntarily—*Harbans v A E* 8 O C 395B. Where the Magistrate refused to make a memorandum on the ground that the accused had been in police custody for 5 days before he was produced before him and that there was a proposal on the part of the police to treat the accused as an approver, but there was no evidence that the proposal was communicated to the accused it was held that this ground was not a valid ground and the Sessions Judge ought to have proceeded in the absence of the memorandum to take evidence under sec 533 whether the confession was duly made—*Q E v Anga Valayan* 22 Mad 15

520 Explanation—Magistrate without jurisdiction—The Explanation to this section lays down that a statement or confession can be recorded by a Magistrate although he has no jurisdiction

trate not having jurisdiction can record the statement of a witness under this section if the witness appears voluntarily before him and is not brought before him by the police—*Emp v Nuri Sheikh* 29 Cal 483 This section will not empower a police officer to compel a witness to go to a local Magistrate not competent to deal with the case and to get the statement recorded—*Queen Emp v Nana Ratanlal* 468 (469) *Emp v Nuri Sheikh* 29 Cal 483 Where the police officer has reason to believe that the witness is likely to be gained over by the accused the proper course is to send the accused and the witness to the Magistrate having jurisdiction without delay—*Emp v Nuri Sheikh* 9 Cal 483

165 (1) Whenever an officer in charge of a police station or a police officer making an investigation considers that the production of any document or thing is necessary to the conduct of an investigation into any offence which he is authorised to investigate and there is reason to believe that a person to whom a summons or order under Section 94 has been or might be issued will not or would not produce such document or thing according to the directions of the summons or order or when such document or thing is not known to be in the possession of any person such officer may search or cause search to be made for the same in any place within the limits of the station of which he is in charge, or to which he is attached

165 (1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge or to which he is attached and that such thing cannot in his opinion be otherwise obtained without undue delay such officer may after recording in writing the grounds of his belief and specifying in such writing so far as possible the thing for which search is to be made search or cause search to be made for such thing in any place within the limits of such station

(2) Such officer shall if practicable, conduct the search in person

(2) *A police officer proceeding under sub section (1) shall if practicable conduct the search in person*

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may require any officer subordinate to him to make the search and he shall deliver to such subordinate officer an order in writing specifying the document or thing for which search is to be made, and the place to be searched, and such subordinate officer may thereupon search for such thing in such place

(3) *If he is unable to conduct the search in person and there is no other person competent to make the search present at the time, he may after recording in writing his reasons for so doing require any officer subordinate to him to make the search and he shall deliver to such subordinate officer an order in writing specifying the place to be searched and so far as possible the thing for which search is to be made and such subordinate officer may thereupon search for such thing in such place*

(4) The provisions of this Code as to search warrants shall so far as may be apply to a search made under this section

(4) *The provisions of this Code as to search warrants and the general provisions as to searches contained in Section 102 and Section 103 shall so far as may be apply to a search made under this section*

(5) *Copies of any record made under sub section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the Magistrate*

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost

Change —The changes in this section as shown by the italicised words have been introduced by sec 36 of the Criminal Procedure Code Amendment Act (XVIII of 1923) For reasons see below

521 Sub section (1)—General search —The old section spoke of 'any document or thing which meant a *specific* document or thing which might be the subject of a summons or order under section 94 it did not authorise a *general search* on the chance that something might be found—*Bajrang Gope v Emp* 38 Cal 304 *Pran Khan v K E* 16 C W N 1078 *Emp v Brishbbhan* 13 A L J 979 38 All 14 *Divakar v Ramamurti* 35 M L J 127 19 Cr L J 901 The section spoke of a particular document or thing which was necessary to the conduct of an investigation into an offence and did not authorise a general search e g for *arms generally*—*Clarke v Brojendra Kishore* 36 Cal 433 or for stolen property generally—*Bisser Misser v Emp* 41 Cal 261 nor was the requirement of this section fulfilled by framing the warrant as one for stolen property relevant to the case—*Pran Khan v K E* 16 C W N 1078 13 Cr L J 764

This has been made clear by the present amendment by the addition of the specific words and specifying in such writing to be made These words were added during the Debate on the motion of Mr Ranga chariar who observed as follows I think that it is a vicious thing to allow a police officer to have power to conduct a general search without knowing what it is he is going to search for but merely to see if he can find something incriminating in a person's house Even the wording of the clause itself (that such a thing cannot in his opinion be otherwise obtained without undue delay) contemplates that the man himself has some information and that he must know what it is that he is after and it is necessary that he should record this in writing and forward the record to the Magistrate so that it will be a check upon irresponsible general searches which have frequently disgraced the police administration in various parts of the country —*Legislative Assembly Debates* 31st January 1923 p 1754

This section is not restricted to a search for what is stolen and believed to be stolen property but it permits a police-officer to make a search of anything necessary for the purposes of an investigation into any offence—*Emp v Param Sukh* 23 A L J 1037 A I R 1926 All 147

522 Within the limits —A Station House officer has no power to make a search beyond the local limits of his own circle—*Mir Sha v Crown* 8 S L R 1 16 Cr L J 15 *Krishna Aiyar v Emp* 24 M L T 96 20 Cr L J 145 Such a search is illegal and resistance to such search is not an offence—*Madho Sonar v Emp* 13 A L J 691 16 Cr L J 589 But see sec 166 (3) which now authorises a Police officer, under certain circumstances to make a search within the limits of another police station

523 Who shall conduct the search —Sub section (2) lays down that the officer in charge of a police station or the investigating officer must 'conduct the search in person'. But this does not mean that the officer must himself make the search: he ransack boxes examine the room, dig up the floor or otherwise seek for the property. Nor is it necessary that all these processes should take place under his very eye. Therefore where the Inspector remained outside the house while the actual search was being made inside by two constables it was held that the search was not illegal. All that the section means is that the officer should go to the spot and exercise a general superintendence over the search in contradistinction to the cases where he is unable to go to the spot and deposes a subordinate by a written order to conduct the search in his place—*Sadagopala v Satrugna* 23 M L J 445 (dissenting from 17 M L J 323 where a search made by a constable inside the house while the Inspector was seated outside was held to be illegal as not being conducted in person by the Inspector).

The Magistrate cannot conduct the search under this section. This section speaks of a search made by a Police officer and not by a Magistrate—*Clarke v Brojendra* 36 Cal 433. The Magistrate can conduct a search only under section 105 which section has not been made applicable here.

524 Sub section (3)—Order in writing —If the officer cannot himself go to the spot he can depute a subordinate but the deputation must be by an order in writing. A constable making the search without such a written order does not lawfully exercise the power of a public servant, and resistance to such search is not an offence—*Q v Narain* 7 N W P H C R 209. *Idu Manjal v Fmp* 6 C L J 753. *Mir Sha v Crown* 8 S L R 1. *Madho Sonar v Emp* 13 A L J 691.

525 Sub section (4)—Necessity of Search warrant —A subordinate Police officer may however without a warrant enter a house in search of a person who is charged with having committed a cognizable offence but he is not empowered to enter a house without a search warrant in search of property—*Reg v Ickhatarau* 7 B H C R 50.

Witness to the search —Prior to the present amendment it was held that the failure to call inhabitants of the locality as witnesses to the search did not make the search illegal because the provisions of section 103 did not apply to a search under this section—*Sadagopala v Satrugna* 23 M L J 445. This ruling is now rendered obsolete by the present sub section (4) which makes the general provisions of searches under sections 102 and 103 applicable to searches under this section.

Damages for illegal search —A police officer cannot investigate into a non cognizable case without the order of a Magistrate (sec 155) nor can he make a search in respect of it because he can make a search only

in those cases which he can investigate Therefore a police officer making a search in a non cognizable case without being authorised by a Magistrate is liable to be sued for damages—24 Cal 691

Where a Police officer makes a search for specific stolen property *bona fide* the person whose premises are searched is not entitled to damages —*Divakar v Ramamurthi* 35 M L J 127 19 Cr L J 901

A police officer not having jurisdiction over the place searched who takes part in a search conducted by another police officer authorised by the Code to conduct the search cannot be said to exceed his jurisdiction and is not liable in damages as one making an illegal search—*Asan v Masilamani*, 42 Mad 446 36 M L J 252 20 Cr L J 422

Subsection (5) —This subsection and its proviso did not exist in the Bills or Reports but were added during the Debate on the motion of Mr Rangachariar who in moving this amendment observed as follows —

The object of this amendment is that as soon as a search is made, an immediate report should be made to the nearest Magistrate The second object is that the person whose house is searched should have copies of the records made under sub sections (1) and (3) Subsection (4) as it stands enables the provisions of section 103 to apply that is, the general rules relating to searches are made applicable Under section 103 the occupier of the place where the search was made gets only a *list* of the articles taken but what I want him to get is the *reason for the search* which has to be recorded in writing which has to be sent to the Magistrate and he gets a copy thereof See the *Legislative Assembly Debates* 31st January 1923 page 1755

166 (1) An officer in charge of a police station or a police

<p>When officer in charge of police station may require another to issue search warrant</p>	<p><i>officer not being below the rank of a Sub-Inspector making an investigation may require an officer in charge of another police-station, whether in the same or a different district, to cause a search to be made in any place, in any case in which the former officer might cause such search to be made, within the limits of his own station</i></p>
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(2) Such officer, on being so required, shall proceed according to the provisions of section 165, and shall forward the thing found, if any, to the officer at whose request the search was made

(3) *Whenever there is reason to believe that the delay occasioned by requiring an officer in charge of another police station*

to cause a search to be made under sub section (1) might result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer in charge of a police station or a police officer making an investigation under this Chapter to search or cause to be searched, any place in the limits of another police station in accordance with the provisions of Section 165 as if such place were within the limits of his own station

(4) Any officer conducting a search under sub section (3) shall forthwith send notice of the search to the officer in charge of the police station within the limits of which such place is situate, and shall also send with such notice a copy of the list (if any) prepared under Section 103 and shall also send to the nearest Magistrate empowered to take cognizance of the offence, copies of the records referred to in section 165 sub sections (1) and (3)

(5) The owner or occupier of the place searched shall, on application, be furnished with a copy of any record sent to the Magistrate under sub section (4)

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost

Change —The changes have been introduced by sec 37 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

Not being below the rank of Sub inspector — In the Bill as introduced an investigating officer could not be below the rank of Sub Inspector We have proposed to some extent to remove this restriction but we are inclined to think that the powers conferred by section 166 should not be exercised by a police officer making an investigation who is below the rank of Sub Inspector We realise however that there may be administrative difficulties in this connection and if such difficulties are pointed out by Local Governments we should be prepared to retain this clause unamended —*Report of the Joint Committee* (1922)

Sub sections (3), (4) — These two sub sections are proposed to be added in order to give power in certain circumstances to an officer in charge of a Police station to search or cause to be searched places within the local limits of another police station —*Statement of Objects and Reasons* (1914)

Sub-section (5) —This sub-section and the proviso as well as the words and shall also and (3) in the last three lines of subsection (4) did not exist in the Bills or the Reports but were added on the motion of Mr. Rangachariar during the Debate in the Legislative Assembly The reason

for this amendment is the same as that for a similar amendment made in sec 165 See the *Legislative Assembly Debates* January 31st 1923 page 1757

<p>167 (1) Whenever it appears that any investigation under this Chapter cannot be completed within the period of twenty four hours fixed by Section 61 and there are grounds for believing that the accusation or information is well founded the officer in charge of the police station shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused (if any) to such Magistrate</p>	<p>167 (1) Whenever any person is arrested and detained in custody and it appears that the investigation * * * cannot be completed within the period of twenty-four hours fixed by Section 61, and there are grounds for believing that the accusation or information is well founded the officer in charge of the police station or the police officer making the investigation if he is not below the rank of Sub-Inspector shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time forward the accused (* *) to such Magistrate</p>
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(2) The Magistrate to whom an accused person is forwarded under this section may whether he has or has not jurisdiction to try the case from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or commit it for trial and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction

Provided that no Magistrate of the third class, and no Magis

trial of the second class not specially empowered in this behalf by the Local Government shall authorise detention in the custody of the police

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing

(4) If such order is given by a Magistrate other than the District Magistrate or Sub divisional Magistrate he shall forward a copy of his order with his reasons for making it to the Magistrate to whom he is immediately subordinate

Change —The italicised words in subsection (1) and the proviso in sub section (2) have been inserted by sec 38 of the Criminal Procedure Code Amendment Act XVIII of 1923 The reasons are stated below

526 Scope —Prior to the present amendment the first six lines of this section ran thus — Whenever it appears that any investigation under this chapter cannot be completed etc : & this section applied only to investigations *under this chapter* and gave no authority to a Magistrate to remand an accused person to custody in proceedings under Chapter VIII in order to enable the police to arrest other persons jointly accused with him—*Emp v Basya* 5 Bom L R 27 *Raghuandan v Emp* 32 Cal 80 8 C W N 779 *In re Sublarayya* 39 Mad 928 36 All 262 These rulings are no longer good law because the words *under this chapter* have now been omitted by the Amendment Act of 1923

527 24 hours fixed by sec 61 —Having regard to the provisions of this section and of sec 61 and to the requirements of justice the intention of the Legislature is that the accused persons should be brought before the Magistrate competent to try or commit with as little delay as possible —*Q E v Engadu* 11 Mad 98

Not below the rank of Sub Inspector — In sec 167 however which confers a power to ask for a remand we would confine the operation to investigating officers not below the rank of sub Inspector —*Report of the Joint Committee (1922)*

528 Forward the accused to the Magistrate —Before a Magistrate remands an accused person to police custody the accused must be produced before him—*Pearj Mohan v Heston* 16 C W N 145 13 Cr L J 65 Where the accused is not brought before the Magistrate it is illegal for him to remand the prisoner on the application of the police—*Crown v Shera* 1867 P R 39

529 Sub section (2)—Magistrate's power to detain —Under this section a Magistrate on a mere perusal of the entries in the Police diaries may from time to time authorise the detention of the accused for a

not exceeding 15 days on the whole. Thereafter he can, under sec 344 by a warrant, remand the accused for any term not exceeding 15 days at a time if there is sufficient evidence to suspect that the accused has committed an offence and that further evidence may be obtained by such remand—36 Cal 166

An application for remand to police custody must be made personally by the chief Police officer present to the chief Magisterial officer present, unless this is impossible owing to the absence of one of the officers concerned or through some other exceptional cause—*Peary Mohan v Weston*, 16 C W N 145 13 Cr L J 65

The power under sec 167 is given to detain the prisoners in custody while the police make the investigation and before the inquiry, but the custody mentioned in sec 344 is quite different and is intended for under-trial prisoners, i e when the inquiry or trial has begun or is about to begin—*Q E v Engadu* 11 Mad 98 *In re Arishnaji* 23 Bom 32, *In re Nagendra Nath*, 51 Cal 402 (412)

Under the proviso to this sub section newly added the power of detention is confined to first class Magistrates and to second class Magistrates specially empowered. The reason is that the period of detention is just the time which is taken advantage of by inexperienced Magistrates for extorting confessions and other things. Therefore the power of detention should be given only to experienced Magistrates. We consider that the Bill does not go far enough in its restriction of the Magistrates who should be authorised to remand to police custody. We would confine the power to first class Magistrates and to second class Magistrates specially empowered—*Report of the Joint Committee (1922)*

530 Period of detention.—The period for which a Magistrate can authorise the detention of the accused in police custody is under this section 15 days on the whole—*In re Krishnaji*, 23 Bom 32, *Reg v Surhaja* 5 B H C R 31, 1902 P R 24 *Q E v Engadu* 11 Mad 98, 19 W R 36

In ordering further detention when there are good reasons for it a Magistrate should invariably limit the term as much as possible to what may be necessary for the object in view—*Emp v Kampu Kuki*, 11 C. W. N 554

531. Subsection (3)—Grounds of detention.—Where a Magistrate orders the detention of an accused person in police custody, he must record sufficient reasons for the same—*In re Arishnaji* 23 Bom 32, *Peary Mohan v Weston*, 16 C W N 145. Before he orders the detention of an accused person he should ascertain how long the accused had been under police surveillance or influence and in recording the reasons for detention

he should note all the information that he is able to obtain on the subject—*Emp v Madar*, 1885 A W N 59

By requiring the Magistrate to record his reasons in case of sanctioning detention in police custody, the law contemplates that the Magistrate should consider whether on the facts placed before him there are good grounds for allowing such detention. There must be at least something to satisfy the Magistrate that the presence of the person arrested would, during the police investigation, assist in some discovery of evidence—*Emp v Kampu Kuki*, 11 C W N 554. The reasons which are to be recorded must be reasons showing the particular necessity which exists in each particular case for leaving the prisoner in the hands of the Police. Under no circumstances should an accused person be remanded to police custody unless it is made clear that his presence is actually needed in order to serve some important purpose connected with the completion of the inquiry—*Emp. v Madar*, 1885 A W N 59

Thus, when the accused had confessed before the Magistrate and had pointed out some of the properties stolen and was waiting to do more, but was unable to do so because the Police were by law unable without a special order to detain him it was held that an order for detention should be made—*Emp v Kampu*, 11 C W N 554. If in a case into which the police are enquiring, the suspected persons have voluntarily offered to conduct the police to a place where the stolen property may be found but such an offer cannot be carried into execution within the limited period of 24 hours, the power to detain under this section may be rightly exercised—*Q E v Rugonath*, 3 N W P H C R 275

But the fact that the accused is wanted by the police for the purpose of pointing out the places through which he passed on his way to commit a dacoity, or for the purpose of obtaining his identification in the village is not a sufficient reason for sanctioning detention—*Amir Khan v K E*, 7 C W N 457. So also, it would be improper for a Magistrate to sanction the detention of a person in police custody so that he may be forced to give a clue to the stolen property—*Q E v Rugonath*, 3 N W P H C R 275, or on a mere expectation that time will show his guilt—1872 P R 17, or simply for the purpose of verifying his confession recorded under section 164—*Lmp v Radhe Halwai*, 7 C W N 220

168 When any subordinate police officer has made any investigation under this Chapter, he shall report the result of such investigation to the officer in charge of the police-station.

Report of investigation by subordinate police officer.

532. It was held that a report made by a subordinate Police Officer under this section was not a public document within the meaning of section

74. Evidence Act, and an accused person was not entitled to a copy of it before trial—20 Mad 189 But now see sec 173 sub section (4)

169 If, upon an investigation under this Chapter, it appears to the officer in charge of the police station or to the police-officer making the investigation, that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report and to try the accused or commit him for trial

Change —The words or to the police officer making the investigation have been added by section 39 of the Crim Pro Code Amendment Act, XVIII of 1923 'In the case of sec 169 we agree that the power contemplated by the section should be exerciseable by investigating officers and we see no reason in this case to restrict the power to officers not below the rank of Sub-inspector With regard to section 170, however, we consider that the direct responsibility for sending up a case should rest with the officer in charge of the police station' —*Report of the Joint Committee (1922)*

533 Power of Police Officer —This section does not authorise a police officer to entertain an application for withdrawal of a complaint Permitting a complainant to withdraw is a judicial act the exercise of which is vested in the Magistrate under Secs 248 and 345 and the police have no authority to interfere in such matters—*Anonymous, Ratanlal 91*

Re arrest —The admission to bail by the Police under this section is a purely provisional arrangement, and therefore if the Magistrate considers that the evidence does establish a *prima facie* case of a non bailable offence, the accused should be re-arrested and forwarded to the Magistrate in custody—*Anonymous Ratanlal 121*

170. (1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under

Cases to be sent to Magistrate when evidence is sufficient.

custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial or if the offence is bailable and the accused is able to give security shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

(2) When the officer in charge of a police station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) If the Court of the District Magistrate or Sub divisional Magistrate is mentioned in the bond such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial provided reasonable notice of such reference is given to such complainant or persons.

(4) * * * * *

(5) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it and shall then send to the Magistrate the original with his report.

Change — Subsection (4) has been recently omitted by the Crim Pro Code Amendment Act II of 1926. The reasons for the omission have been thus stated — Subsection (4) of section 170 provides that the day fixed

appear
he may
forwarded
witnesses shall
be bound down to appear before the Magistrate on the date when the a
is expected to arrive at the Court if he is forwarded in custody. It
been found to be inconvenient and it is understood is not free

followed in practice —*Statement of Objects and Reasons* (Gazette of India 1925 Part V p 214)

534 Shall forward —As soon as it appears to the investigating police officer that there is sufficient ground for forwarding the accused the police officer is bound to forward the accused and has no option but to do so—*Govinda v Enp* 16 N L R 9 21 Cr L J 769

On a day fixed —A recognisance taken from a prisoner binding him to attend the Court to answer a charge against him should specify a particular day for his attendance—*Q v Pooran* 11 W R 47

The police should not bind over witnesses to appear and give evidence long after the prisoner is brought before the Magistrate—6 W R 52

535 Right of accused to copy of charge sheet at the beginning of trial —It was held under the old law that a Magistrate was entitled to refuse to give the accused at the commencement of the trial a copy of the Police charge sheet containing the whole of the prosecution evidence and extracts from the police diaries—19 Mad 14 but this is no longer good law in view of the new subsection (4) of sec 173 which now entitles the accused to get a copy of the charge sheet before trial

Complainants and witnesses not to be required to accompany police officer	171. No complainant or witness on his way to the Court of the Magistrate shall be required to accompany a police officer
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Complainants and witnesses not to be subjected to restraint	or shall be subjected to unnecessary restraint or inconvenience or required to give any security for his appearance other than his own bond
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Provided that Recusant complainant or witness may be forwarded in custody	if any complainant or witness refuses to attend or execute a bond as directed in Section 170 the officer in charge of the police-station may forward him in custody to the Magistrate who may detain him in custody until he executes such bond or until the hearing of the case is completed
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536 Unnecessary restraint —Where a witness was kept under police surveillance for about four days it was held that there was no warrant in the law to keep a witness under such unnecessary restraint and that under such circumstances the evidence of the witness could not be accepted as given voluntarily—4 C W N 49

172 (1) Every police-officer making an investigation under this Chapter shall day by day enter his ^{Diary of proceedings in investigation.} proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through this investigation

(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court and may use such diaries not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court, but if they are used by the police-officer who made them, to refresh his memory or if the Court uses them for the purpose of contradicting such police officer the provisions of the Indian Evidence Act, 1872 Section 161 or Section 145, as the case may be, shall apply

537 *Diary to be kept properly* —Though Police diaries are not evidence in the case against the accused still it is very essential for criminal trials that they should be properly kept in the manner provided by the Code and Magistrates should enforce the observance of law in this respect—1867 P R 39 See also *Punj Cir* p 174

It is incumbent upon a Police officer who investigates a case under this chapter to keep the diary as provided by this section and the omission to keep the diary deprives the Court of the very valuable assistance which such diaries can give if legitimately used—*Hiralal v Crown* 1918 P R 16 19 Cr L J 517

Court may send for diaries —Sessions Judges should not issue a general order directing the Police diaries in all cases committed for trial to the Court of Session and in every criminal appeal to be transmitted to them. They are only authorised to send for the diaries of cases under trial before them if they think it necessary in such cases to peruse the diaries—*Q E v Manna* 19 All 390 (T B)

538 *Use of diary* —

Diary not an evidence in the case —Police diaries are not original evidence of the matters contained therein—*Dal Singh v K E* 44 Cal 876 (P C) 21 C W N 818 *Q E v Zahir Husain* 21 All 159 *In re Nira-*

vals 2 Weir 143 Anonymous 2 Weir 142 The Court should not take the facts and statements contained in the diaries as the material which would help it to come to a finding for this would be using the diary as an evidence in the case—10 C W N 600 nor should the Court make a summary of the contents of the diary and make it a part of the judgment for that would also make the statements contained in the diary virtually a part of the evidence in the case—*Emp v Nand Lal* 1894 A W N 155 The use of the diary as evidence in the case either for or against the accused is strictly forbidden by sec 162 Even the consent or desire of the accused cannot legalise the use of the diary as evidence in the case—*Manna Lal v A E* 27 O C 40 A I R 1925 Oudh 1

The diary may be used not as evidence but only for the purpose of assisting the Court in the inquiry or trial or as suggesting means of further elucidating the points which need clearing up and which are material for doing justice between Crown and the accused—*Dal Singh v Emp* 44 Cal 876 (P C) *Q E v Jadab* 27 Cal 295 19 All 390 *Achhaibat v Emp* 2 P L T 223 *Emp v Nand Lal* 1894 A W N 155 *Sundar Singh v Emp* 23 Cr L J 251 (Lab) or for the purpose of seeking for sources and lines of enquiry and for the names of persons who may be in a position to give material evidence—*Ibid*

Entries made in a personal diary kept by a police officer who did not start investigating and did not carry on the investigation of the case do not fall within the provisions of this section and the diary is not inadmissible in evidence *Kala v Emp* 6 Cr L J 579 A I R 1925 Cal 959

Use by Police officer for refreshing memory or by the Court to contradict the Police officer—A criminal Court may permit the Police officer who made the special diary to look at it for the purpose of refreshing his memory or may use it for the purpose of showing contradiction between the statements recorded in the diary and the evidence which the police officer is giving in Court A special diary cannot be used to enable any witness other than the Police officer who made it to refresh his memory by looking at it and it cannot be used to contradict any witness other than such Police officer—*Q E v Mannu* 19 All 390 *Dal Singh v Emp* 44 Cal 876 (P C) It is illegal to use police diaries for the purpose of contradicting the evidence of prosecution witnesses—*Emp v Chunn* 1883 A W N 37

The object of subsection (2) is to enable the Court to direct the police officer who is giving his evidence to refresh his memory from the notes made by him in the course of his investigation of the case or to question him as to contradictions which may appear between statements so recorded and the evidence he is giving in Court If used for the latter purpose the provisions of secs 145 and 161 of the Evidence Act shall apply The Court may also use the diaries in the course of the trial for the purpose of clearing

up obscurities in the evidence or bringing out relevant facts which the Court thinks are material in the interests of a fair trial. If the statements in question, however, have not been made evidence in accordance with these statutory provisions, no Court has the right to refer to them subsequently for the purpose of coming to a judicial decision upon the case which is under trial or inquiry—*Mohammad v Emp*, 26 Cr L J, 1308: A I R. 1926 Lah 54

The accused is not entitled to insist that a Police officer should refer to the diary to refresh his memory—8 Cal 154, nor is the Judge bound to compel the witness to look at the diary to refresh his memory—8 Cal 739 But see *Mohiuddin v K E*, A I R 1924 Pat 829, where it is held that if a Sub-Inspector does not remember what the witnesses stated at the investigation, and refuses to refresh his memory from the diaries, the Court should compel him to look into the diaries

The diary is permitted to be used for the limited purpose of contradicting the Police officer and not for the purpose of corroborating him—*Ashhatbat v Emp* 2 P L T 223 22 Cr L J 374 But where independently of the police diary wrongly relied upon by the Court below, there was ample legal evidence to corroborate the prosecution case and to sustain the conviction the High Court in revision condoned the irregularity and refused to interfere—*Ibid* A Magistrate should not refer to an entry in a diary which is not used by a prosecution witness to refresh his memory as corroborative of his evidence but an error of this kind is not a sufficient ground for interference by the High Court when the Magistrate has found the accused guilty after considering the other evidence in the case—*In re Cuthalikhutti*, 1 L W 229 15 Cr L J 256

539 Accused not entitled to copy of diary—Inspection—Neither the accused nor his agent is entitled to a copy of the special diary or of any part of it His right is limited to inspection only in certain cases Where the diary is used by the Court for the purpose of enabling the Police officer who made it to refresh his memory or for the purpose of contradicting him the provisions of sec 161 of the evidence Act apply and the accused or his agent is entitled to see (but not to get a copy of) such diary and to cross-examine such Police officer thereupon—*Q E v Maunu* 19 All 390

The right of the accused to inspect the police diary is limited to that portion of the diary from which the police officer who gave evidence refreshed his memory He is not entitled to an inspection of anything more—*Lachmi v K E*, 2 Pat 74

540 Contents of the diary—Statements under sec 161—Statements made to a police officer by a person whom he is examining under sec 161 should not be recorded in the special diary—33 Cal 1023, 20 Cal 642 *Contra*—19 All 390

173. (1) Every investigation under this Chapter shall be completed without unnecessary delay and as soon as it is completed the officer in charge of the police station shall—

Report of police officer

(a) forward to a Magistrate empowered to take cognizance of the offence on a police report a report in the form prescribed by the Local Government setting forth the names of the parties the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond and if so whether with or without sureties and

(b) *communicate in such manner as may be prescribed by the Local Government the action taken by him to the person if any by whom the information relating to the commission of the offence was first given*

(2) Where a superior officer of police has been appointed under Section 158 the report shall in any cases in which the Local Government by general or special order so directs be submitted through that officer and he may pending the orders of the Magistrate direct the officer in charge of the police station to make further investigation

(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit

(4) *A copy of any report forwarded under this section shall on application be furnished to the accused before the commencement of the inquiry or trial*

Provided that the same shall be paid for unless the Magistrate for some special reason thinks fit to furnish it free of cost

Change —Clause (b) and subsection (4) have been added by sec 40 of the Criminal Procedure Code Amendment Act XVIII of 1923 The

principal change effected is to prescribe that the Police shall communicate the result of their investigation to the person by whom the first information was given—*Statement of Objects and Reasons* (1914) For reason of subsection (4) see below

541 Police report—It is the duty of the Police to make a report in every investigation under this Chapter Where the accused gave information to the Police of the commission of a non cognizable offence and the Police obtained the authority of a Magistrate under section 155 to investigate the case and *without making any report* instituted proceedings against the accused under section 211 I P C which ended in his conviction it was held that the conviction was illegal in the absence of a Police report under this section—*Emp v Appa Ragho* 17 Bom L R 69 16 Cr L J 161

There is no legal limit to the number of investigations which can be held into a crime and when one has been completed by the submission of a report under this section another may be begun on further information received—*Divakar v Ramamurthi* 35 M L J 127 19 Cr L J 901

The report must set forth the nature of the information A report which omits to set forth the information is defective and a Magistrate taking cognizance of a case on such report acts illegally—37 Cal 49

It is sufficient if the Police report contains the names of the parties the nature of the information and the names of the persons acquainted with the circumstances of the case The report need not state whether in the opinion of the police the accused are guilty or not Where the police sent up their report wherein they mentioned the names of two persons and stated that certain witnesses spoke against them on account of enmity but that if the Court thought that there was evidence against them the Court might issue warrant *held* that the report was a police report within the meaning of this section—*Mehrab v Emp* 17 S L R 150 A I R 1924 Sind 71 26 Cr L J 181

On receipt of a police report under this section the Magistrate can take cognizance of the case under sec 190(b) If instead of doing so he proceeded to make over the case to a subordinate Magistrate for enquiry and report as if he had taken cognizance of the case on a complaint *held* that the proceedings of the Magistrate were irregular—*Abdullah v A E* 40 Cal 834 17 C W N 1004 14 Cr L J 297

Order to strike off case—A Magistrate's order directing a case reported to him by the Police under this section to be struck off is not a judicial order dismissing a complaint and cannot be reviewed by the Sessions Judge under sec 437 (now 436)—*Q F v Asurm Ratanlal* 51

Sub section (4)—This sub section did not exist in the Bills or Reports but was added during the debate on the motion of Mr Rangachar

who observed as follows This amendment relates to the supply to the accused person of a copy of the charge sheet in the case in which he is being prosecuted There has been considerable difficulty in this matter on account of the rulings of various Courts that copies of charge sheets should not be furnished to accused persons Some Courts went to the length of holding that till the accused begins his defence a copy of the charge sheet should not be furnished to him It has worked a great hardship The accused has to grope in the dark as to what case he has to meet who the prosecution witnesses are and what their evidence is going to be This amendment is therefore very necessary Before a case begins or the inquiry or trial commences an accused person ought to be furnished with a copy of the charge on which he is being prosecuted Just as he is furnished with a copy of the complaint on which he is being prosecuted so also this charge sheet is the information on which the Magistrate takes cognizance and it is but right that the accused should be granted a copy of it —*Legislative Assembly Debates* 31st January 1923 pages 1763—1764

Before the enactment of this sub section it was held that the report made by a Police officer under this section not being a public document within the meaning of Sec 74 of the Evidence Act the accused was not entitled to get a copy of the report before trial—20 Mad 189 19 Mad 14 But these cases are now overruled by the new sub section (4)

174 (1) The officer in charge of a police station or some other police officer specially empowered by the Local Government in that behalf, on receiving information that a person—

- (a) has committed suicide or
- (b) has been killed by another or by an animal or by machinery, or by an accident or
- (c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence,

shall immediately give intimation thereof to the nearest Magistrate empowered to hold inquests and, unless otherwise directed by any rule prescribed by the Local Government or by any general or special order of the District or Sub divisional Magistrate, shall proceed to the place where the body of such deceased person is and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation,

and draw up a report of the apparent cause of death, describing such wounds fractures bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any) such marks appear to have been inflicted

(2) The report shall be signed by such police officer and other persons or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub divisional Magistrate

(3) When there is any doubt regarding the cause of death, or when for any other reason the police officer considers it expedient so to do he shall, subject to such rules as the Local Government may prescribe in this behalf, forward the body, with a view to its being examined to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the Local Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless

(4) In the Presidencies of Fort St George and Bombay, investigations under this section may be made by the head of the village, who shall then report the result to the nearest Magistrate authorised to hold inquests

(5) The following Magistrates are empowered to hold inquests namely, any District Magistrate Sub divisional Magistrate or Magistrate of the first class and any Magistrate especially empowered in this behalf by the Local Government or the District Magistrate

Change —In subsection (5) the words 'or Magistrate of the first class' have been newly added by sec 41 of the Criminal Procedure Code Amendment Act XVIII of 1923 By this amendment, all first class Magistrates have been generally empowered to hold inquests

Magistrates empowered —In the Punjab all Magistrates of the 1st and second class have been specially empowered to hold inquests under this section—*Punjab Gazette*, 1883 pp 23 32 In Bombay, 'Magistrates (except Honorary Magistrates) all District Super and Assistant Superintendents of Police are empowered to this section—*Bombay Government Gazette* 1872 p 1325, *Ibi*'

District Magistrates should inform District Superintendents of Police which of the subordinate Magistrates have been authorised under section 37 read with sec 174 Cr P C to hold inquests. The District Superintendent of Police will thus be enabled to instruct his subordinates as to the particular Magistrates to whom the intimation required by this section is to be sent, and the intimations will give those Magistrates the opportunity of proceeding under sec 176, when it may be desirable to do so—C P Cr Cir, Part II, No 10

542 Scope —When the body cannot be found or has been buried, there can be no investigation under section 174. This section is intended to apply to cases in which an inquest is necessary which presupposes that the corpse must be available—1908 P R 27

543 Report —The report is different from the final or complete report mentioned in sec 173. *Inquest reports must be written up and completed on the spot* where the inquest over the corpse is being held. Immediately the inquest is closed, the report thereof will be put into a cover and handed over in the presence of the *Panchayeldars* to the constable about to take the corpse to the Medical Officer's station for examination.—*Mad Pol Man*, Vol I, p 85

Considering the important nature of the evidence which is generally supplied by the results of the *post mortem* examination it is necessary that in such cases the results of the observation, external and internal should be fully recorded. A *verbatim* report of the statements of witnesses examined at the inquest may often be of great use to the Court in testing the value of evidence subsequently given.—*In re Pachudayan*, 9 M L T 321 12 Cr L J 124

Special diary not necessary in all cases — The Lieutenant Governor does not think that special diaries are intended or necessary in all cases of inquiry into unnatural deaths. The report described in sec 174 Cr P Code is very much the same in character as the special diary of sec 172. If the Police officer investigating sees reason to suspect crime, the inquiry becomes one under sec 172 and special diaries become as a matter of course necessary, but in ordinary cases in which the inquiry is made and completed in a few hours there seems to be no necessity of reporting the facts first in a special diary and then in the report prescribed by sec 174. When however the inquiry is prolonged or lasts for more than one day the diary should be sent to inform the District Superintendent and Magistrate of what is going on. The Lieutenant Governor would therefore rule that in cases of any complexity or in which the inquiry lasts over one day, or in which a crime is suspected, special diaries should be sent in anticipation of the final report which will be made under sec 173 if a crime is detected, and under sec 174 if the death is from

accident or unnatural causes It is to be understood that in the station Diary everything done by the Police will be entered"—*Bengal Police Circular*, 1872, page 107

175. (1) A police-officer proceeding under Section 174 may by order in writing summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case Every person so summoned shall be bound to attend and to answer truly all questions other than questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture

(2) If the facts do not disclose a cognizable offence to which section 170 applies such persons shall not be required by the police officer to attend a Magistrate's Court

Punishment — A person who fails to attend in obedience to the order issued under this section is punishable under sec 174 I P Code

It should be noticed however that the word 'truly' which has been omitted from sec 161 is still retained under this section, probably through oversight but whether retained through oversight or otherwise, the word cannot be ignored, and a person giving false answers to questions put to him is liable to prosecution for giving false evidence, under sec 193 I P C If he refuses to answer the questions he is punishable under sec 179 I P C

It should be further noted that the obligation to answer truly all questions attaches only to the persons summoned by the Police officer If a person voluntarily comes forward without any summons, and makes false statements he cannot be prosecuted for perjury—*Id Hajat v Crown*, 23 Cr L J 82 A I R 1922 Lah 133 1922 P W R 6

544. Record of statement —The statements of witnesses examined at the inquest should be recorded *verbatim* in the report, as the statements may be of great use to the Court in testing the value of evidence subsequently given — *In re Pachudajan*, 9 M L T 321 12 Cr L J 124

176 (1) When any person dies while in the custody of the police the nearest Magistrate empowered to hold inquests shall, and, in any other case mentioned in Section 174, clauses (a) (b) and (c) of sub-section (1), any Magistrate so empowered may,

Inquiry by Magistrate into cause of death.

hold an inquiry into the cause of death either instead of or in addition to the investigation held by the police-officer, and, if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereafter prescribed according to the circumstances of the case.

(2) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred in order to discover the cause of his death the Magistrate may cause the body to be disinterred and examined.

545 Jurisdiction of Presidency Magistrate —The Presidency Magistrate is not ousted of his jurisdiction to hold a preliminary inquiry into a charge of murder because the Coroner has held an inquiry into the cause of death and has committed the accused to the High Court under sec 75 of the Coroners Act (IV of 1871)—*Q E v Md Rajudin* 16 Bom 159 *Emp v Jogeshwar* 31 Cal 1 *Q E v John Paul Ratanlal* 540

Power to disinter corpses —A Police officer making an investigation under this section has no power to cause a dead body which has been already interred to be disinterred in order to examine it. Such power is conferred on a Coroner under section 11 of the Coroners Act (IV of 1871) and on a Magistrate holding an inquest under the present section.

546 Revision —Proceedings under this section are now liable to revision by reason of the omission of sub section (3) of section 435 by the Amendment Act of 1923.

But there is nothing in this section which requires that a Magistrate holding an inquiry under this section is bound to make a report or to come to a finding. The inquiry under this section into the cause of a suspicious death is not a judicial proceeding and where he sent a report of the result of his inquiry to his executive superior (the District Magistrate) the High Court could not call for it under sec 435—*In re Trivellokhanath* 3 Cal 742. *Q E v Bayaji Ratanlal* 843

PART VI.

PROCEEDINGS IN PROSECUTIONS

CHAPTER XV

OF THE JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

A—Place of Inquiry or Trial

177 Every offence shall ordinarily be inquired into and
Ordinary place of inquiry and trial tried by a Court within the local limits
of whose jurisdiction it was committed

547 General Rule —All crime is local the jurisdiction over the crime belongs to the country where the crime is committed—*Macleod v Attorney General* L R (1891) A C 458 Crimes in their nature are local, and the jurisdiction of crimes is local—2 Blackstone page 1038 Crime is purely local i.e. depends on the law of the place in which it is committed and not on the nationality of the person who commits it—*Sirdar Gurdayal v Rajah of Furidkote* (1894) A C 670 Therefore British Indian Courts have no jurisdiction to try for offences committed and completed outside the British territory—*Ibrahim v Emp* 1894 P R 7 Q E v *Ranchhod* 2 Bom L R 337 7 Mad 354 *Anonymous* 6 M H C R App 3 As to the jurisdiction of British Indian Courts over offences committed by subjects of the Crown in places outside British India see sec 188

548. Offence —This chapter deals with the place of inquiry and trial in respect of offences only an application under sec 488 for maintenance is not a complaint of an offence and the provisions of this section are not applicable to determine the jurisdiction of a Court competent to entertain such application—*Hildephonsus v Malone* 1885 P R 13 1893 P R 3 *Contra* —*Bibi Nur v Shah Walais* 1883 P R 9 and 13 All 348, where it was held that neglect to maintain a wife being an offence punishable under this Code under sec 488 the place for its trial must be determined by the provisions of this Chapter But the recent amendment of subsection (9) of sec 488 shows that that section does not contemplate any offence

So also proceedings under Chapter XII are not proceedings in respect of an offence and therefore sec 182 does not apply to a proceeding under sec 145—3 C W N 148 nor does sec 185 apply to determine jurisdiction in respect of such proceeding—*Rudra Pratip v Dewan*, 12 A L J 390 15 Cr L J 520

Similar remarks may also apply to proceedings under Chapters VIII and X

"Ordinarily" —The word 'ordinarily' indicates that this section is a general one and must be read subject to any special provisions of law which may modify it. The rule laid down in this section has been relaxed or modified by several succeeding sections. Thus this section must be read subject to the special provisions of sec 197 (2) which overrides the general rule contained in this section—4 L B R 265

549 Local jurisdiction —Although this section lays down that every offence must be inquired into and tried by the Court within whose jurisdiction it was committed still if the offence is inquired into or tried by a Magistrate who has no territorial jurisdiction over the place where the offence was committed it would be at most an irregularity which would be cured by sec 531 if such commitment or trial has occasioned no failure of justice—*Rayin Kull v Emp* 26 Mad 640, *Assi Sessions Judge v Ramammal*, 36 Mad 387 30 Mad 94 Where a Magistrate being empowered to commit to the sessions but having no territorial jurisdiction over the place in which the offence is alleged to have been committed commits a case to a Sessions Court which has jurisdiction over the place the commitment is valid and cannot be quashed under sec 532 although the objection to such commitment is taken before the commitment—*Q E v Abbi Redi*, 17 Mad 402 But no Judge or Magistrate can try or pass an order of committal in respect of an offence committed outside the Province altogether. Such a trial or order of committal is illegal and the illegality can not be cured by section 531—*Bhagwati v Q E*, 3 Pat 417 (422) 26 Cr L J 49 A I R 1925 Pat 187

Commitment to wrong Session —Where a Magistrate commits a case to a Sessions Court other than the one within whose local jurisdiction the offence has been committed, the commitment is merely irregular and would be cured by sec 531 and the High Court will not quash the commitment but will direct the transfer of the case to the Court having jurisdiction—*Queen Emp, v Thaku*, 8 Bom 312 *Q E. v Atmaram* 2 Bom L R 394, *Q E. v Ram Des*, 18 All 350 But the Madras High Court, dissenting from the above cases and following the Privy Council ruling in *Ledgerd v Bull*, 9 All 191, has laid down that a commitment to a Sessions Court having no territorial jurisdiction over the offence is illegal and must be set aside, and the High Court would not be justified in upholding the commitment

and directing the transfer of the case to the proper Sessions Court—*Asst Sessions Judge v Ramammal*, 36 Mad 387 (391) This is also the view of the Patna High Court in *Bhagawatia K E*, 3 Pat 417 But where a commitment was made to the High Court Sessions in respect of two offences, one of which was committed within and the other without the original jurisdiction of the High Court held that the High Court could on the grounds of expediency and convenience proceed with the trial, the irregularity being cured by sec 531 Even if the High Court had no jurisdiction on its original side to try the case an order could be made under sec 526 directing the trial to take place at the High Court Sessions And the High Court ordered accordingly—*Ganapathi v Rex* 42 Mad 791 37 M L J 60 20 Cr L J 484

Several offences—Where two different offences are committed in the course of the same transaction, the case should be tried by a Magistrate who has jurisdiction to try both the offences it would not be a proper course that a Magistrate who has jurisdiction over one of them should try that offence leaving the other to be tried by another Magistrate Such a procedure would be highly inconvenient—2 Weir 144

550 Holding trial outside British India—The mere fact that an offence has been committed within the local limits of the jurisdiction of a District Magistrate would not enable him to try that offence at some place outside British India—*Q E v Maniklal Ratanlal* 376

551 Effect of irregular arrest—The irregularity of an arrest is not a ground for invalidating all proceedings and trials subsequent to the arrest—1899 P R 6 *Crown v Gobinda* 1911 P R 1 Thus a Magistrate should not acquit an accused merely because the officer who arrested the accused did not belong to the circle in which the arrest was made—26 Mad 124 *Contra*—7 Bur L R 83 where it has been held that if a person is illegally arrested and brought before a Magistrate the Court is bound to stay further proceedings against the accused

552 Effect of transfer of territory to Native State—Where an offence was committed in a place within British territory but some time after the commitment of the case to the Court of Session and before the commencement of the trial the place in which the offence was committed ceased to be a British territory and became part of a Native State, it was held that this fact did not oust the jurisdiction of the British Court to try the offence—*K E v Ram Narsh* 9 A L J 51 34 All 118 *K E v Ganga*, 9 A L J 696 34 All 451 Similarly if pending an appeal from a conviction, the place where the offence had been committed was transferred to a Native State it was held that this transfer of territory did not deprive the Court in which the appeal had been filed of its jurisdiction to hear it *Mahabir v K E*, 8 A L J 630 33 All 578

and directing the transfer of the case to the proper Sessions Court—*Asst Sessions Judge v Ramammal*, 36 Mad 387 (391) This is also the view of the Patna High Court in *Bhagawatia A E*, 3 Pat 417 But where a commitment was made to the High Court Sessions in respect of two offences one of which was committed within and the other without the original jurisdiction of the High Court *held* that the High Court could on the grounds of expediency and convenience proceed with the trial, the irregularity being cured by sec 531 Even if the High Court had no jurisdiction on its original side to try the case an order could be made under sec 526 directing the trial to take place at the High Court Sessions And the High Court ordered accordingly—*Ganapathi v Rex* 42 Mad 791 37 M L J 60 20 Cr L J 484

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552 Effect of transfer of territory to Native State —Where an offence was committed in a place within British territory but some time after the commitment of the case to the Court of Session and before the commencement of the trial the place in which the offence was committed ceased to be a British territory and became part of a Native State it was held that this fact did not oust the jurisdiction of the British Court to try the offence—*A E v Ram Naresh* 9 A L J 51 34 All 118 *A E v Ganga* 9 A L J 696 34 All 451 Similarly if pending an appeal from a conviction the place where the offence had been committed was transferred to a Native State it was held that this transfer of territory did not deprive the Court in which the appeal had been filed of its jurisdiction to hear it—*Mahabir v A E*, 8 A L J 630 33 All 578

178 Notwithstanding anything contained in Section 177, Power to order the Local Government may direct that any cases to be tried in different sessions divisions cases or class of cases committed for trial in any district may be tried in any sessions divisions

Provided that such direction is not repugnant to any direction previously issued by the High Court under Section 15 of the Indian High Courts Act or Section 107 of the Government of India Act, 1915 or under this Code, Section 526

553 Local Government's power in Burma—The Local Government of Burma has no power to transfer a case committed to the Court of the Recorder of Rangoon for trial to the Court of the Commissioner. But it can transfer a case from the District of Rangoon to the Sessions Judge of Pegu—10 Cal 643

179. When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued

Illustrations

(a) A is wounded within the local limits of the jurisdiction of Court X, and dies within the local limits of the jurisdiction of Court Z. The offence of the culpable homicide of A may be inquired into or tried by X or Z.

(b) A is wounded within the local limits of the jurisdiction of Court X, and is, during ten days within the local limits of the jurisdiction of Court Y, and during ten days more within the local limits of the jurisdiction of Court Z, unable in the local limits of the jurisdiction of either Court Y or Court Z to follow his ordinary pursuits. The offence of causing grievous hurt to A may be inquired into or tried by X, Y or Z.

(c) A is put in fear of injury within the local limits of the jurisdiction of Court X, and is thereby induced, within the local

limits of the jurisdiction of Court Y, to deliver property to the person who put him in fear. The offence of extortion committed on A may be inquired into or tried either by X or Y.

(d) A is wounded in the Native State of Baroda and dies of his wounds in Poona. The offence of causing A's death may be inquired into and tried in Poona.

554 Scope of Section.—This section applies when the act (or omission) is an offence by reason of anything which has been done *and of any consequence* which has ensued. But where the act (or omission) is a complete offence *irrespective of any consequence* which has ensued, this section does not apply and the offence is to be inquired into and tried only by the Court within whose jurisdiction the act was committed (Sec. 177). Thus—

Examples—(a) The offence of falsification of accounts (sec. 477A, I P C) is complete as soon as the accounts are falsified and any consequence resulting from it is immaterial for the offence. Therefore, it is to be tried only by the Court within whose jurisdiction the accounts were falsified and not by any other Court.—*Suaminathan v Annamalai*, 4 M L T 481, 9 Cr L J 9.

(b) Where a person who was assaulted by the accused in Baroda had his leg completely broken there and then came to British India where he remained for 2 months in the hospital, it was held that the offence of grievous hurt was complete in Baroda by the fracture of the leg, irrespective of any consequence (viz. the injured man lying in hospital) ensuing in British India; therefore the offence could not be tried in British India.—8 Bom L R 513.

(c) Where a dacoity was committed in a Native State and some stolen property was found concealed by the accused in the British territory, it was held that the offence of dacoity was complete in the Native State, irrespective of retaining the stolen property in the British territory and could not be tried in British India.—1 Bom 50.

(d) Where a woman sold in District A her minor girl to a prostitute who took the girl to District B, it was held that the offence of selling a minor girl for the purposes of prostitution was complete in District A, and that the possession of the girl in District B was not a consequence completing the offence. The Magistrate of District B had no jurisdiction to try the offence.—6 Agra 46.

(e) The offence of infringement of copyright is complete as soon as the book infringing the copyright is printed and it does not depend for its completion upon any consequence (e.g. loss of money to the complainant) such as is contemplated by Sec. 179. Therefore the offence is to be inquired into and tried under Sec. 177 at the place where the infring-

ing book was printed—*Kalidas v Karam Chand* 1916 P R 28 18 Cr L J 353

(f) Where a person consigned some goods from District F to District K and the consignee misappropriated the goods at K it was held that the consignee could be tried in K and not in F because the accused was not charged by reason of any consequence or loss which ensued to the consignor at F but solely by reason of what was alleged to have been done at K—*Nirbhai Ram v Kallu Ram* 4 O C 376

(g) Where a complaint was made before a Magistrate at Aligarh that a person had dishonestly and fraudulently two days after he became insolvent realised at Calcutta the money due in respect of certain hundies which the complainant purchased it was held that the offence should be inquired into at Calcutta where the offence (sec 415 I P C) was committed and not at Aligarh where the loss ensued to the complainant—5 A L J 333

(h) Where the offence of kidnapping is committed outside British India the subsequent act of conveying the kidnapped person to British India is not such a consequence as is contemplated by this section so as to give jurisdiction to a British Indian Court over the offence committed outside British India—*Bhula Santol v Dama Santol* 20 C W N 62 17 Cr L J 128 1901 P R 1 *Crown v Iochan* 7 S I R 17 14 Cr L J 439

(i) Two persons were alleged to have induced another to purchase a barrel at Meerut on the false representation that the barrel contained a certain quantity of spirits. At Agra it was discovered that the quantity was less than what it was represented to contain. It was held that the Agra Court had no jurisdiction because the offence of fraud had been committed at Meerut and that sec 179 did not apply in as much as the discovery of the fraud after the delivery of the article was not a consequence which has ensued within the meaning of the section—*Pragdas v Daulatram* 13 A L J 1067 16 Cr L J 875

(j) Where a petition under sec 21 of the Income Tax Act (1918) was falsely verified at a place in the Tanjore District and was presented in the Ramnad District held that the offence of false verification was completed in the Tanjore District and the Ramnad Magistrate had no jurisdiction—*In re Mohideen* 43 M L J 475 45 Mad 839 23 Cr L J 619

555 Criminal misappropriation.—In case of the offence of criminal misappropriation or breach of trust the consequence of wrongful gain or wrongful loss is not an essential part of the crime and a person is not accused of the offence by reason of it therefore the offence is triable where the dishonest use or disposal took place and not where the loss ensued to the complainant—*Rambhais v Emp* 29 M L J 175 38 Mad 639,

Simhachalam v Rati Kant 21 C W N 573 44 Cal 912 1 P L T 200
A. A. Mahtia v Kamini Mohan 25 Cr L J 377 (Cal) *Banerjee v Poinis*,
 20 N L R 72 25 Cr L J 922 (1919) U B R 3rd Or 172 23 Cr L J
 743 (Lah) *Ahmed Ibrahim v Haji A. Gunny* 1 Rang 56 In *Asst*
Sessions Judge v Ramasami 38 Mad 779 however where certain jewels
 were entrusted to a person in a Native State for sale on commission and he
 converted the jewels to his own use it was held that since the loss of the
 jewels *which was the consequence* occurred in British India (where the com-
 plainant resided) the Magistrate of the British Indian Court had jurisdiction
 under this section (See this case cited under sec 188) See also 19 All
 111 and 26 C W N 175 where it is held that the offence of criminal
 breach of trust by an agent can be tried by the Court having jurisdiction
 in the place where the principal resides This difference of opinion hangs
 upon the different interpretation put on the word consequence occurring
 in this section See Note 557 *infra*, and Note 563 under sec 181

556 Cases where either Court has jurisdiction—Where an act is
 an offence by reason of any consequence which has ensued the offence
 is triable either by the Court within whose jurisdiction the act was com-
 mitted or by the Court within whose jurisdiction the consequence has ensued
 Thus—

(a) Where a petition presented to a person at Lahore contained de-
 famatory statements against another and was published at Amritsar
 it was held that the Amritsar Court had jurisdiction to try the offence of
 defamation because the publication at Amritsar completed the offence
 and was a consequence by reason of which the accused was charged with
 the offence of defamation—1885 P R 44

(b) Where A sent goods by Railway from Karachi to Lahore under
 a false description the Court at Lahore could under this section try A for
 the offence of cheating as the consequence of A's act viz the loss of
 freight to the Railway Company was an ingredient of the offence and
 took place at Lahore the Headquarters of the Railway Company—1900
 P R 7

(c) In fulfilment of a contract the accused consigned several tins of
 groundnut oil at Salem (Madras) to the complainant at Dhulia (Bombay)
 The tins when opened were found to contain groundnut oil mixed with
 rock oil The complainant thereupon filed a complaint of cheating in the
 Magistrate's Court at Dhulia Held that the Dhulia Court had jurisdic-
 tion for the deception took place at Dhulia where the complainant became
 the victim of the deceit in consequence of the accused's act—*Emp v Jam*
nadas 17 Bom L R 389 16 Cr L J 433 *Yusuf Ali v Wahajuddin*,
 12 A L J 1022 16 Cr L J 719

(d) Where an alleged defamatory letter is written and posted in Mad-

ras with a view to its being read at Tinnevely the offence of defamation is triable either in Madras or in Tinnevely—*Krishnamurti v Parasurama* 44 M L J 648 32 M L T 164 24 Cr L J 309

(e) Where the accused residing at Lahore recovered money from a Bank at Bombay on a forged draft of the Amritsar Branch of the Punjab National Bank of Lahore it was held that the Lahore Court had jurisdiction to try the accused for an offence under sec 420 I P C, as the consequence (viz loss to the P N Bank) contemplated by this section ensued at Lahore where the Head Office of the Bank was situated—1908 P W R 18

(f) The offence of cheating may be tried either at the place where the cheating was committed (where the accused resided) or at the place where the complainant resided—*Girdhar v Emp* 21 A L J 621 24 Cr L J 929

557 Consequence—The consequence mentioned in this Section is the *primary* consequence and not any secondary consequence of the offence. The primary consequence should be taken into consideration in determining the jurisdiction. Thus where an accused living in Nandyal was appointed agent for the sale of the oil of the complainant living in Madras and when called on to account the accused failed to do so it was held that the offence of criminal breach of trust was triable at Nandyal and not at Madras because the firm's loss at Nandyal was a primary consequence and the loss at Madras the firm's head quarters where the funds were kept is a secondary one which is not sufficient to attract the operation of this section—*Krishnamachari v Shaw Wallace & Co* 39 Mad 576 The same view is taken in 29 C W N 43 38 Mad 639 44 Cal 912 and *Ganeshi Lal v Nand Kishore* 10 A L J 45 34 All 487 But in *Langridge v Atkins* 35 All 29 *Shro Shanfar v Mohan* 19 A L J 69 *Emp v Ramratan* 46 Bom 641 32 All 397 1902 P R 2 1901 P R 24 19 All 111 38 Mad 779 *Abdul Latif v Abu Md Kasim* 26 C W N 175 a wider interpretation has been put on the word consequence which has been taken to include such secondary consequence as loss resulting to the employer by criminal breach of trust or failure to account for moneys misappropriated at the head office of the firm and the Court of the place where such secondary consequence ensues has been held to have jurisdiction over the offence. See also Note 563 under sec 181

Offence in Native State—Consequence in British India—See 38 Mad 779 cited above. See the same case cited under sec 188

Illustrations—The illustrations are not exhaustive and to hold that all the consequences prescribed by the Legislature as conferring jurisdiction are limited to those specified in the illustrations is not justified by the language of the section—1908 P W R 18 The Illustration (d) to this

section must be applied with certain restrictions. The offender in that illustration must be taken to be a subject of the British Government and a certificate of the Political Agent must be obtained under sec 188 before he can be tried. If the offender is a subject of the Native State he cannot be tried by the British Courts.

180. When an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence a charge of the first-mentioned offence may be inquired into or tried by a Court within the local limits of whose jurisdiction either act was done.

Illustrations

(a) A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed or by the Court within the local limits of whose jurisdiction the offence abetted was committed.

(b) A charge of receiving or retaining stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were stolen, or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained.

(c) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into or tried by the Court within the local limits of whose jurisdiction the wrongful concealing, or by the Court within the local limits of whose jurisdiction the kidnapping took place.

558 Scope of section—Foreign territory—The Code extends only to British territory and the present section assumes the offence therein indicated to have been committed in a local jurisdiction created by the Code. Therefore where a foreign subject in a foreign territory instigated the commission of an offence which was in consequence committed in British territory it was held that the instigation not having taken place in any district created by this Code the instigator was not amenable to the juris-

dition of a British Court—*Reg v Pirat* 10 B H C R 356 1878 P R 20 When a house breaking took place in a district in British India and a non British subject residing in a Native State was found to be in possession of the stolen property held that that person was not triable by the British Courts—*Id Hussain v Crown* 2 Lah L J 348 23 Cr L J 560 The operation of this Code cannot be extended beyond the British territory so as to give jurisdiction to a British Court to try a non British subject residing outside British India for the offence of retaining stolen properties although the theft of those properties might have taken place in British India—*Moheswari v A C* 18 C W N 1178 15 Cr L J 537 9 All 523 *Reg v Bechar* 4 B H C R 38 If however an Indian British subject is found in the Native State in possession of property stolen in British India he can be tried by a Court in British India under this section but a certificate of the Political Agent under sec 188 would be necessary—*Sessions Judge v Sundara* 8 M I T 54 11 Cr L J 306

If however the contrary things happen : e if the theft takes place outside British territory and the stolen property is brought within British India the offence of retaining stolen property may be tried in British India although the offence of theft which was committed outside British India cannot be tried here—*Q C v Abdul Latif* 10 Bom 186 *Reg v Lakhyan* 1 Bom 50 *Emp v Sindhur* 6 Cal 307 (*Contr*—5 Bom 338 and 2 Weir 115 where it has been held that such persons cannot be convicted for retaining stolen property because in order to establish the offence of retaining stolen property it is necessary first to show that the property was stolen according to the law of the forum i e the Penal Code which has no operation in foreign territories and against the provisions of which therefore no offence could have been committed These two decisions are however no longer good law in view of the words whether the transfer has been made or the misappropriation or breach of trust has been committed within or without British India added to Sec 410 I P C by the Penal Code Amendment Act VIII of 1832)

559 Abetment —Where a person sends a letter to another through post inviting him to the commission of an offence he is guilty of the offence of abetment as soon as the letter is received by and the contents known to the addressee and is triable at the place where the letter is received—16 All 389

Although an abetment of an offence might have taken place outside the territorial jurisdiction of a Magistrate yet under this section the abettor can be tried by a Magistrate within whose territorial jurisdiction the offence abetted was committed—*In re Chinnannagoud* 1 Weir 155

Where the abetment of the offence as well as the offence itself is committed in N (1 place in the province of Bengal) but the abettor has a house

10 J (a place in the province of Behar), the charge of abetment should be inquired into and tried in N and not in J. A committal order in respect of the charge of abetment passed by a Court in Behar is without jurisdiction and must be quashed. If the abetment is committed both in a place inside the province of Behar as well as in a place outside that province, it may be inquired into and tried in a Court of Behar—*Bhagwati v K L*, 3 Pat 417 (124).

Abetment in British India of offence committed outside British India.—Where a British subject abets in British India an offence committed outside British India he may under the amended section 108A I P C be tried in British India—24 Bom 287. In view of Sec 108A I P C the decision in 19 Bom 105 is no longer good law.

560 Conspiracy.—The offence of an attempt to murder a person in district R in pursuance of a conspiracy entered into in district M can be inquired into and tried in either of the two districts—*Gurdit Singh v Crown* 1917 P R 24 18 Cr L J 514. But the Calcutta High Court is of opinion that if a conspiracy is entered into in District A and acts are committed in pursuance of that conspiracy in District B the Magistrate of District A can try the conspiracy but cannot try the accused in the same trial for acts committed outside his district. Even the fact that the offences could have been tried jointly under sec 239 if committed within his jurisdiction will not give him jurisdiction to try them—*Bissessar v Emp*, 28 C W N 975 A I R 1924 Cal 1034.

181. (1) The offence of being a thug, of being a thug and committing murder, of being a thug and dacoity, of dacoity with murder, of having belonged to a gang of dacoits, or of having escaped from custody, may be inquired into or tried

Being a thug or belonging to a gang of dacoits, escape from custody, etc

by a Court within the local limits of whose jurisdiction the person charged is.

(2) The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person or the offence was committed.

Criminal misappropriation and criminal breach of trust.

(3) The offence of stealing anything may be inquired into or

Stealing.

(3) The offence of theft or any offence which includes theft

Theft.

tried by a Court within the local limits of whose jurisdiction such thing was stolen or was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen or the possession of stolen property, may be inquired into or tried by a Court within the local limits of whose jurisdiction such offence was committed or the property stolen was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen

(4) The offence of kidnapping or abduction may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained

Change —Sub section (3) has been redrafted by sec 42 of the Crim Pro Code Amendment Act XVIII of 1923 but the actual change effected by this redrafting is the addition of the words or any offence which includes theft or possession of stolen property. We accept this clause but would enlarge the enumeration of offences to include the possession of stolen property. This will also cover the case of extortion. See the definition in sec 410 I P C. —*Report of the Select Committee of 1916*

The language of sub section (3) is open to objection. The words such offence' are intended to mean the offence of theft but grammatically these words would mean any offence of possession of stolen property.—*Emp v Bhima* 24 A L J 148 27 Cr. L J 21 A I R 1926 All 167

561 **Scope of section** —This section does not apply to the case of an offence committed by a person who is not a British subject outside British territory. This section is intended to regulate the jurisdiction of Courts in British India in respect of offences committed in British India and cannot vary or abrogate the ordinary rule that no foreign subject can be tried in British India for an offence committed outside British India.—*Emp v Balteva* 28 All 372. This section only applies as between Courts of different local areas whose jurisdiction has been limited under sec 12.—*Imp v Tribhuan* 5 S L R 266, 1 Mad 171

Thus where a dacoity or theft was committed in a Native State and part of the stolen property was found to have been concealed by the accused in British territory it was held that the offence of dacoity could

not be tried by British Indian Courts, although the offence of retaining stolen property could be tried by such Courts, the retaining having taken place in British territory—*Reg v Lakhya*, 1 Bom 30, *Q E v. Abdul Latib*, 10 Bom 186, and *Emp. v Sunkur*, 6 Cal 307 cited under sec 180, see also 1 Mad 171. When a person escaped from lawful custody in a Native State and came into British India, it was held that British Courts had no jurisdiction to try him for an offence under sec 224 I P C, as it was committed out of British India—*Ratanlal* 870. So also, where a criminal breach of trust was committed in a Native State, a Court in British India had no jurisdiction—*Imp v Tribhuan*, 5 S L R 266. 13 Cr L J 530. Where the offence of kidnapping was committed out of British India, and the minor was brought into British India, a British Court had no jurisdiction as the offence was complete out of British India even the fact that the person kidnapped was conveyed to British India would not give the British Court jurisdiction because the words 'was conveyed' in this section do not import any separate or distinct offence, where the offence was complete previous to such conveying—*Jaima Singh v. Emp*, 1901 P R 1, *Crown v Koochri*, 7 S L R 17, *Bhusa Santal v Dama*, 20 C W N 62. The complainant sent a sum of money from Burma to the accused, who was his agent in Japan. The accused misappropriated the money whereupon the complainant took criminal proceedings in Rangoon. Held that the offence of criminal misappropriation was complete when the conversion was done with the intent of causing wrongful gain to the offender, and did not depend on the consequence of wrongful loss which had ensued to the complainant. The conversion having taken place in Japan, the Rangoon Court had no jurisdiction to entertain the complaint—*Ahmed Ebrahim v Hajee Abdul Ganny*, 1 Rang 56.

562. Belonging to a gang of dacoits.—Where a resident of a Native State was arrested in that State and was brought before a Court in British India and charged with the offence of belonging to a gang of dacoits who had committed dacoities within the jurisdiction of that Court it was held that the Magistrate had jurisdiction over the accused as the accused was within his district at the time of the charge—*Crown v Goinda*, 1911 P. R. 1. 12 Cr L J. 113.

"Is".—The word 'is' at the end of subsection (1) does not mean 'is of his own accord'. The Magistrate has jurisdiction, whether the accused has come within the local limits of his jurisdiction of his own accord or has been brought there by force (i.e., under arrest)—*Ibid*.

563. Criminal misappropriation etc.—See 4 O C 376, 38 Mad. 639, 44 Cal 912, 35 All 39, 26 C W. N 175, 19 All 111, 39 Mad 576, and 31 All 487 cited under Sec 179. In all these cases, the applicability of

non applicability of sec 179 to cases of criminal misappropriation or breach of trust was decided with reference to the meaning of the word 'consequence' occurring in that section. But in some other cases it has been held that since the offence of criminal misappropriation or breach of trust is specially provided for in sec 181, the place of trial of the offence must be determined in accordance with the provisions of this section, without reference to the 'consequence' mentioned in sec 179. See *Mahlab Din v Emp* 25 Cr L J 410 A I R 1914 Lah 663; *Dina Nath v Tuls Ram*, 6 Lah L J 471 26 Cr L J 136, *Gunananda v Santi Prakash* 29 C W N 432. The Allahabad High Court also recently holds that in respect of the offence of criminal breach of trust sec 179 is controlled by sec 181 and the offence can only be inquired into and tried by the Court within whose jurisdiction the offence was committed or the property (the subject of the offence) was received or retained by the accused. Therefore where the complainant residing at Basti appointed the accused as his commission agent in Bombay, and advanced money to him from time to time to purchase and sell goods at Bombay on behalf of the complainant but the accused misappropriated the money including the profits derived from the purchase and sale of goods on behalf of the complainant, held that the Basti Court had no jurisdiction to try the offence of criminal breach of trust, which was triable by the Bombay Court alone—*Girdhar v K E*, 21 A L J 621 24 Cr L J 929 A I R 1924 All 77. Where the complainant charged the accused under Sec 408 I P C alleging that the complainant had engaged the accused to manage a brunch firm at Rurki that accounts were sent by the accused to Rawalpindi for some time but subsequently discontinued, and that on inspection of accounts it was found that the accused had made false entries in respect of certain items it was held that in as much as the allegation in the complaint referred to specific items in respect of which the accused was charged with having committed the offence of criminal breach of trust at Rurki, the Rawalpindi Court had no jurisdiction to try the case—*Crown v. Raghubir*, 1915 P R 22. Where the accused is under a liability to render accounts at a particular place and fails to do so by reason of his having committed an offence of criminal breach of trust which is alleged against him, the Court within the local limits of whose jurisdiction that place is situated may inquire into and try the offence under the provisions of this section—*Gunananda v Santi Prakash*, 29 C W N 432 : 41 C L J 80 26 Cr L J 725, *Ram Sahai v Arishna*, A I R 1926 Lah 119 7 Lah L J 586. Where the accused was entrusted with a railway receipt for goods in one district with instructions to take delivery of the goods at their destination in another district and to sell them on complainant's account, and the accused did so sell them and misappropriated the sale-proceeds, it was held that the offence was triable by the Court

within the jurisdiction of which the goods were sold and the money was received and misappropriated. It was held further that the *property which was the subject of the offence* in this case was not the railway receipt but the money received on sale of the goods—*Kasi Chetty v Kasi Chetty* 10 Bur L T 50 18 Cr L J 645

Sub-section (3) —The offences of theft and the possession of stolen property cannot be tried by a Magistrate if neither the offence of theft was committed nor the property possessed within his jurisdiction even though a conspiracy to commit these offences was entered into in a place within his jurisdiction—*Bissessar v Lmp* 28 C W N 975

564 Sub section (4)—*Scope* —This sub section refers only to cases of kidnapping and abduction but it does not apply to offences under Chapter XX of the I P C e.g. detaining a married woman for the purpose of illicit intercourse. Such offence is to be inquired into only in the district where the detention of the woman occurs—*Jaswant v Crown* 1918 P L R 51 18 Cr L J 438

Kidnapping —Sub section (4) was for the first time added in the Code of 1898. Prior to 1898 it was held that the offence of kidnapping not being a continuing offence could be tried only by the Court within the local limits of which the minor was taken out and not by the Court within whose jurisdiction the minor was confined—*Lmp v Surja* 1883 A W N 104 *Lmp v Prasadi*, 1887 A W N 139 nor by the Court within whose jurisdiction such minor was conveyed—*Lmp v Budha* 1883 A W N 67. But these decisions are no longer good law. See also 18 All 350, 19 All 109 26 All 197 27 Cal 1041 2 C W N 81 where it has been held that the offence of kidnapping is not a continuing offence but is complete as soon as the minor is taken out of the custody of the lawful guardian.

The words kidnapping and abduction do not include an offence of wrongfully confining or keeping in confinement a kidnapped person—*Badli v Emperor* 25 Cr L J 552 A I R 19 4 All 454 21 A L J 912. A girl was kidnapped in the Budaun district by D and B. These men took the girl to a place in Etah district where they met two other men H and A and the four men then took the girl to Karnal district in Panjab to the house of one Dattu. Held that the offence committed by D and B (*viz* kidnapping, see 366 I P C) may be tried in Budaun Etah or Karnal the offence committed by H and A (*viz* keeping in confinement a kidnapped person, see 368 I P C) should be tried in Etah and the offence committed by Dattu (see 368 I P C) should be tried in Karnal —*Ibid*

A person kidnapped outside British India and conveyed into British territory cannot be tried by British Courts. See 20 C W N 6. 1901 P R 1 and 7 S L R 17 cited under Note 561 above.

182. When it is uncertain in which of several local areas

Place of inquiry or trial where scene of offence is uncertain or not in one district only or where offence is continuing or consists of several acts.

an offence was committed, or

where an offence is committed partly in one local area and partly in another, or

where an offence is a continuing one,

and continues to be committed in more local areas than one, or where it consists of several acts done in different local areas,

it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

565. Object of section—This section intends to provide for the difficulty which would arise where there is a conflict between the different areas, in order to prevent an accused person from getting off entirely because there may be some doubt as to what particular Magistrate has jurisdiction to try the case—*Bichitranand v Bhagbut*, 16 Cal 667 Where there is an uncertainty in which of two districts the scene of an alleged offence lies, sec 182 is applicable and the offence may be tried by the Court of either district—*Punardeo v Ram Saran*, 25 Cal 858 Thus, where the accused who was a travelling agent of a firm, employed to sell goods, sold the goods, and misappropriated some of the money, and it was not possible to say exactly where the various acts of embezzlement took place, it was held that according to the fist para of this section the accused was triable either at the place where the firm was situated or at one of the various districts through which the accused travelled—*Mahadeo v. K. L.*, 32 All 397 7 A L J 319

If a defamatory letter is posted in Madras with a view to its being read in Tinnevely, the offence of defamation is triable either in Madras or in Tinnevely under sec 179 or 182—*Krishnamurthi v. Parasurama*, 44 M L. J 648: 24 Cr. L. J 309 An offence under section 134 of the Companies Act, 1913 (default in filing balance sheet), even though the Company is situate outside Calcutta, can be tried by the Presidency Magistrate of Calcutta, because the office of the Registrar of joint stock companies with whom the balance sheet is to be filed is in Calcutta—*Debendra v. Registrar of Joint Stock Companies*, 45 Cal 486, 490.

566 Local area—The words 'local area' mean a local area to which the Code applies, and not a local area in a foreign country or in a portion of the British Empire to which the Code has no application—*Bichitranand v. Bhagbut*, 16 Cal 667 Moreover, the expression includes Sessions Division, District or Sub-division, and cannot be restricted to mean the scene of an alleged occurrence only. Therefore this section applies where

the place of occurrence is known but it is doubtful to which sessions division the place belongs—*Punardeo v Ram Sarn* 25 Cal 858

183 An offence committed whilst the offender is in the course of performing a journey or voyage may be inquired into or tried by a Court through or into the local limits of whose jurisdiction the offender or the person against whom or the thing in respect of which the offence was committed passed in the course of that journey or voyage

Offence committed on a journey

567 Object and Scope —The object of this section is to remove doubts and inconveniences as regards the exact locality in which the offences alleged to have occurred in a journey or voyage had been actually committed or completed—*Q v Malon* 1 M H C R 193

But this section only applies where the offence is committed in British India and not in a foreign territory. The word journey does not include a journey in a foreign territory but is confined in its meaning to a journey within the territories of British India. Where during the course of a journey through foreign territory and British India the carrier to whom certain goods were entrusted committed criminal breach of trust in respect of those goods and there was nothing to show that the offence took place during the journey in British India the offence could not be tried by any Court in British India—*Nadar v Emp* 4 Cr L J 579 (Lah)

568 Offence committed in a journey —Under this section if a person is accused before a Court of an offence committed during a journey or voyage he may be tried by that Court if any part of that journey or voyage during which the offence was committed is within the local limits of the Court's jurisdiction—*Q v Malon* 1 M H C R 193. And the Courts competent to try the case of an offender in respect of an offence committed in a journey are the Courts through or into the local limits of whose jurisdiction the offender in the course of the journey passed at the time the offence was committed—*Aminulla v P M Guha* 1 C L J

334. Thus if a theft is committed from a running train the offence may be said to have been committed during a journey, and it can be inquired into and tried by any Court having jurisdiction over any part of the country through which the train passed during the course of its journey, no matter in whose jurisdiction the offence was committed—*Lal aris v Emp* 24 Cr L J 253 (Lah). Where the offence is committed in the course of a railway journey the accused can be tried at the place of destination though the offence was actually committed outside the jurisdiction of that Court—*Emp v Moulabux* 25 Cr L J 433 1 I R 195
Sind 177

But this section is applicable only when the journey or voyage is *continuous and uninterrupted*. Therefore where an offence was alleged to have been committed by the accused in the course of a journey from Bombay to Howrah but in fact took place between Bombay and Allahabad at which place both the complainant and the accused broke the journey and then proceeded separately by different trains to Howrah it was held that the journey from Bombay to Howrah not being continuous, the Magistrate at Howrah had no jurisdiction to try the offence—*Q v Piran* 21 W R 66. Where a guard of a train going from Coimbatore to Madras was found drunk and detained at Arkonam on the way but he broke away got into train and arrived at Madras it was held that the journey must be deemed to have been broken at Arkonam and the offence (of being drunk under sec 27 of the Railways Act) could not be tried at Madras—*Q v Malony* 1 M H C R 193.

But any *short stoppage* in the course of a journey does not break the journey. Thus where some articles were missed from a boat during a halt at S in the course of a journey to C it was held that the journey would not be deemed to have been broken by the halt at S and that the offence of theft could be tried at C—*Q v Abdul Ali* 25 W R 45.

569 Voyage on High Seas—This section applies only to the trial of offences committed in British India. The words journey or voyage do not include a voyage on the High Seas or in a foreign territory but are confined only to a voyage or journey within the territories of British India—*Bapu Dall v Q* 5 Mad 3.

But in *Q E v Ismael Ratanlal* 181 where the accused and the complainant sailed from Bombay to Honawar and during the voyage the accused threw a box of the complainant into the sea it was held that the Magistrate at Honawar through whose jurisdiction the accused passed during the voyage had jurisdiction to try the offence of mischief (although it was committed on the High Seas about 9 miles off from the coast).

184 All offences against the provisions of any law

for the time being in force relating to

Railways Telegraph the Post Office or

Arms and Ammunition may be inquired

into or tried in a presidency town whether

the offence is stated to have been committed within such town

or not

Offences against
Railway Telegraph,
Post Office and Arms
Acts

Provided that the offender and all the witnesses necessary for his prosecution are to be found within such town

185 Whenever any

High Court to decide, in case of doubt, district where inquiry or trial shall take place.

doubt arises as to the Court by which any offence should under the pre-

ceding provisions of this chapter be inquired into or tried, the High Court, within the local limits of whose appellate criminal jurisdiction the offender actually is, may decide by which Court the offence shall be inquired into or tried

185. (1) Whenever a ques-

High Court to decide, in case of doubt, district where inquiry or trial shall take place

tion arises as to which of two or more Courts subordinate to the same

High Court ought to inquire into or try any offence, it shall be decided by that High Court

(2) Where two or more Courts not subordinate to the same High Court have taken cognizance of the same offence, the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced may direct the trial of such offender to be held in any Court subordinate to it, and if it so decides, all other proceedings against such person in respect of such offence shall be discontinued. If such High Court, upon the matter having been brought to its notice does not so decide, any other High Court within the local limits of whose appellate criminal jurisdiction such proceedings are pending may give a like direction and upon it so doing all other such proceedings shall be discontinued

Change —This section has been redrafted by the Procedure Code Amendment Act XVIII of 1923 below.

570 Sub section (1)—Nature of the doubt —The decision of the High Court can be sought not only where the doubt arises as to whether one Court or another has jurisdiction but also where the doubt is on the point whether the choice between two Courts both of which have jurisdiction to try the offence should be decided on the ground of general convenience—*Charu Chandra v Emp* 44 Cal 595 F B (overruling *Rajani Benode v All India Banking Co* 41 Cal 305) *Emp v Chaichal* 5 L B R 17 9 Cr L J 581

Again the doubt must be as to the jurisdiction of the Court by which an offence is to be inquired into or tried and not as to whether a particular Magistrate is competent to try or commit the accused for trial—*Emp v Clegg* 1887 P R 13 3 All 751 Where no doubt exists as to the jurisdiction of the Court this section does not apply—*Gurdit Singh v Crown* 1917 P R 24 18 Cr L J 514 *Girdhar v K E* 21 A L J 621 24 Cr L J 99

571 Sub section (2)—Power of High Court to transfer case from Court outside jurisdiction —Where the nominee of a policy holder resident within the District of Chittagong brought a charge of cheating in the Chittagong Magistrate's Court against the Insurance Company having its head office at Gujranwalla and a branch office at Chittagong and the Insurance Company also brought a charge of cheating against the nominee in the Gujranwalla Magistrate's Court both charges relating to the payment of the amount secured on the policy it was held that the Calcutta High Court could properly make an order under sec 185 to the effect that the offence should be inquired into and tried at Chittagong and transfer the case from the Court at Gujranwalla to that of Chittagong—*Hiran Kumar v Mangal Sen* 17 C W 761 24 Cr L J 308 In another Calcutta case also it was held that this section was comprehensive enough to be applicable to a case instituted in a Court beyond the local limits of the Appellate Criminal Jurisdiction of the High Court where the offender actually was—*Charu Chandra v Emp* 44 Cal 595 F B) 21 C W N 370 *Contra*—The Madras High Court however was of opinion that the High Court had no power to direct the transfer of a case pending before a Magistrate not subject to its appellate jurisdiction—*Mahomed Ghouse v Nathu* 40 Mad 835 18 Cr L J 148 5 L W 319

This subsection has been enacted to remove this conflict of opinion. By adopting the Madras view it practically disallows the High Court to transfer a case from a Court outside its jurisdiction and lays down a new procedure in case of such contingency. In view of the conflicting decisions in the Indian Law Reports 44 Cal 595 and Indian Law Reports 40 Mad 835 it is proposed to make it clear that one High Court has no power whether by implication or otherwise to transfer a case to itself from another High Court or vice versa or to decide which of two other

High Courts should try a particular case — *Statement of Objects and Reasons* (1921)

By adopting the simple procedure laid down in this subsection, the High Court will be relieved of the cumbrous procedure of a reference to the Governor General for an order under sec. 527.

186 (1) When a Presidency Magistrate, a District Magistrate, a Subdivisional Magistrate or if he is specially empowered in this behalf by the Local Government, a Magistrate of the first class sees reason to believe that any person within the local limits of his jurisdiction has committed without such limits (whether within or without British India) an offence which cannot under the provisions of Sections 177 to 184 (both inclusive) or any other law for the time being in force be inquired into or tried within such local limits, but is under some law for the time being in force triable in British India, such Magistrate may inquire into the offence as if it had been committed within such local limits and compel such person in manner hereinafter provided to appear before him and send such person to the Magistrate having jurisdiction to inquire into or try such offence or if such offence is bailable take a bond with or without surety for his appearance before such Magistrate.

(2) When there are more Magistrates than one having jurisdiction and the Magistrate acting under this section is not satisfied as to the Magistrate to or before whom such person should be sent or bound to appear, the case shall be reported for the orders of the High Court.

Empowered —If a Magistrate who is not empowered under this section finds that he has no jurisdiction under this Chapter to conduct the jurisdiction—*Q. I. v. Ramji Bhanlal* 831. But if a Magistrate not empowered under this section acts in good faith his proceedings will not be set aside for want of jurisdiction, the defect being cured by sec. 529.

522 Power of High Court —The High Court under sec. 29 of the Letters Patent can direct a Magistrate to make a preliminary inquiry and to commit for trial to the Sessions a case falling within this section. Where the circumstances of a case fall exactly within the terms of this section, the procedure must be governed by such special provision and

the High Court will not interfere except in extremely exceptional cases—
2 Weir 146

573 Issue of warrant from outside jurisdiction —It is not necessary that the Magistrate issuing the warrant should be present within the local limits of his jurisdiction at the time of issuing it. Where a Magistrate of Ahmedabad District issued from a place in Kathiawar a warrant for the apprehension of a person who was in Ahmedabad for an offence committed in Kathiawar it was held that the issuing of the warrant from Kathiawar by the Magistrate without being present in the Ahmedabad District in which he had jurisdiction was not beyond his competency—1 Bom 340

187. (1) If the person has been arrested under a warrant issued under Section 186 by a Magistrate other than a Presidency Magistrate or District Magistrate such Magistrate shall send the person arrested to the District or Sub divisional Magistrate to whom he is subordinate, unless the Magistrate having jurisdiction to inquire into or try such offence issues his warrant for the arrest of such person in which case the person arrested shall be delivered to the police officer executing such warrant or shall be sent to the Magistrate by whom such warrant was issued

(2) If the offence which the person arrested is alleged or suspected to have committed is one which may be inquired into or tried by any Criminal Court in the same district other than that of the Magistrate acting under Section 186 such Magistrate shall send such person to such Court

Send the person to the District Magistrate —Where a British Indian subject was arrested in a British district by a first class Magistrate for an offence committed in a Native State and the Political Agent's certificate (required by sec 188) was obtained it was unnecessary to send the accused to the District Magistrate under this section and the First Class Magistrate was competent to hold the preliminary inquiry himself—
Reg v Kahandas Ratanlal 97

188 When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India or

Liability of British subjects for offences committed out of British India

when any British subject commits an offence in the territories of any Native Prince or Chief in India, or

when a servant of the Queen (whether a British subject or not) commits an offence in the territories of any Native Prince or Chief in India,

he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found

Provided that notwithstanding anything in any of the preceding sections of this chapter, no charge as to any Political Agents to certify fitness of inquiry into charge such offence shall be inquired into in British India unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India, and where there is no Political Agent, the sanction of the Local Government shall be required

Provided, also that any proceedings taken against any person under this section, which would be a bar to subsequent proceedings against such person for the same offence if such offence had been committed in British India, shall be a bar to further proceedings against him under the Foreign Jurisdiction and Extradition Act, 1879 in respect of the same offence in any territory beyond the limits of British India

Change —The italicised words in the proviso have been added by sec 44 of the Criminal Procedure Code Amendment Act XVIII of 1923

575 This section controls the preceding sections —Sections 177 to 184 are controlled by the provisions of sec 188 so that if the offence specified in those sections (177—184) happen to be committed outside British India, those sections would cease to apply, and the special provision of Sec 188 would come in. Thus to give concrete illustrations, where the offence of criminal breach of trust was committed in a Native State by a British subject, then according to sec 181, independently of sec 188, such offence could not have been tried by a British Court. But as Secs 177—184 are controlled by Sec 188 the latter section would apply, and would give jurisdiction to a British Court to try the offence, but the certificate of a Political Agent would be absolutely necessary.—End ..

Tribhūn 5 S L R 266 13 Cr L J 530 So also where a person was kidnapped in a Native State and conveyed to British territory Sec 181 would not apply but the case would fall under Sec 188 and a certificate of the Political Agent would be a preliminary requisite of the trial of the offence by a British Court—*Crown v Koochri*, 7 S L R 17, *Narain v Emperor* 41 All 452 17 A L J 450 20 Cr L J 276 Where a British Indian subject is found in a Native State in possession of stolen articles he can be tried in British India for an offence under sec 411 I P C but the certificate of the Political Agent would be necessary—*Session Judge v Sundara* 8 M I T 54 11 Cr L J 306

But in a Madras case where the complainant in a place in British India entrusted certain jewels to the accused, a Native Indian subject of His Majesty, for sale on commission and the latter pledged the jewels in a Native State and converted them to his use, it was held that the loss of the jewels which was the consequence occurred to the complainant in British India and this was sufficient under sec 179 to give jurisdiction to the British Indian Court to try the offence that secs 179—184 should not be read subject to sec 188 and that no certificate of the Political Agent was necessary—*Assistant Sessions Judge v Ramaswami* 38 Mad 779 26 M L T 235 15 Cr L J 207 This view of the law is totally untenable and the words 'notwithstanding anything Chapter ' have now been added in the proviso to make it clear that sec 188 controls the preceding sections of this chapter The Select Committee observe — Certain decisions of the Madras High Court seem to make it doubtful whether section 188 is subject to the provisions of sections 179—184 and we think it is desirable to clear this up We are not satisfied that this was the intention of section 188 and in our opinion it is safer when a man is tried in British India in respect of an offence committed in a Native State to require the Political Agent's certificate in every case The amendment which we propose will make this clear — *Report of the Select Committee of 1916*

576 **Illegal arrest** —Sec notes under sec 177 A trial under this section will not be vitiated by reason of the fact that the accused has been brought into British India from a foreign territory under an illegal arrest — *Emp v Vinayak Damodar Savarkar* 35 Bom 225 13 Bom L R 296

577 **Native Indian Subject** —This expression means only a Native Indian subject *de jure* and not *de facto* a person who is not a Native Indian subject *de jure* but who owns some land in British territory and occasionally resides in British India does not thereby become an Indian subject, amenable to the jurisdiction of a British Indian Court for an offence committed by him in a foreign territory—*Fakir v Emp*, 1885 P R 1 on appeal from 1883 P R 22

Foreigners —This section does not apply to an offence committed by

a foreigner outside British territory though he may subsequently be found in British India—*Q E v Abdul Latif* 10 Bom 186 British Indian Courts have no jurisdiction to try a foreigner for offences committed and completed outside the British territory—*Ibrahim v Empress* 1891 P R 7 No foreign subject can be tried in British India for an offence committed outside British India—*Emp v Ballewa* 8 All 37 *Q E v Ranchhod* 2 Bom L R 337 *Falir v Emp* 1883 P R 22 *Rodiv Empress* 1889 P R 30 Therefore where the subject of a Native State committed theft in that State and was subsequently found in British India in possession of the stolen property the British Indian Court had no jurisdiction to try him for the offence of theft (but had jurisdiction to try him for retaining stolen property, under sec 411 I P C)—*Emp v Ballewa* 8 All 37 *Q E v Abdul Latif* 10 Bom 186

578 Offence.—The word offence in this section means an offence punishable under the Indian Penal Code. Thus the act of giving false evidence before a foreign Court where the oath is administered not under the provisions of law in force in British India but under the law of that State in relation to proceedings before the Court is not punishable under section 193 of the Indian Penal Code and cannot be taken cognizance of by Magistrates of British Indian Courts. So also the offence of lodging a false complaint in a foreign Court is not punishable under the Indian Penal Code because it cannot be said that a false information was given to a public servant as defined by the Indian Penal Code. Similarly the act of instituting criminal proceedings and making false charges before a foreign Court does not constitute an offence under Sec 212 of the Indian Penal Code because the criminal proceedings and false charges contemplated by that section mean proceedings and charges in British India where the Indian Penal Code is in force. Therefore offences committed in relation to Courts and authorities outside British India do not constitute offences under the Indian Penal Code and cannot be tried by any Court in British India and a certificate of the Political Agent is out of the question—*In re Ramlal* 47 Bom 907 5 Bom L R 77 5 Cr I J 333

'May be found'.—The word find must be taken to mean not where a person is discovered but where he is actually present whether he comes of his own accord or is brought under arrest—*In p v Maganlal* 6 Bom 62

579 Scope of proviso.—This proviso is of universal application and is not restricted to Native States only. If the offence is committed in a Native State the certificate of the Political Agent is necessary. If the Native State has no Political Agent the sanction of the Local Government is required. And if the offence is committed in a place other than

State e g Spain the sanction of the Local Government is likewise necessary—*Imp v Chelliram* 6 S L R 260

The words or where there is no Political Agent the sanction of the Local Government shall be required have been added to the Code in 1898 Under the previous Codes when the offence was committed in a territory in which there was no Political Agent no certificate (or sanction) was necessary as for instance in Goa (13 Bom 447) or Siam (Ratanlal 773) or Cyprus (2 All 218)

580 Offences on High Seas —Section 188 does not apply to offences committed on the High Seas The proviso to this section refers to offences committed in a territory and not to offences committed on the High Seas Therefore an offence committed by a Native Indian subject on the sea at a distance of five or six miles from the coast can be tried by a Magistrate of British India without the sanction of the Local Government—*Emp v Manuel Philip* 41 Bom 667 *Po Thaug v King Emp* 5 L B R 221 12 Cr I J 198 The power to try offences committed on the High seas is conferred on Indian Courts by Stat 23 and 24 Vic C 88 (within three miles from the Coast of British India) and Stat 30 and 31 Vic C 124 section 11 (beyond the three miles limit) See *Reg v Kastya Rama* 8 B H C R 63 *Q F v Sh Abdul Rahaman* 14 Bom 227

581 Certificate of a Political Agent —The certificate of the Political Agent is the preliminary requisite for the institution of criminal proceedings in a Court of British India for an offence committed outside British India Want of certificate will invalidate all subsequent proceedings—*Emp v Kalchiran* 24 All 256 *Q E v Ram Sundar* 19 All 109 *Narain v Emp* 41 All 452 *Emp v Chan* 1884 A W N 85 *Q E v Bak* 1 24 Bom 287 *Sirdar v Jethalhai* 8 Bom L R 513 *Q E v Kathaperumal* 13 Mad 423 *Bapu v Q* 5 Mad 23 *Sessions Judge, In re* 2 Weir 148 The want of a certificate is not a mere irregularity which can be cured by section 532 by a subsequent production of the certificate—*Q E v Kathaperumal* 13 Mad 423 Even where the Magistrate was himself the Political Agent the defect would not be cured by any subsequent production of the certificate signed by him—*Q E v Kathaperumal* 13 Mad 423 *Bapu Dald v Q* 5 Mad 23 *Q E v Ram Sundar* 19 All 109

An agreement between a Native State and the authorities of a British Indian district conceding to the British Indian Courts the right to arrest and try British Indian subjects found gambling in the Native State and *vice versa* cannot take the place of the certificate or sanction required by this section—*Nandu v Emp* 42 All 89

Where a commitment was made without the certificate the fact that the certificate existed at the date of the commitment (i e it had been signed by the Political Agent before the date of commitment but had not

come into the hands of the Magistrate till after commitment) will not cure the defect—*Emp v Kalicharan* 24 All 256 In certain Punjab cases, however, it has been held that the want of a certificate is not a fatal defect, but a mere irregularity cured by section 537, if no objection is taken at the trial and no prejudice to the accused has been caused in the defence—*Shamir Khan v Emp*, 1888 P R 35, *Roda v Emp* 1889 P R 30 *Fateh Din v Emperor* 1902 P R 4 (F B) Where however the defect was observed and objected to by the Sessions Judge the commitment should be quashed—*Q E v Mastana* 1899 P R 11 *Ram Charan v Crown* 5 Lah 416 (420) A I R 1925 Lah 185

The proviso lays down that no charge shall be inquired into in British India unless the Political Agent etc and therefore there is nothing illegal in obtaining the certificate or sanction after the complaint has been filed and the inquiry has begun or been completed as far as the framing of the charge—12 Bom L R 667 *In re Ram Bharathi* 47 Bom 907 (at p 99r) *Alibhoy v Emp* 25 Cr L J 620 (Sind) So also where the certificate was received after the examination of some prosecution witnesses but before the commitment of the case to the Sessions it was held that the commitment was good and the irregularity if any was cured by sec 537—*Emp v Mahamad Bakh* 8 Bom L R 307 4 Cr L J 49

Magistrate not confined to the charges in the certificate —The Magistrate is not restricted to the charge mentioned in the certificate The certificate granted by the Political Agent in respect of an offence will cover every charge which the facts declared in the certificate will suffice to sustain—*Krishna Nath v Emp* 33 All 514 An order of committal on a charge which is different from that mentioned in the certificate but based upon the same set of facts will be perfectly valid—*In re Sessions Judge* 8 M I F 703 11 Cr I J 531

Certificate cannot be revoked —Where the District Magistrate as the Political Agent granted a certificate for the trial of the accused by a Magistrate in British India it was held that the latter was legally seized of the case and it was not competent to the Political Agent to recall the certificate and to hand over the accused to the Native State for his trial in that State—*In re Fazir Suleb* 14 Bom L R 377 13 Cr I J 537
In re Hossusjee, Ratnial 53

189. Whenever any such offence as is referred to in Sec-

tion 188 is being inquired into or tried,
the Local Government may, if it thinks
fit, direct that copies of depositions made
or exhibits produced before the Political Agent or a judicial
officer in or for the territory in which such offence is alleged to

Power to direct
copies of depositions
and exhibits to be
received in evidence

have been committed shall be received as evidence by the Court holding such inquiry or trial in any case in which such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate.

B—Conditions requisite for Initiation of Proceedings.

190. (1) Except as hereinafter provided, any Presidency Magistrate District Magistrate or Sub-
Cognizance of off-
 ence by Magistrate
 divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence—

(a) upon receiving a complaint of facts which constitute such offence ;

— (b) upon a report in writing of such facts made by any police officer ;

(c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion that such offence has been committed

(2) The Local Government, or the District Magistrate subject to the general or special orders of the Local Government, may empower any Magistrate to take cognizance under sub-section (1), clause (a) or clause (b), of offences for which he may try or commit for trial

(3) The Local Government may empower any Magistrate of the first or second class to take cognizance under sub-section (1), clause (c), of offences for which he may try or commit for trial.

582 Change —The words in clause (b) have been substituted for the words upon a police report of such facts by section 45 of the Criminal Procedure Code Amendment Act XVIII of 1923. The object of this amendment is to make it clear that the word 'police report' formerly used in this clause was not used in a technical sense as meaning the report of the police in cognizable cases only but was used to cover any report made by a police officer, i.e., a report in a cognizable as well as a non cognizable case. See the Report of the Select Committee of 1916. In *H. E. v. Sada*, 26 Bom. 150, *Bhairab v. Emp.*, 46 Cal 807, *In re Chidambaram*, 32 Mad 3, *Ram Lal v. Emp.* 1 P. L. T. 73, *Harihar v. K. E.*, 23 C. W. N. 481, 26 C. W. N. 181, *Emp. v. Ghulam Husain*, 6 Lah. L. J. 606, and 1 L. J.

R 18 it was wrongly held that the term *police report* in this clause meant a report in a cognizable case only and since a police officer had no power to make a report in a non cognizable case a police report in such a case was to be treated as a *complaint* under clause (a) and the procedure of sec 200 would then have to be followed by the Magistrate taking cognizance of the case. The present amendment lays down that the report of a police officer in a non cognizable case is a report under clause (b) all the same and not a complaint under clause (a) and the Magistrate will not have to follow the procedure of Chapter XVI. See *Bh Lazarz v Emp* 28 C W N 490 26 Cr L J 68.

Moreover before the present amendment the words [] were used in a technical sense to mean a police report under sec 173 or 173 : c a report made *after investigation* and not an information sent by the Police to the Magistrate before making any investigation—*Abdur Khan v Emp* 5 S L R 1 12 Cr L J 92 *Emp v Khushaldas* C I R 82 13 Cr L J 752 *In re Nagendra Nath* 51 Cal 492 (413) *Emp v Sada* 26 Bom 150 (157). Under the present amendment the words have been changed altogether and replaced by the words "report made by any police officer" which would certainly be a report or information given *before investigation*. Even before the present amendment it was held in a Sind case that the Police report referred to in this section was not confined to a report under sec 173 but was wide enough to cover reports under other sections of the Chapter (e.g. reports under secs 157 and 168) nor was it confined to reports under sec 173 alone—*Mehrab v Crown* 17 S I R 150 (dissenting from 5 S I R 1).

583 Magistrates empowered.—The power of Magistrate to take cognizance of a case under this section is not affected by sec 22 of the Bombay District Municipal Act (VI of 1873)—*Q E v Mahomed Ismail* 355.

When a Magistrate who has begun a case is succeeded by another the latter has power to issue process for the arrest of an accused even if the predecessor had not issued such process before commencing the trial—*Q E v Gorinda Ratanlal* 652. See section 55.

Under this section a third class Magistrate can take cognizance of an offence under clauses (a) and (b) only : c upon a complaint or report—*K E v Sada* 26 Bom 150.

The District Magistrate of the Civil and Military District has jurisdiction to take cognizance of and try offences committed by European British subjects in accordance with the provisions of this Code—*re Laurance* 34 Mad 346 (F B).

If a Magistrate not empowered to take cognizance of an offence does so under a *bona fide* mistake his proceedings will not be

merely on the ground of his not being empowered—Sec 529 (e) But proceedings under clause (c) of a Magistrate not empowered to take cognizance under that clause are void—Sec 530 (k)

A Magistrate duly empowered under this section to take cognizance of an offence cannot refuse to take cognizance on the ground that gravity of the offence requires severer punishment than he can inflict
Q E v Gema Ratanlal 375

584 Offence —A Magistrate authorised under this section to take cognizance of an offence upon complaint can take cognizance of an offence under sec 20 of the Cattle Trespass Act even in the absence of a special authorisation in that behalf because the very definition of the word 'offence' in section 4 clause (o) includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act—*E v Vishwanath* 44 Bom 42

585 Taking cognizance —The expression to take cognizance has not been defined in the Code and it is difficult to ascertain at what precise stage of the case cognizance is said to be taken When a Magistrate in charge on receipt of a police report, makes over the case to another Magistrate for inquiry and the latter after taking evidence summons the accused it is the latter Magistrate and not the former who is said to have taken cognizance of the offence—17 C W N 795 A Magistrate cannot be said to have taken cognizance of a case under section 107 unless he issues notice to the person charged to show cause why he should not be proceeded against under that section Therefore where the Police referred the matter to the District Magistrate who ordered the case to be transferred to the file of the Headquarters Deputy Magistrate who then issued notice to the accused *held* that it was the latter Magistrate and not the District Magistrate who took cognizance of the case —*Konda Reddy King Emp* 41 Mad 246 (249)

Taking cognizance does not involve any formal action or indeed act of any kind but occurs as soon as a Magistrate applies his mind to a suspected commission of an offence Where a police report of a case was submitted to the Subdivisional Officer on the 24th April 1909 and the case was afterwards withdrawn by the District Magistrate to his own file on the 20th January 1910 *held* that the District Magistrate took cognizance of the case on the 20th January 1910—*Sourindra v Emp* 37 Cal 412

Where an officer who is also a Magistrate holds a departmental inquiry and charges are made before him he cannot be said to have taken cognizance—19 Bom 51

In cases where sanction or certificate is necessary (e g cases under secs 132, 188 197) the Magistrate is not competent to take cognizance

upon a mere complaint unaccompanied by the requisite sanction or certificate—27 Cal 820 See also 39 Cal 119.

A Magistrate is not debarred from taking cognizance of an offence simply because another Magistrate has already taken cognizance of the same and is in seisin of the case But since the accused person cannot be tried twice for the same offence the proper course is for the one Magistrate to transfer his case to the other, and thus a multiplicity of trials can be avoided—*Hari Satya v Emperor* 50 Cal 482

Magistrate cannot proceed without taking cognizance.—On a complaint of a cognizable offence the police sent up for trial only some of the persons against whom a complaint was made After their conviction by a Deputy Magistrate the Deputy Commissioner while inspecting the police outpost made a note that the remaining accused should be sent up The remaining accused were thereupon sent up to the Deputy Magistrate It was held that nothing was made over to the Deputy Magistrate at first except the case of some of the accused who were tried and convicted and that the proceedings taken against the remaining accused without any one formally taking cognizance of the case were irregularly instituted and should be set aside—*Jharu v Sukh Deo* 3 C L J 87

586 Clause (a) —Cognizance upon complaint —For complaint see Sec 4 (h) and notes thereunder

Complaint of facts which constitute offence —Where a complaint presented to the Magistrate contains the offences with which the accused is charged the fact that it was defective in not stating *all the facts* necessary to constitute the offence charged is immaterial—*Sardar Dyal Singh v Q E* 1891 P R 8

Who can make a complaint —A complaint of an offence may be made by any person acquainted with the facts of the case it need not necessarily be made by the aggrieved party except in those cases (e g under secs 198 199) where it is so restricted by the Code—*Fareed Ali v Hanuman* 18 All 465 *Jure Ganesh Varain* 13 Bom 600 *Dedar Bux v Shyamapada*, 41 Cal 1013 14 Cr L J 409 (Oudh)

The fact that the complainant is a servant of the Magistrate does not deprive the Magistrate of his jurisdiction though in such a case it would be expedient to refer the complainant to another Magistrate—9 Bom 172. See notes under secs 526 and 556

It is not necessary that the person lodging the complaint must have personal knowledge of the facts constituting the offence—*Sukumar v Mofizuddin* 25 C W N 357 *Suresh v Emp* 1 P L T 351 21 Cr L J 346 *Imp v Shevak Ram* 7 S L R 77 15 Cr L J 369

Magistrate bound to take cognizance upon complaint —It cannot be held that the words may take cognizance of an offence mean a

Magistrate is not bound to take cognizance of an offence on receiving a complaint of facts constituting an offence—*Ram Sarup v K E* 1 O C 127 The use of the term may offence does not make it optional with a Magistrate to hear a complaint but refers to the action of the Magistrate in taking cognizance of the offence in either of the specified courses in which the facts constituting the offence may be brought to his notice He is bound to examine the complainant and can then either issue summons to the accused or order an inquiry under sec 202 or dismiss the complaint under Sec 203—13 Cal 334 He is bound when the circumstances giving him jurisdiction exist to receive the complaint and deal with it according to law—17 Bom 161 and has no option to refer it to the police under sec 156 (3) without taking cognizance of it—*In re Arula* 10 M L T 120 1. Cr L J 463 When a complaint is made to a Magistrate of a petty offence ordinarily within the cognizance of heads of villages the Magistrate is bound to take cognizance of it to proceed under sec 200 and to dispose of the complaint according to law The mere fact that the complaint is also cognizable by the head of the village does not entitle the Magistrate to decline to exercise jurisdiction and to direct the complainant to seek redress from the head of the village—7 M H C R App 31

Instances where Magistrate acts under Cl (a) and not Cl (c)—Where a complaint is made before a Magistrate he takes cognizance of the case under clause (a) and not under clause (c), even though he may record on the complaint that he acts under clause (c)—*Mesidi v Rangoon Municipal Committee* 4 L B R 300 *Emp v Rashid* 9 Bom L R 212 5 Cr L J 202 *Girdhari Lal v Emp* 1911 P R 11 *Jitna Lal v King Emp* 2 P L J 657

Where a complainant charged certain persons with committing a certain offence and the examination of the complainant revealed an offence different from that mentioned in the complaint or revealed an additional offence the Magistrate was competent to take cognizance of the latter offence and in taking cognizance thereof he acted under clause (a) and not under clause (c) so that sec 191 did not apply—*Jagat Chandra v Q E*, 26 Cal 786 *Abdul Rahman v K E* 4 Bur L J 213 A I R 1906 Rang 53

Similarly where the complainant charged several persons with having committed an offence but the Magistrate after examination of the complainant found out that other persons not mentioned in the complaint were concerned in the offence he was competent to take cognizance in respect of the latter persons also and in so doing he acted under clause (a) and not under clause (c) so that sec 191 was not applicable to the case—*Jagat Chandra v Q E* 26 Cal 786 1904 P R 32 U B R (1897—1901) 56 *Emp v Imankhan*, 14 Bom L R 141, *Dedar Bux v Shja*

mapada, 41 Cal 1013, 4 C W. N 367, *Srs Kishan v. Debi Dayal*, 2 O W. N 823 26 Cr L J 1619

587 Clause (b)—Police Report —The 'police report' mentioned in this section is not limited to a report mentioned in Chap XIV of the Code. Where on an information received by post, a Magistrate sent the case to the police for inquiry and report and on the report thus received took cognizance of the case it was held that it must be presumed that the action taken by him was based on the police report—*Sarfraz Khan v King Emp*, 11 A L J 331

A police report in a *non cognizable* case falls within this clause, and there is no authority in the Code for examining a police officer submitting a police report under this section, as if he were a complainant—1914 U. B R 19 *Sh Abdul Ali v Emp*, 1 P L T. 446 See Note above under heading 'Change'

A report submitted by a Police officer under sec 24 of the Police Act falls under this clause—1 P L T. 446

A Police *challan* is a police report of facts constituting an offence under clause (b) and a Magistrate can take cognizance upon it—*Emp v. Sundar*, 1901 P R 8, *Emp v Chet Singh*, 1900 P R 22 But a mere suggestion by the police officer is not a police report, and where a Magistrate issued summons to the accused on the suggestion of a police officer that the accused injured the crops of the people of the village, it was held that the Magistrate acted illegally, as none of the conditions required by this section had been fulfilled—*Samun v Emp*, 1894 P R 24

The police report must state the facts which constitute the offence. That is, the concrete facts which constitute the alleged offence must be specifically stated before the Magistrate. Where no facts were stated, the mere assertions made by the police that certain offences had been committed, could not be regarded as compliance with the letter or the spirit of the law—*In re Nagendra Nath*, 51 Cal 402 (414) A I R 1924 Cal 476

So also, a Magistrate cannot take cognizance of an offence on the mere information of a police officer who has no knowledge of the facts and whom it is impracticable to examine—1 L B R 18

A prosecution is not legally instituted under section 190 (b) when the police report is defective and does not fulfil all the requirements of sec. 173 (e g when it does not set forth the nature of the information) and the first information report under sec 154 is equally defective in this respect—*Lee v Adhikari*, 37 Cal 49 In *Feroza v Amirudin*, 16 C W N. 1049 it has been remarked that if the police report be defective it is open to the Magistrate to treat it as a complaint, and in that case it will be necessary for him to call upon the Police officer to appear and substantiate that complaint upon oath.

Magistrate not bound to take cognizance upon police report—A Magistrate is entitled to refuse to initiate proceedings on the report of the Police in the absence of a complaint—*Bhiku v K E* 1 A L J 609 He has a discretion either to take cognizance of the offence or to proceed under sec 203 or to take no further steps—2 Weir 119

Instances where Magistrate acts under Clause (b) and not under Clause (c)—Where L was charged by the police before the Magistrate and the Magistrate after examining the investigating officer found that another person S should be joined as an accused person and issued process against him it was held that the Magistrate took cognizance of S's offence under clause (b) and not under clause (c) and was not bound to act under sec 191—*Sarna v Emp* 9 N L R 65 The principle is that when a Magistrate takes cognizance under clause (b) on a police report he takes cognizance of the offence and not merely of the particular person charged in the report as the offender. He can therefore issue process against other persons also who appear to him on the basis of the report and other materials placed before him when he has taken cognizance of the case to be concerned in the commission of the offence. When he does so it is not a case of taking cognizance against such persons under clause (c) of this section—*Mehrab v Crown* 17 S L R 150 (F B) overruling 5 S L R 1 Similarly where the Magistrate issued warrants against persons not named in the complaint or in the first information but named in a report subsequently made by the police after investigation it was held that the Magistrate took cognizance of the case under clause (b) and not under clause (c) of this section—8 C W N 864 Where a Magistrate while acquitting a certain person sent up by the Police stated that another person had in his opinion committed the offence and that the Police should take action against that person and that person was accordingly sent up and convicted it was held that the Magistrate acted under clause (b) and not clause (c) and sec 191 was not applicable—*Hakim Ali v A T* 4 L D R 137 7 Cr L J 414 Where an accused person charged by the Police was convicted and the case came up in appeal before a Subdivisional Magistrate the latter could try the offender himself under sec 423 (1) (b) if the offence was one within his ordinary jurisdiction and in so doing the Sub-divisional Magistrate took cognizance of the case not under clause (c) but under clause (b), as he had before him the police charge sheets stating all the facts—*Emperor v Manikka* 30 Mad 278 Where after the close of a trial the Magistrate ordered the police to send up a charge sheet in respect of a witness for the prosecution which the Police did and then the Magistrate tried that person and convicted him it was held that the Magistrate took cognizance of the case under clause (b) and not under clause (c), and section 191 did not therefore apply to the case—*Emperor v Gundoo* 23 Bom L R 842 22 Cr L J 603

588. Clause (c).—This clause applies only to cases where the private individual who is injured or aggrieved or some one on his part does not come forward to make a formal complaint. It is a provision of law for enabling a public official to take care that justice may be vindicated notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute—13 W R. 27.

Where upon the Sub Registrar refusing to register a deed, the petitioner appealed to the District Registrar (who was also the District Magistrate) under the provisions of the Registration Act, and the District Registrar finding that the document was a forgery ordered the prosecution of the petitioner for an offence under sec 471 I P C, *held* that although the District Registrar, not being a Civil, Criminal or Revenue Court, could not direct a prosecution under sec 176 of the Cr P Code, still his action must be deemed as one under clause (c) of section 190, Cr P Code, because in his capacity as District Magistrate he was competent to take cognizance of the offence under this clause, and to transfer the case to a subordinate Magistrate under sec 191—*Cheta Mahlo v A E*, 2 Pat 459 1 P L T. 727 24 Cr L J 792

A Magistrate taking cognizance of an offence under this clause must comply with the provisions of law laid down in section 191 *infra*—*Sh Abdul Ali v Emp*, 1 P L T 446

589 Information.—The expression 'information received from any person other than a Police officer' means only such information as does not constitute a complaint or a Police report—*Meshidi v Rangoon Municipal Committee*, 4 L D R 300

A letter written to the District Magistrate conveying information of an offence and asking for action to be taken can be treated as information under this clause for taking action—*Chhotey Maharaj v A E* 28 O C. 33 A I R 1925 Oudh 144

The information need not contain all the allegations necessary to be proved to establish the offence it is sufficient if enough is alleged to justify the Magistrate in dealing judicially with the matter. What allegations or how much of the information should be recorded by the Magistrate in such a case, it is difficult to lay down in general terms but when it is found that the recorded information is sufficient to justify the Magistrate in considering that a *prima facie* case has been made out, the High Court will not interfere with the Magistrate's action in taking cognizance under this clause—*Rash Behary v Emp*, 35 Cal 1076

Where the Deputy Commissioner as a Collector and as such representing the Court of Wards received information of an offence, he as Magistrate was not competent to act on the information and to issue warrants, as by such action he was practically making himself a Judge in his own case

—*Thakur Persad v Emp.*, 10 C W N 775; *Laksh Narayan v Emp.*, 37 Cal 221 (per Stephen J) But this view does not seem to be correct, for sec 191 provides a sufficient safeguard and gives the accused a right to have the case transferred to another Magistrate. On this principle the Madras High Court has held that there can be no objection to a Magistrate taking cognizance of an offence upon information received by him in another capacity e.g. as President of the District Board—*Sundarasana v K. E.*, 43 Mad 709 (dissenting from 10 C W N 775) 37 Cal 221 (per Carnduf J dissenting from 10 C W N 775)

The following are held to be 'information' within the meaning of this section —(a) An anonymous communication—*In re Hari Narain*, 3 C W N 65 (b) communication through post—2 Weir 149 *Karim Buksh v Azil Khan*, 1899 A W N 201 (c) information received from another Magistrate—*Makhan v Jepson*, 1914 P L R 65 15 Cr L J. 261, 3 C. W. N cclxv

Information must be recorded —A Magistrate taking cognizance upon information under this clause should at least record the information on which he acted, though he may not be obliged to disclose the sources of the information—*Thakur Persad v Emp.* 10 C W N 775, *Rash Behary v Emp.*, 35 Cal 1076 12 C W N 1075 but his omission to do so does not necessarily vitiate the proceedings—*Mg Nya Bu v K E.*, 4 Bur L J. 211; A I R 1926 Rang 46

Information received from witness —A Magistrate taking cognizance of an offence against a person on evidence given on behalf of another accused person, proceeds under clause (c) of this section —*Raghab v Emp.*, 3 C. W. N cclxxix So also a Magistrate who takes cognizance of an offence against a witness in a case pending before him, upon the facts disclosed by the evidence of another witness does so under clause (c) of the present section and not under section 351—*Akhud Ram v Emp.*, 1 C. W. N 105 *Contra*—5 N L R 113 and 4 S L R 258, in which under such circumstances it was held that the Magistrate took cognizance against the new accused under sec 351 and not under clause (c) of sec 190 If, however, the Magistrate has already taken cognizance upon a complaint of an offence against some person, and after examination of some witnesses the offences of other persons are revealed, the Magistrate proceeding against the latter does so under clause (a), (since there is a complaint) and not under clause (c)—*Dedar Bux v Shyamapada* 41 Cal 1013

590 *Knowledge* —Knowledge means actual personal knowledge of the Magistrate or knowledge based upon evidence legally placed before him—*Q E v Nga Shwe*, 1 L. B R 18 A gratuitous suspicion or belief founded on private information contained in an anonymous petition is not knowledge—*In re Mohesh*, 13 W. R. 1.

Where a Magistrate issued an order under sec 144 to stop work in a quarry, and took action for the disobedience of that order, and convicted the accused, it was held that the Magistrate took cognizance of the offence on his own knowledge of the facts under this clause (and the conviction was therefore illegal under sec 191)—*Croan v Mul Raj*, 1905 P R 36. 2 Cr L J 365. So also, where the accused in disobedience of an order given by a Cantonment Magistrate tied his buffaloes in a certain place, and the Magistrate finding the place filthy in consequence sent for the accused and fined him, it was held that the Magistrate took cognizance from his own knowledge under this clause and was debarred from trying the case by virtue of sec 191—*K E v Abdul Rahim*, 1905 P R 8.

A Magistrate who takes part in the initiation of proceedings is not incompetent to take cognizance of the offence, because this clause empowers the Magistrate to take cognizance upon his own 'knowledge'; but of course the Magistrate will be debarred under section 556 from trying the case—*Oziullah v Dem Madhab*, 50 Cal 135.

591. Suspicion.—Where a Magistrate has a mere suspicion that an offence has been committed, he should not as a matter of sound judicial discretion, take cognizance of it until some person aggrieved has complained (clause a) or until he has before him a police report (clause b) on the subject based on investigation directed to the offence—14 Cal 707.

592. Miscellaneous —

Fresh complaint after discharge—A Magistrate has jurisdiction to entertain a second complaint on the same facts after an order of discharge was passed by another Magistrate before whom the former complaint was made—*Bijoo Singh v King Emp* 2 P L J 34. The discharge of a person accused of an offence is no bar to his being apprehended and brought before a Magistrate for commitment or trial—8 W R 61. 14 W R 65. *Contra*—2 Bom 534, where it has been held that if a Subordinate Magistrate has discharged an accused the District Magistrate is not competent, acting under clause (c) of this section, to direct another Magistrate to rehear the case. See Note 681 under sec 203.

No Limitation—The general law of limitation is chiefly intended for civil matters and does not apply to the taking cognizance of offences—20 Bom 543.

Complaint in respect of one offence—Cognizance in respect of another:—See 26 Cal 786 cited above under cl (a).

Complaint against some persons, cognizance against others—Where a complaint is made against some persons and the Magistrate takes cognizance of the offence, it is the duty of the Magistrate to deal with the evidence brought before him, and to see that justice is done in regard to any other person who might be proved by the evidence to be con-

in the offence—4 C W N xlv When once a Magistrate has taken cognizance of an offence, he is competent to take proceedings against all who from the evidence appear to be offenders His power is not limited only with regard to the persons mentioned in the complaint or Police report—4 C W N 560, 21 C W N 950, 1 Bur L J 183, *Mehrab v Emp*, 17 S L R 150 (F B). See also 26 Cal 786, U B R (1897—1901) 56; 1904 P R 32, 14 Bom L R 141 41 Cal 1013, and 4 C W N 367 cited under clause (a) also 9 N L R 65, and 8 C W N. 864 cited under clause (b)

191. When a Magistrate takes cognizance of an offence under sub-section (1), clause (c), of the preceding section, the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court, and if the accused, or any of the accused if there be more than one, objects to being tried by such Magistrate, the case shall, instead of being tried by such Magistrate, be committed to the Court of Session or transferred to another Magistrate.

593. Principle —The principle of this section is that no man ought to be a Judge in his own case If a Magistrate proceeds against a person upon his own personal information he is interested in the prosecution and thereby he would practically make himself a Judge in his own case and his pre conceived opinion as to the guilt of the accused is likely to bias himself against the accused

Moreover, this section has another object in view, viz., "to clear away everything which might engender suspicion and distrust (in the mind of the accused) of the tribunal and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security The law in laying down the strict rule has regard not so much to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties"—per Miller and Lush JJ in *Sergeant v Dal*, 2 Q B D 558, quoted in 19 Mad 263 The law, partly out of regard for the susceptibilities of the accused, and partly to inspire confidence in the administration of justice, allows the accused the right to claim to be tried before another Magistrate—*Imp v Shevak Ram*, 7 S L R 77

A Magistrate cannot take cognizance of an offence under clause (c) of section 190, without complying with the provisions of this section—1 P L T. 446 Where on a report being made by a Cantonment official in respect of an offence under sec 92 of the Cantonment Code, the Canton-

ment Magistrate took cognizance of the case and convicted the accused *held* that the trial and conviction were illegal as the Magistrate should have informed the accused under this section that he was entitled to have the case transferred to another Magistrate—*Anandi Pershad v Emp* 1923 P L R 124 21 Cr L J 394 When a Magistrate himself institutes criminal proceedings under sec 476 he is bound to inform the accused that he is entitled to have his case tried by another Court—*A E v Nairpal* 10 O L J 532 29 O C 1 A I R 1924 Oudh 448

The mere fact that the Magistrate takes cognizance of a case under clause (c) of section 190 does not bring the case within the operation of sec 536 and so long as the Magistrate complies with the provisions of section 191 he is entitled to try the case—*Nga Chil v Emp* 3 Bur L J 121 A I R 1924 Rang 352 26 Cr L J 249

594 Right of accused to have case transferred —The words shall be informed that he is entitled are mandatory and a Magistrate cannot refuse to comply with them—13 All 345 He is bound to inform the accused of his right to have the case transferred If he omits to inform the accused of his right or if in spite of objections taken by the accused the Magistrate proceeds with the case the proceedings will be wholly void It is not a mere irregularity curable by section 537—*Q E v Hautlorne* 13 All 345 *Emp v Cledt* 8 All 212 3 A I J 694 *R v Ratan v Emp* 19 A L J 139 *Glander Se v Emp* 4 Cr I J 656 21 A L J 89 *Crown v Mul Ray* 1905 P R 36 1 E v *Abdul Ratu* 1905 P R 8 5 N L R 113 1898 P R 13 22 Cr L J 96 (Iah) *Sirfaraz Khan v A E* 11 A L J 331 *A E v Nairpal* 10 O L J 532 25 Cr L J 1224

The accused can waive his right under this section—1 S L R 98 But if a Magistrate omits to inform the accused of his right the mere silence on the part of the accused is not to be taken as a waiver of his right—3 C W N cclxxix Waiver cannot be implied unless the accused is distinctly told in accordance with the terms of this section—*Chander Sen v Emp* 21 A L J 89 24 Cr I J 656

Although this section enables the accused to apply for a transfer of the case still unless the accused exercises that right the jurisdiction of the Magistrate to try the case is unquestionable The mere fact that the Magistrate has taken cognizance under section 190 clause (c) does not oust the jurisdiction of the Magistrate to hear and determine the case—*In re Ganeshi* 15 All 192 (194)

The omission by the Magistrate to inform the accused that he is entitled to have his case tried by another Court may be a ground for having the proceedings set aside but not for making an order for transfer—*In re Abdul Ally* 2 Weir 151

595 Nature of the accused's right —All that the accused is entitled to

to under this section is to have the case tried by *another* Court, but he cannot choose or determine for himself by what other *particular* Court the case is to be tried—7 B L R 637 And the Magistrate has a discretion, on objection being taken, either to transfer the case to another Magistrate or to commit it to the Sessions He is not bound to transfer the case to another Magistrate He may elect to commit the case to the Court of Session—22 Mad 148

Again, the accused can object only to the *trial* of the case by that Magistrate, he cannot object to a *preliminary inquiry* This section directs the Magistrate either to transfer the case to another Magistrate or to commit the case to the Sessions And the commitment involves the holding of a preliminary inquiry This section empowers the Magistrate to hold a preliminary inquiry even in a case triable by himself if the case is one triable exclusively by the Sessions Court, the Magistrate is *a fortiori* entitled to hold an inquiry preliminary to commitment—*Q E v Abdul Razzak*, 21 All 109 *Azam Ali v Emp*, 20 Cr L J 47 (Cal)

But a Magistrate who takes cognizance of a case under sec 190 (c) cannot, after becoming a District Magistrate, hear an *appeal* from a conviction in the case (which was tried by another subordinate Magistrate) without following the procedure laid down in Sec 191, as an appeal is a part of the trial of the offence—12 C W N 438

596 When objection to be taken —If the accused wants to be tried by another Court he must express his objection before any evidence is taken—*Murad v Emp*, 1894 P R 29 (at p 82)

597 Application of Section to Chapter VIII —The provisions of secs 190 and 191 do not apply to proceedings under sec 110 and a Magistrate who has instituted those proceedings need not inform the person proceeded against that he is entitled to have his case transferred to another Magistrate—27 All 172 But in *Alimuddin v Emp*, 29 Cal 392 and *Godhan v Emp*, 4 P L J 7 however it has been held that the principle of this section, viz, that no man ought to be a judge in his case, applies to proceedings under Sec 110, though they do not relate to offences, therefore, where a Magistrate has initiated proceedings against a person under sec 110 mainly if not wholly upon his own knowledge of the character of that person, he is incompetent to proceed with the trial under Sec 117

192. (1) Any Chief Presidency Magistrate, District Magistrate or sub-divisional Magistrate may transfer any case, of which he has taken cognizance, for inquiry or trial, to any Magistrate subordinate to him.

Transfer of cases by Magistrates

(2) Any District Magistrate may empower any Magistrate

of the first class who has taken cognizance of any case to transfer it for inquiry or trial to any other specified Magistrate in his district who is competent under this Code to try the accused or commit him for trial; and such Magistrate may dispose of the case accordingly.

May transfer' —The power under this section is optional and not obligatory. As to cases which a Magistrate is disqualified from trying and is bound to transfer see Secs 487 and 556.

598 Any case' —This section deals with the power of the Magistrate to transfer any case the words any case are not restricted to criminal cases only but are wide enough to include any case triable by any criminal Court e.g. cases under Chapter VIII—*Chintaman v Emp* 35 Cal 243 24 All 151 *Hirananda v Emp* 1 Pat 621 or cases under Chapter XII—*Satish v Rajendra* 22 Cal 598 *Ram Kessore v Duarka* 10 C W N 1095 *Mahendra v Raspati* 20 A L J 215 *Abdul Hamid v Hasan*, 4 P L T 297 24 Cr L J 487 Even if the transfer be not strictly legal the irregularity would be cured by Sec 519 (f)—*Gurudas v Gaganendra* 2 C L J 614 *Akbar v Domi Lal* 4 C W N 811

The word case has not been defined but reading together sections 192 (1) 190 (a) and 200 (c) it is clear that the term includes a proceeding upon a complaint as soon as the complaint has been received by the Magistrate who takes cognizance of the offence and before he issues any process. A case can therefore be transferred under sec 19 even before a decision to issue process against the accused has been made—*Isaram v Bhagirathi* 7 N L R 97 12 Cr I J 437

Power to transfer cases which the subordinate Magistrate is incompetent to try —Under subsec (1) the Magistrates specified have power to transfer a case to a Sub Magistrate even though the latter be incompetent to try the case on his own initiative thus a complaint under Sec 10 of the Cattle Trespass Act can be entertained only by the District Magistrate or a Magistrate specially authorised but this section will empower a Subordinate Magistrate to try the case if it is transferred to him by the District Magistrate—*Budhan v Issur Singh* 34 Cal 926

But if a first class Magistrate transfers a case under subsection (1) he can transfer only those cases to a Subordinate Magistrate which the latter is competent to try or commit for trial

599 'Of which he has taken cognizance' —This section empowers the District Magistrate to transfer to Subordinate Magistrates only those cases of which he has taken cognizance. A Magistrate is said to take cognizance of a case under section 107 only when (and not before) he issues notice to the person charged to show cause why he should not be proceeded against

under that section. Therefore where the District Magistrate has not issued any notice to the person charged that is where he has not taken cognizance of a case under section 107 he cannot transfer the case to a subordinate Magistrate—*Konda Reddy v King Emp* 41 Mad 246. This section enables a District Magistrate or subdivisional Magistrate to transfer only those cases of which he has taken cognizance under the provisions of Sec 190. It has no reference to cases which have been transferred to his Court—*Darra v Mukat* 12 A L J 277 15 Cr L J 357. In other words, a case which has once been transferred to a District Magistrate or Subdivisional Magistrate cannot be transferred by him again under Sec 192—*Bashir Husain v Ali Husain* 36 All 166 *Crown v Nga So* 1 L B R 86 *Anonymous* 7 M H C R App 33. But where a case had been transferred by the Chief Court under sec 526 from the Dt Magistrate of Rohtak to the Dt Magistrate of Hissar with a direction that the latter should either dispose of the case himself or transfer it to some other competent Magistrate in the District and the District Magistrate of Hissar transferred the case under sec 192 to an Honorary Magistrate held that the District Magistrate of Hissar was competent under this section to make the transfer—*Ashen Singh v Crown* 1917 P R 30 *O I v Mula Prasad* 19 All 241.

Where a trying Magistrate sends up a report to the District Magistrate that an accused before him has committed perjury and altered a document filed in Court the report amounts to a complaint and the District Magistrate can take cognizance of the case under section 190 (a) and transfer it for trial under section 19 to another Magistrate subordinate to him—*Suraj Prasad v Emp* 11 A L J 85 *Emp v Sindar Sarup* 20 All 514.

600 At which stage case can be transferred.—The Magistrate can transfer the case on taking cognizance of it. A District Magistrate is competent under sec 190 to take cognizance without complaint and to transfer the case to a subordinate Magistrate without such complaint—1 S L R 119. He can transfer the case before any process has been issued to the accused—*Asaram v Bhagvathi* 7 N L R 97 12 Cr L J 437. He can transfer a case even after summons has been issued against the accused—7 C L J 249 *Eqbal v Emp* 20 Cr L J 413 (Pat). But a case cannot be transferred under this section after it has been partly tried—2 Weir 152 e g after all the evidence for the prosecution and the defence has been taken—*Q F v Radhe* 12 All 66. The transfer of a part heard case after the framing of the charge and the cross examination of some of the prosecution witnesses to another Magistrate for disposal is undesirable. A Magistrate who undertakes a trial and hears the witnesses should if possible finish it—*Maahar Ali v Emp*, 50 Cal 223 (226).

'For inquiry or trial' —This section empowers a Magistrate to transfer a case for inquiry or trial, but it does not empower him to transfer a case simply for the purpose of considering the report of an investigation under sec 202, which he has himself ordered. The provisions of sections 192 and 202 do not entitle a Magistrate, after he has proceeded under the latter section, to make an order under the provisions of the former section transferring the case for the purpose of being dealt with under sec 203 or 204, without a fresh investigation as contemplated by sec 202—*Mahabir v. Giribala*, 29 C W N 508 26 Cr L J 990 A I R 1925 Cal 742

601. How much of the case need be transferred —Where a complaint or a police report deals with several persons, it is not necessary that the entire case, i. e., the case regarding the offences committed according to the complaint or Police report, should be transferred. Whether the entire case has been transferred or not is a question of fact, depending on the intention of the transferring Magistrate and this intention must be gathered from the order itself. Where no reservation is made it may be concluded that the entire case has been transferred—32 Cal 783. Thus, where a complaint was lodged against several persons, and the Magistrate after examining the complainant issued summons against one of the accused only and transferred the case to a Subordinate Magistrate, it was held that the whole case of the complainant was transferred and the Subordinate Magistrate could take proceedings against the other accused persons also—7 C L J 249

602. 'Subordinate to him' —A case can be transferred under this section by the Magistrate specified to the Court of a Magistrate subordinate to him and not to a superior Magistrate. A transfer of a case by a Subordinate Magistrate to a Superior Magistrate is not contemplated by this section. So a third class Magistrate cannot transfer a case to a District Magistrate—*Q E v Radhe*, 12 All 66

The subordination of the Presidency Magistrate to the Chief Presidency Magistrate shall be deemed to be of the same kind and extent as the subordination of Magistrates and Benches to the District Magistrate under sec 17 (1). The Chief Presidency Magistrate can under Sec 578 withdraw any case from any Presidency Magistrate and refer it for inquiry or trial to any other Presidency Magistrate—*In re Nageswar*, 1 Bom L R 347.

For the purpose of this section an Additional District Magistrate is subordinate to the District Magistrate see Sec 10 (3)

A village headman is not a Magistrate, and a case cannot be transferred to him—*Q E v Maung Gale*, 1 L B R 59

603. Effect of transfer —When a District Magistrate has transferred a case for trial to a Deputy Magistrate, the former ceases to have jurisdic-

tion in the case so long as the transfer is in existence and cannot take any further steps in the matter (e g issue warrants) unless the case is withdrawn to his own file under sec 528—*Golapdy v Q E* 27 Cal 979 *Amrit Majhi v A E* 46 Cal 854 Until the transferring Magistrate withdraws the case from the file of the subordinate Magistrate (to whom the case was transferred) to that of his own Court he has no power to make any order save an order for further inquiry under Sec 437 (now 436)—32 Cal 783 30 Cal 449 In this respect this section differs from Sec 202 Under that section the Magistrate receiving a complaint refers it to a subordinate Magistrate only for inquiry and report and does not cease to have control over the case The provisions of secs 192 and 202 are separate and distinct and the powers conferred by one section do not curtail the powers conferred by the other—*Amrit Majhi v King Emp* 46 Cal 854

604 Procedure before transfer —*Notice to parties* —Before a case is transferred under this section from one subordinate Court to another the District Magistrate should give notice to the parties of such transfer —8 Cal 393 *Umrao v Fakirchand* 3 All 749 *In re Saher Nath* 2 Bom L R 342 *In re Daud Hussain Ratanlal* 460 *In p v Sadashit* 2 Bom 349

Examination of complainant —Under Sec 200 proviso (a) when a complaint is made in writing the Magistrate is not bound to examine the complainant before transferring the case under this section See also *Q v Haru* 18 W R 18

605 Procedure after transfer —*Examination of complainant* —If the transferring Magistrate has already examined the complainant the Magistrate to whom the case is transferred is not bound to examine the complainant again—Sec 200 (c)

Examination of prosecution witness —Even where the transferring Magistrate has examined all the prosecution witnesses still the Magistrate to whom the case is transferred is bound to examine the witnesses again He cannot act upon the deposition of witnesses recorded by the transferring Magistrate—*Q E v Bashir Khan* 14 All 346 *In re Tota Venkanna* 2 Weir 152 see also 12 C W N 140

606 Transfer by High Court —In the case of a transfer of a criminal case by the High Court from a Court subordinate to the District Magistrate to the District Magistrate's Court it will be understood that the District Magistrate should try the case himself unless the High Court has expressed that the District Magistrate shall have the power to transfer the case to a subordinate Court But when the High Court transfers a case from the Court of one District Magistrate to the Court of another District Magistrate it will be understood unless the contrary is directly

expressed, that the Magistrate of the Court to which the transfer is made has power and jurisdiction to apply section 192, and to transfer the case to the Court of any Magistrate subordinate to him, who may be competent to try it—*Q E v Mata Prasad*, 19 All 249, *Kishen Singh v Crown*, 1917 P. R. 30

193. (1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf.

<p>(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try, or, in the case of Assistant Sessions Judges, as the Sessions Judge of the division, by the general or special order, may make over to them for trial</p>	<p>(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try or, [* * * *] as the Sessions Judge of the division by the general or special order, may make over to them for trial</p>
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Change —The words 'in the case of Assistant Sessions Judges' which occurred in subsection (2) after the words 'may direct them to try' have been omitted by sec 16 of the Criminal Procedure Code Amendment Act XVIII of 1923. We propose to omit from section 193 (2) the words 'in the case of Assistant Sessions Judges'. The section as it stands at present (i.e. before the amendment) makes a distinction between Additional Sessions Judges and Assistant Sessions Judges only allowing transfers by the Sessions Judge in the case of the latter. Considerable inconvenience has been felt owing to this limitation, which we propose to remedy by the omission of the words referred to above. —*Report of the Select Committee of 1916*. Under the present law Sessions Judges will be able to make over the cases to the Additional Sessions Judges as well as to the Assistant Sessions Judges.

607. Object of this section —The object of the requirement of a commitment before trial is to secure in the case of a person charged with a grave offence, a preliminary inquiry which would afford him the opportunity of becoming acquainted with the circumstances of the offence imputed

to him and enable him to make his defence—*Rama Varma v Q* 3 Mad 351 The law contemplates that in the serious cases of which a Court of Session may take cognizance the accused should have some information of the case he has to answer—*Q v Chinna Vedagiri* 4 Mad 227

608 Trial without commitment —The trial in the Court of Session without a commitment is *ultra vires*—*Q E v Ramalevan* 15 Mad 352 *Sharina v Emp* 1884 P R 42 22 Cal 50 The absence of commitment is a defect of substance and not merely of form and is not cured by section 537—*Sharina v Emp* 1884 P R 42 Even where a Sessions Judge holds that the approver who is giving evidence before him as a witness is not complying with the conditions of pardon he cannot try him at once but can do so only after a proper commitment by a competent Court—*Q E v Ramalevan* 15 Mad 352 22 Cal 50 *Nga Aung v Q E I B R* (1893—1900) 536

Irregular commitment —If the commitment is made by a Magistrate duly empowered the fact that the Magistrate investigated the case without a formal complaint is not a ground of treating the commitment as a nullity the Sessions Court should proceed with the trial in the usual course—4 B H C R 35

A commitment made in the absence of the accused is void and the subsequent trial upon such commitment must be set aside as a nullity—*Akhanan v Crown* 1913 P L R 260

Onus of proof —Where the commitment was made by a person exercising the powers of a Magistrate that fact is sufficient to entitle a Sessions Court to proceed with the trial and it would be on the party impugning the correctness of the proceedings to show that there was no jurisdiction—13 W R 17

609 Reference under sec 123 —*Power of Additional Sessions Judge*—A reference to a Court of Session by a Magistrate of a case under section 123 is not a case committed for trial and the Court of Session disposing of it does not try a case within the meaning of this section An Additional Sessions Judge empowered by the Govt to try all cases which may be committed for trial by the District Magistrate has no jurisdiction to pass an order on such reference—*In re Dazaram Ranchhod* Ratnial 830 This decision is no longer good law because the new subsection (3B) of sec 123 as now amended by the Amendment Act of 1923 expressly authorises the Sessions Judge to make over all references under sec 123 to the Additional or Assistant Sessions Judge In *Beisode Behari v Emperor* 50 Cal 229 the word cases under this section was held to include a reference under sec 123 but such a laboured interpretation is no longer necessary

610 Assistant Sessions Judge appointed temporarily —An Assistant Sessions Judge who has been directed by the Government to take

over charge of the duties of the Sessions Judge during a temporary vacancy of the office, is not an officer appointed to act as a Sessions Judge, and has no jurisdiction to try any case even as Assistant Sessions Judge, unless it was made over to him by a general or special order under the last para of this section—*Q E v. Mahadhu, Ratanlal 500*

Power of Assistant Sessions Judge to hear appeal—The word 'case' used in sub-section (2) does not include an *appeal* or other matter, and a Sessions Judge has no power to transfer an appeal filed in his Court to the Court of the Assistant Sessions Judge—*Emp v Abdul Razzak, 37 All 286* Sec Note 1110 under sec 409

194. (1) The High Court may take cognizance of any offence upon a commitment made to it by High Court, in manner hereinafter provided.

Nothing herein contained shall be deemed to affect the provisions of any Letters Patent granted under the Indian High Courts Act, 1861, or the Government of India Act, 1915, or any other provisions of this Code.

(2) (a) Notwithstanding anything in this Code contained, the Advocate-General may, with the previous sanction of the Governor-General in Council or the Local Government, exhibit to the High Court, against persons subject to the jurisdiction of the High Court, information for all purposes for which Her Majesty's Attorney-General may exhibit informations on behalf of the Crown in the High Court of Justice in England

(b) Such proceedings may be taken upon every such information as may lawfully be taken in the case of similar informations filed by Her Majesty's Attorney-General so far as the circumstances of the case and the practice and procedure of the said High Court will admit.

(c) All fines, penalties, forfeitures, debts and sums of money recovered or levied under or by virtue of any such information shall belong to the Government of India.

(d) The High Court may make rules for carrying into effect the provisions of this section.

195. (1) No Court shall take cognizance—

(a) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code, except with the previous sanction or on the complaint, of the public servant concerned, or of some other public servant to whom he is subordinate,

(b) of any offence punishable under sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 or 228 of the same Code, when such offence is committed in, or in relation to any proceeding in any Court except with the previous sanction or on the complaint of such Court or of some other Court to which such Court is subordinate,

(c) of any offence described in section 463 or punishable under section 471, 475, or 476 of the same Code, when such offence has been

195 (1) No Court shall take cognizance—

(a) of any offence punishable under sections 172 to 188 of the Indian Penal Code, except * * * on the complaint *in writing* of the public servant concerned or of some other public servant to whom he is subordinate,

(b) of any offence punishable under any of the following sections of the same Code, namely, sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211, and 228 when such offence is *alleged to have been* committed in or in relation to, any proceeding in any Court, except * * * on the complaint *in writing* of such Court or of some other Court to which such Court is subordinate, or

(c) of any offence described in section 463 or punishable under section 471, section 475 or section 476 of the same Code, when such

committed by a party to any offence *is alleged to have been* proceeding in any Court committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding except with the previous sanction, or on the complaint of such Court, or of some other Court to which such Court is subordinate

(2) In clauses (b) and (c) of sub-section (1) the term "Court" means a Civil, Revenue or Criminal Court but does not include a Registrar or Sub Registrar under the Indian Registration Act, 1877

(3) *See infra*

(4) The sanction referred to in this section

Nature of sanction necessary may be expressed in general terms and need not name the accused persons but it shall so far as practicable specify the Court or other place in which and the occasion on which the offence was committed

(5) When sanction is given in respect of any offence referred to in this section, the Court taking cognizance of the case may frame a charge of any other offence so refer-

(2) In clauses (b) and (c) of sub-section (1) the term 'Court' includes a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub Registrar under the Indian Registration Act 1877

(omitted)

(omitted)

red to which is disclosed by the facts

(6) Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate, and no sanction shall remain in force for more than six months from the date on which it was given, provided that the High Court may, for good cause shown, extend the time

(omitted)

(7) For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie that is to say —

(c) Where no appeal lies from such Court shall be deemed to be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first mentioned Court is situate

(a) Where such appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate.

(3) For the purposes of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the *appealable decrees or sentences* of such former Court, or in the case of a *Civil Court* from whose decrees no appeal ordinarily lies to the principal Court having ordinary original *civil* jurisdiction within the local limits of whose jurisdiction such *Civil Court* is situate :

Provided that—

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate ; and

(b) Where such appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case in connection with which the offence is alleged to have been committed

(3) The provisions of subsection (1) with reference to the offences named therein apply also to criminal conspiracies to commit such offences and to the abetment of such offences and attempts to commit them

(5) *Where a complaint has been made under sub section (1) clause (a) by a public servant any authority to which such public servant is subordinate may order the withdrawal of the complaint and, if it does so, it shall forward a copy of such order to the Court and upon receipt thereof by the Court no further proceedings shall be taken on the complaint*

Change —This section has been substantially amended by sec 47 of the Criminal Procedure Code Amendment Act (XVIII of 1933)

The changes introduced by the present Amendment are the following —

(1) The words *with the previous sanction* have been omitted from clauses (a) (b) and (c) of subsection (1) Under the old law a private person could launch a prosecution for the offences referred to in this section after obtaining the sanction of the Court Under the present law by *abolishing sanction altogether* the right of private individuals to prosecute for the said offences has been taken away Sub-sections (4) (5) and (6) which dealt with sanction have also been omitted

(2) The words *in writing* have been added after the word *complaint* in clauses (a) (b) and (c) and the words *is alleged to have been committed* have been substituted for the words *have been committed* in clauses (b) and (c) For reasons, see notes under those words

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court, according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed

(4) The provisions of subsection (1) with reference to the offences named therein, apply also to criminal conspiracies to commit such offences and to the abetment of such offences and attempts to commit them

(3) In sub section (2) the word includes has been substituted for means

(4) Sub section (3) has been re numbered as sub section (4)

(5) Sub section (7) has been re-numbered as sub section (3) because that sub section should come in more properly after the definition of the word Court in sub section (2) The old clause (c) of sub section (7) has now been incorporated into the body of sub section (3) with this restriction that it is now confined to civil Courts only

(6) Sub section (5) is entirely new

Reasons for the change — The provisions of section 195 cause constant and great difficulty and various amendments have been suggested which we have considered at length We have no doubt that it will not be possible to remedy the evils which are connected with this section so long as private individuals are allowed to prosecute for offences connected with the administration of justice In our opinion the only effective way of dealing with this section is to allow prosecutions to be launched only by the public servant or by the Court

We see no reason why the public servant or the Court should not file a complaint exactly in the same way as a private individual would do in other cases and our proposals in this connection with this section and the enlargement of section 476 involve the adoption of this principle In our view section 195 should bar the cognizance by any Court of offences of this nature except upon such complaint while the procedure to be followed when the Court desires to prosecute should be prescribed by section 476

The adoption of this principle will at all events get rid of the objectionable practice of keeping a sanction which has been granted to a private individual hanging over the head of the accused person for a period of six months which is frequently utilised for the various purposes of blackmail In the case of a complaint by a Court or a public servant we do not think that it will be necessary to prescribe any limit of time

It will also in our opinion be a distinct advantage to get rid altogether of the term sanction in connection with these prosecutions a result which will be effected by the amendments we propose

We recognise that clause (a) of sub-section (1) stands on a somewhat different footing from clauses (b) and (c) but we think there is no reason to retain even in it any reference to a sanction as prosecution under clause (a) can reasonably be launched in all cases on the direct complaint of a public servant — *Report of the Select Committee of 1916*

The object of the amendment is to stop private persons from obtaining sanction as a means of wrecking vengeance and to give the Court concerned full discretion in deciding whether any prosecution is necessary or not—

Abdul Rahman v. L. 194 Bur L. J. 213 A. I. R. 1946 Rang 57

611 Sanction abolished—Effect of Amendment —Since sanction has been abolished by the Amendment Act XVIII of 1923 a sanction granted after the 1st September 1923 (the date on which the Amendment Act came into operation) is illegal—*In re Gafur* 26 Bom L R 1235 A I R 1925 Bom 151 A sanction granted after 1st September 1923 is illegal, even though an application for sanction was made prior to that date. The order granting sanction cannot be treated even as a complaint—*Baldeo Misser v D I G of Police* 51 Cal 652 (655)

So also where sanction was granted before the 1st September 1923 but no prosecution was launched by that time further proceedings cannot be taken after that date on the strength of the sanction. A prosecution can then be started only on a complaint by the Court concerned—*Ani v Ak Yone* 2 Bur I J 289 *Jasahir v Jasru* 6 Lah 41 26 P L R 152 26 Cr L J 1163 *Ameraj v Emp* 73 A L J 35 26 Cr L J 751

But where a sanction was obtained and the Court had taken cognizance of the offence before the Amendment Act came into operation the subsequent amendment of the law did not take away the jurisdiction of the Court to proceed with the trial and did not necessitate a fresh complaint under the amended provisions—*In re Appasamy* 49 M L J 276 A I R 1925 Mad 1172 *Muthia Goundan v Chinna* (1924) M W N 358 A I R 1924 Mad 615 26 Cr I J 14 *Emp v Akbar Ali* 8 Lah L J 87 A I R 1926 Lah 131

An application under sub section 1 (6) of the old section to revoke a sanction granted before the Amendment Act of 1923 is maintainable even after the coming into operation of the Amendment Act of 1923 because the right conferred by sub section (6) of the old section was not a mere matter of procedure but a substantive right and such right could not be taken away by any amending Act—*Ramakrishna v Sathai Annai* 48 Mad 670 (T B) 49 M I J 773 (practically overruling *Nataraja v Rangaswamy* 47 Mad 384 46 M L J 774 25 Cr I J 361 and *Sesha Aiyar v Public Prosecutor* 19 I W 463 34 M I T 353 25 Cr L J 702). Similarly where proceedings under the old sec 195 were commenced and the order of the subordinate Judge refusing to sanction a prosecution was passed under the old Code but during the pendency of the application to the District Judge against the order of refusal the new Code came into operation and the District Judge sanctioned the prosecution *held* that the case was governed by sec 6 (e) of the General Clauses Act and the repeal of the old sec 195 could not affect any pending investigation in respect of the right which had accrued to the complainant. The District Judge therefore did not act illegally in granting the sanction—*Kashmere Lal v Kishen Das* 26 Cr L J 90 A I R 1924 All 563

(It should be noted that many of the cases cited below are cases relating to *sanctions*, but the principle of those cases applies also to complaints.)

for under the old law no distinction was made between a sanction and a complaint. The cases noted below are therefore cited with certain verbal alterations.)

612. Object of section.—The object of this section is:—to protect persons from being needlessly harassed by rash, baseless or vexatious prosecutions at the instance of private individuals for the offences specified—39 Mad 677 32 M L J 54, to protect persons from criminal prosecution by persons actuated by personal malice or ill-will or frivolity of disposition—18 All 203, 1887 A W N 142 1 C W N 400, to protect persons from criminal prosecutions upon insufficient grounds and to ensure prosecution only when the Court after due consideration is satisfied that there is a proper case to put a party on his trial—4 L B R 234, to insist on there being prosecution only when the public justice demands it and to prevent prosecution when public interest cannot be served—1 C W N 400; 2 Weir 178; Ratanlal 374 3 C W N 3, 1893 A W N 104, and to save the time of Criminal Courts from being wasted by endless prosecutions without convictions—39 Mad 677 1 C W N 400

613. Duty of Court.—A complaint ought not to be made under this section when there is no probability of conviction. It is necessary for the Court before making a complaint, to consider the evidence and to decide as to whether there is a *prima facie* case and any reasonable chance of conviction being obtained—*Abou v. Kuppuswami*, 2 Weir 188, 26 Mad 116; 12 M L J 408 12 M L J 392 *Munisami v. Rajaratnam*, 44 M. L. J 774, 12 C W N 3 4 P I J 374 *In re Raoji* 7 Bom. L. R 732 (per Russell J), 32 M L J 54 13 A I J 1111 61 W 241, 10 N L R. 177; *Mulayya v. Maung Shai*, 3 Bur L. R 152 11 Cr I J 749, *Khajumal v. Cronin*, 14 S L R 69 *Bhagirathi v. Imp.*, 26 Cr I J. 2401

It would be an abuse of the powers vested in a Court of justice if complaints were made by it on the principle that though the conviction of the party complained against is a mere possibility, it is desirable that the matter should be thrashed out, so that it may be decided whether or not an offence has been committed—37 Cal 250 (Nag)

614 Sub-section (1)—Complaint.—If a Court adopts the procedure laid down in sec 476, and after making the necessary inquiry under that section, sends the case to a first class Magistrate, such action amounts to making a complaint—*Q. E. v. Rachappa*, 13 Bom 109. In order to make a complaint under this section, the Judge or Munsiff will not have to appear before a Magistrate and make a complaint on oath like an ordinary complainant. If he adopts the procedure under sec 476, that would be sufficient. Section 476 was enacted with the object of avoiding the inconvenience which might be caused if a Munsiff or subordinate Judge or a Judge were obliged to appear before a Magistrate and make a complaint on oath to

lay the foundation of a prosecution—*Ishri Prasad v Sham Lal* 7 All 871 (F B)

But it should be noted that Sec 476 refers only to offences 'when committed before the Court' and the ruling in 7 All 871 must be applied to those cases only. But if the offence is committed before a public servant other than a Court his proper course is to prepare an ordinary complaint. See U B R (1908) Cr P C 13.

But even in the case of complaints by public servants, the law is not so stringent as in the case of complaints by ordinary persons. Thus where a Sub Inspector drew up what was virtually a complaint and sent it up along with a calendar of witnesses to his immediate superior praying that a case under sec 182 I P C be lodged against the accused and then the superior officer got the documents presented to the Magistrate by the Court Inspector it was held that there was a sufficient complaint by the Sub Inspector although it was not addressed to the Magistrate as required by sec 4 (h) but to his superior officer—*Mehr Chiragh Din v Crown* 4 Lah 359. So also where a police officer made a report that a certain person had lodged a false information before him and recommended that that person might be prosecuted *held* that the report virtually amounted to a complaint within the meaning of sec 195—*Dulan Singh v Emp* 40 Cal 360.

The words 'in writing' have been inserted after the word 'complaint' in order to remove the inconvenience which might be felt if it was made incumbent on the public servant to attend the Court and to appear before the Magistrate in order to lodge the complaint. It will be sufficient if he sends a written complaint to the Magistrate. It is for this reason that clause (aa) has been added to sec 200 so that it is not incumbent on the Magistrate to examine the public servant (complainant) when taking cognizance of the offence—*Lachmi Singh v K F* 5 P L T 505 A I R 1924 Pat 691 25 Cr L J 972.

If an offence under sec 173 I P C is committed before a public servant the Court shall not take cognizance of the offence without a complaint in writing from the public servant and it is not open to a Magistrate to ignore the provisions of this clause by the device of instituting the case under another section of the I P Code. Hence the Magistrate cannot say that he took cognizance of an offence under sec 225B of the Penal Code and that having done so he was entitled under sec 238 of the Cr P Code to convict the accused under sec 173 I P Code which he regarded as a minor offence of the same character as that for which a penalty is provided under sec 225B I P Code—*Narain Singh v K E* 22 A L J 1005 47 All 114 A I R 1925 All 129.

Instances of complaints by Courts—Where a Munsiff who
saw was of opinion that certain persons should be prosecuted for o

under Secs 193 463 471 I P C and directed them to be sent to a Magistrate for inquiry it was held that the Munsiff's order was a complaint within the meaning of this section—*Ishri Prosad v Sham I* 17 All 871 Where a Magistrate ordered the prosecution of a person and sent the case to another Magistrate for inquiry it was held that the order must be deemed to be a complaint under Sec 476 of this Code—*Q E v Yendata* 7 Mad 189 Where a Civil Judge trying a rent suit was of opinion that a party to the suit had committed perjury, and sent the record to the Collector for starting a case under Sec 193 I P C it was held that the order was a complaint though it was not an order under Sec 476—*Emp v Sundar Sarup* 26 All 524 Where a Judge passed an order to the following effect — I complain that R filed two false and forged bonds in the Court of Small Causes etc and sent the papers to the District Magistrate for taking action, it was held that the order of the Judge was a complaint—*Rajaram v R E*, 12 A L J 881 15 Cr I J 700 Where the accused removed the property which had been attached in execution of a decree and on the report of the attaching officer the District Judge being of opinion that the accused should be prosecuted ordered the papers to be sent to the Deputy Commissioner it was held that the order of the District Judge operated as a complaint—1904 P L R 7 Where a Munsiff being of opinion that a document filed in a case before him had been tampered with communicated his suspicions to the District Judge who thereupon wrote to the District Magistrate requesting him to take action it was held that the letter of the District Judge amounted to a complaint—35 All 8 Where the District Judge forwarded to the District Magistrate a copy of his judgment with a letter in which he called attention to his remarks as regards the forgery of a will and requested the latter to take up the matter for judicial investigation the letter was a sufficient complaint—*In re Aparao* 20 Bom L R 1018 Where a Magistrate who tried a case sent up a report to the District Magistrate that the accused had made a certain alteration in a document filed in Court and had thus committed an offence the report amounted to a complaint—*Sura Prasai v Emp* 21 A L J 825

614A Want of Complaint —Under clause (b) of section 537 before it was amended in 1923 the want of a sanction or any irregularity in the matter of a sanction or in a proceeding under sec 476 did not stand in the way of a conviction if it was otherwise sound This clause does not any longer find its place in sec 537 The inference is that want of a regular complaint by a public servant or a Court must be fatal to a prosecution —*Ameraj v Emp* 23 A L J 35 26 Cr L J 751

615 Subordination of public servants —The subordination of one public servant to another may arise either from express enactment or

from the fact that both the public servants belong to the same department one being superior in rank to another—18 M L J 484

A constable is subordinate to the Superintendent of Police—19 W R 33 The District Magistrate (in his executive capacity) is at the head of the Police and the Police (e g the Superintendent of Police) is subordinate to him—*Empress v Ram Ah Lalan* 1890 A W N 167 *Emp v Shib Singh* 27 All 297 45 All 135 1910 P R 6 32 Cal 180 (*Contra*—*Ramaswamy Lal v Queen Empress* 27 Cal 452 and *Akhan Singh v Kirpa Singh* 4 Lah 130 In these two cases it has been held that although the police officers in a district are generally subordinate to the District Magistrate the subordination contemplated by sec 195 is not such subordination Sec 195 contemplates the subordination of the police officers to some superior officer of Police)

The Secretary of a Municipal Board is subordinate to the Chairman—*In re Sheo Prasad* 1892 A W N 31

The Registrar of the Small Cause Court is subordinate to the Chief Judge of the Court—27 Bom 130

A Station House Officer is not subordinate to the Taluk Magistrate—6 Mad 146 The Police is not subordinate to the Honorary Magistrate *Emp v Balleo* 1895 A W N 152 19 W R 33 or to the Township Magistrate—1 L B R 101 Neither the Police nor the Sub Magistrate is subordinate to the Sessions Judge—27 M L J 586 A village Munsiff or village Magistrate is not subordinate to a Sub Magistrate—18 M L J 584 (dissenting from 4 Mad 241)

616 Clause (b) —The power of a Court to complain in respect of offences mentioned in clause (b) is not restricted as under clause (c) to the parties before it—*Emp v Syed Khan* 3 Rang 303 (F B) A I R 1925 Rang 321

Perjury —In making a complaint against a witness for perjury the Court should remember that the statement must be intentionally false in order to justify a prosecution—*Sheodahn v Bandhan* 2 A L J 836 The essential ingredient of the offence is the intention of the person—3 C W N 81

Again, the statement alleged to be false must have a bearing upon the matter in issue When the question is neither material to the issue in the case nor goes to the credit of the witness he is not liable to prosecution—*Sheodahn v Bandhan* 2 A L J 836 *Akhanumal v Crown* 11 S I, R 69 *Maharaj Prasad v Emp* -1 A L J 673 24 Cr L J 779

Prosecution for perjury ought to not be made in respect of a loose or inaccurate statement which is remotely relevant to the case and which is not pressed home to the witness in cross examination—*Muquaddos v. Zahuruddin* 20 Cr L J 564 (All)

A prosecution for perjury ought not to be made while the principal proceeding in respect of which the perjury is said to have been committed is *pending*. If such a prosecution is to be started, it ought to be started after the principal proceeding has terminated—*In re Vasudev*, 24 Bom L. R. 1153

A complaint for perjury should not be made by the Court in cases where it will have to determine the question by merely weighing the evidence on both sides—*Padarath v Rattan Singh*, 5 P. L. J 23 1 P. L. T 458 21 Cr L J 145

A prosecution for offences under secs 193, 467 and 471 I P C, in respect of a handnote sued upon may be made even though the suit was compromised after it was heard in part—*Dulloo v D I G of Police*, 49 Cal 551 23 Cr L J 138

A prosecution for perjury in respect of a piece of evidence should not generally be made where the trial Court and the Appellate Court have taken different views as to its credibility—*Hirulal v Lila Mahlon*, 3 P. L. T. 60

In considering the question whether a prosecution for perjury shall or shall not be made, it is a safe rule to give the witness a *locus penitentiae* and an opportunity to correct himself and if he avails himself of it, prosecution is inadvisable 1903 \ W \ 68 *Maharaj Prasad v Imp*, 21 A. L. J 673

Where a Sessions Judge believes the evidence of a witness given before him, but disbelieves the evidence given by him before the committing Magistrate he should not prosecute for perjury in the *alternative* but he may prosecute for giving false evidence before the Magistrate—2 Weir 166.

617 Contradictory statements —Whether a prosecution should be made for giving false evidence on the ground that the witness made contradictory statements, depends upon the circumstances of each case—*Nga Lu Pa v. Emp*, 4 Bur L. T 262 13 Cr L J 56 The mere fact that a witness made contradictory statements in the course of a single deposition is not a ground of prosecution—2 Weir 169, 4 C W N 249, in such a case the Court should take into consideration the whole deposition—2 Weir 168, and should consider if the contradiction may possibly be due to some confusion or mistake—3 C W N. 81 Nor should the Court make a complaint on the mere fact that the witness made two contradictory statements, one before the committing Magistrate and another at the trial. The Court should consider how the contradiction has happened and why the witness in the trial has resiled from his statement made before the committing Magistrate. Where the witness had made false statements before the committing Magistrate but deposed truly at the trial, the High Court refused to prosecute—37 Cal. 618. Before making a complaint in respect

of contradictory statements it would be necessary and proper to allow the person against whom the complaint is made an opportunity to explain the statements fully and to state the circumstances under which they came to be made—*Iqbal v Wilayat* 17 Cr I J 93 (All) *Fazl Din v Crown* 3 Lah L J 44.

A Court should not prosecute merely where there is a discrepancy between a statement made on oath and a statement made under circumstances in which the witness is not bound to state the truth e.g., where a person made two contradictory statements one in a petition in which he is not bound to state the truth and another in a deposition—2 Weir 169.

Where a person made two contradictory statements one before a Magistrate and another before a subordinate Judge, it is necessary that there should be a proper complaint for prosecution on each branch of the alternative i.e. one complaint from the Magistrate and another from the subordinate Judge. The Court to which both Courts are subordinate may properly make the complaint where one Court is not subordinate to the other—1890 P R 36 *Emp v Purshottam* 45 Bom 834 (F B) 23 Bom L R 1 22 Cr L J 241.

618 **False Charge**—A complaint for an offence under Sec 211 I P C can be made only when the case is deliberately false but where the case brought is not false in substance but is bolstered up by false evidence prosecution should be made for an offence not under sec 211 but under sec 196 I P C—*Bhola Nath v Harimohan* 7 C L J 169. There must be good grounds for thinking that a false and malicious charge was made and that a prosecution is necessary in the interests of justice—*Nandram v Ramchand* 5 C P L R 78.

Mere acquittal of the person against whom the charge was made is not sufficient for a prosecution under Sec 211 I P C. There must be more than a mere acquittal there must be a reasonable belief in the mind of the prosecuting Court that there was no foundation whatever for the original charge there must be a belief that in instituting the criminal proceedings the accused had acted knowingly without belief in the truth of the allegations made by himself and recklessly without caring whether the allegations were true or false—*Kusum v Janak Lal* 4 P L J 374.

The fact that the complainant fails to prove his case is by itself not sufficient to sanction a prosecution under sec 211 I P Code. It must be established satisfactorily in the mind of the Judge or Magistrate that the complaint was made with intent to cause injury or that it was a false complaint made with the knowledge that it was false—*Bhuvan Katar v Emp*, 6 P L T 365 26 Cr L J 141.

Before making a complaint for bringing a false case it is necessary that the case must be judicially determined, the original case must be

disposed of according to law before proceedings can be taken for prosecution for false charge—*Gunamony v Q E* 3 C W N 758 *In re Sahiram* 3 C W N 254 14 C W N 765 *Sheikh Kutub Ali v Emp* 3 C W N 490 *In re Ningappa* 48 Bom 360 26 Bom L R 183 A Magistrate is not competent to order the prosecution of the complainant for making a false complaint unless that complaint is dismissed as false—3 C W N 758 *Aly Mahomed v Emp* 1912 P R 2 If the original case is neither tried out nor dismissed on evidence taken the prosecution is invalid—*Ram Sarup v A E* 4 O C 127

619 False claim —Before prosecuting a person under sec 209 I P C for bringing a false claim that person should be allowed an opportunity of proving his claim a prosecution should not be made when that person has been thwarted in his attempt to establish the correctness of his claim by the unwarranted activities of the Police acting as the agent of the other party—*Khairati Ram v Crown* 3 Lah L J 537

620 False charges made before police —A complaint by the Court is necessary when the offences referred to in this clause are committed in or in relation to any proceeding in Court it is not necessary when the offence is committed in police proceedings e g when a false charge is made to the Police and has not been followed by a judicial investigation thereof by a Court—*Tajabullah v Emp* 43 Cal 1152 7 Mad 292 2 Weir 162 *Jagatchandya v A E* 26 Cal 786 *Putiram v Mahomed Hasim* 3 C W N 33 4 Cal 869 *Hasim Baksh v Emp* 1905 P R 12 *Q E v Ganpat Ratanlal* 704 30 All 58 *Bakshi v Emp*, 21 A L J 805 10 Mad 232 If however the information to the police was followed by a complaint to the Court based on the same allegations and on the same charges as those contained in the information to the Police and the complaint was investigated by the Court and found to be false a complaint of the Court would be necessary for prosecuting the false complainant because it was an offence committed in relation to a proceeding in Court—*Crown v Ananda Lal* 44 Cal 650 33 Cal 1 14 Cal 707 *Jadnandan v Emp* 37 Cal 250 6 L B R 50 *Nagapan v Emp* 1 Bur L J 258 Where an information to the police is followed by a complaint to the Court based on the same allegations and the same charge and the police investigates the case and reports that it is false the complaint of the Court is necessary even in respect of the false charge made to the police on the ground that it was an offence committed in relation to a proceeding in Court The fact that the complaint was not investigated by the Court does not make any difference—*Sh Abd Yassin v Emp*, 4 Pat 323 6 P L T 457 A I R 1925 Pat 483 *Daroga Gope v Emp* 6 P L T 515 26 Cr L J 1269

If a false charge is made by A before the police against three persons

B C and D but the police takes criminal proceedings in Court against B and C but releases D from the charge and B and C are acquitted by the Court held that a complaint of the Court is necessary for the prosecution of A for making false charge against B and C but no complaint is necessary for the prosecution of A or making false charge against D because there was no *proceeding in Court against D* he having been released by the police before the case came to Court—*Emp v Kashi Ram* 46 All 906 (910 912) dissenting from *Emperor v Hardwar* 34 All 522 in which it was held that under similar circumstances a complaint of the Court would be necessary for the prosecution of A for making false charge against D because the charge against D led to the proceeding in Court although D was not charged in Court

Alleged to have been committed —These words have been substituted for the simple word committed occurring in the old section See Note 626 under clause (c) *infra*

621 In relation to —The words in relation to in this clause are very general and are wide enough to cover a proceeding in contemplation before a Criminal Court though the proceeding may not have begun when the offence was committed Therefore sanction (complaint) is necessary for the prosecution of a person for abetment of perjury though the main case in which the false evidence was intended to be given was not then commenced but was in contemplation—*In re Vasudeo* 24 Bom L R 1153

622 Court —The word Court in this section has a wider meaning than a Court of Justice as defined in the Penal Code Having regard to the obvious purpose for which this section was enacted the widest possible meaning should be given to this word and it will include a tribunal empowered to deal with a particular matter and authorised to receive evidence on that matter in order to come to a determination (e g a tribunal formed under the Calcutta Improvement Act)—*Nunda Lal v Khetra Mohan* 45 Cal 585 17 Cal 872 11 C W N 909

The word Court cannot be so construed as to include a Court in a Native State e g Baroda Court—*In re Muljibhai* 49 Bom 860 27 Bom L R 1063 A I R 1925 Bom 535

The expression Court in sec 195 is of wider scope than the expression Civil Criminal or Revenue Court in sec 476 This is indicated by the word include occurring in sec 195 (2) Section 476 speaks of a civil revenue or criminal Court it does not refer to any Court other than such Courts whereas sec 195 refers to Courts in general—*Kanaiya Lal v Bhagwan Das* 48 All 60 23 A L J 956 16 Cr L J 1485 A I R 1926 All 30 *Bilas Singh v Emp* 23 A L J 845 A I R 1925 All 737 (per Sulaiman J Daniels J *contra*)

What are courts —A Collector acting in appraisement

under Secs 69 and 70 of the Bengal Tenancy Act—17 Cal 872 ; a Certificate Officer acting under section 6 of Bengal Act I of 1895 (Public Demands Recovery Act)—28 Cal 217 a Tahsildar holding an enquiry as to whether a transfer of names in a land register should be made or not is a Court, since he is authorised under Madras Act III of 1869 to receive evidence and to come to a judicial determination as to whether the transfer should be made or not—*Q E v Munda* 24 Mad 121, a village Munsiff trying a case under Regulation IV of 1866—*Q E v Venhaya* 11 Mad 375, a Registrar of the Presidency Small Cause Court of Calcutta is a Court, since he is entitled to decide the question of service of summons, and is entitled to receive evidence in order to come to a finding on that matter—*Balchand v Taraknath* 18 C W N 1323 16 Cr L J 151 a District Judge determining the validity of election under Sec 22 Bombay District Municipalities Act (III of 1901)—*In re Nanchand*, 37 Bom 365, an Income Tax Collector—*In re Punamchand* 38 Bom 642, 36 Mad 72, 1905 P R 44 a tribunal constituted by the Calcutta Improvement Act (V of 1911)—*Nundo Lal v Khetra Mohan* 45 Cal 585, a Deputy Commissioner acting under 5 (ii) or 5 (iii) of the Rules made under sec 240 of the Punjab Municipal Act (III of 1911)—22 Cr L J 525 (Lah)

What are not Courts —A Collector or Deputy Collector acting under the Land Acquisition Act—27 Cal 820 30 Cal 36, 7 C W N 249, a Collector to whom an application is made to replace a damaged stamp—11 W R 45, a Commissioner appointed for the examination of a witness—11 C W N 909 an arbitrator appointed by the Court—17 M L J 420, 1914 P R 3 a Registration officer—11 Cal 566, 10 C W N 222, a Police officer examining a person under section 161 in the course of an investigation—11 Bom 659 a Police patel—4 Bom 479, an Excise Collector—10 C W N 220 an Assistant Collector holding a departmental inquiry under the Bombay Land Revenue Code into the misconduct of a subordinate—22 Bom 936 a Collector in his administrative (and not judicial) capacity—*Emp v Sants Lal* 42 All 130, a certificate Officer acting under the B and O Public Demands Recovery Act—*Jharu Lal v Mohant Madan Das* 2 Pat 257, (but see 28 Cal 217 cited above), a Naeb Tahsildar acting in his administrative capacity as Revenue officer and not in his judicial capacity as a Revenue Court, is not a Court within the meaning of this section—*Crown v Lehna Singh*, 1915 P R 18, a District Judge in his capacity as District Registrar—*Dina Nath v Neh Ram* 21 A L J 88 a Magistrate passing order under section 144 of this Code does so as a public servant and not as a Court—*Natarajan v Rangasami*, 44 M L J 328

623 What Court can make complaint —The only Courts that can make complaints for prosecution for an offence are those before which the alleged offence was committed, or the Courts to which such Courts are

subordinate—6 Cal 640 Where a plaintiff first instituted a suit in one Court and obtained a decree for a part of his claim, and then presented a fresh claim in another Court in respect of the item disallowed by the first Court, and fraudulently obtained an *ex parte* decree, whereupon the first Court took action under sec 195 Cr P C and made a complaint in writing under sec 210 I P Code, held that the action could only be taken by the second Court, and not by the first Court, because the institution of the second suit and the obtaining of a decree by fraudulent means could not be held to be an offence committed in relation to proceedings in the first Court—*Wishnu v Crown*, 6 Lah 445 26 P L R 717 26 Cr L J 1588

As a general rule, complaints should be made by the Court before which the offence is alleged to have been committed and not by any other Court—*In re Raja of Venkatagiri*, 6 M H C R 92, *Nga Aung v K E*, 9 Bur L T 202 18 Cr L J 97, 1879 P R 29 But a complaint may be made in the first instance by the superior Court, even though no complaint was made by the subordinate Court before which the offence was committed—27 Mad 23 *Bhadeswar v Kampta Prasad* 35 All 90 11 A L J 11 Thus the High Court can make a complaint while exercising its powers of revision—23 M L J 593 *Gudula v Janai*, 16 Cr L J 740 (Mad), and consequently the High Court can direct that its order in the revision case should issue as a complaint to the Magistrate—*Syed Khan v Nagoor*, 3 Bur L J 141 26 Cr L J 262

Transfer of Judge—As a matter of convenience and expediency, the complaint should be made by the Judge who tried the case, if he is present, if he is not present, it may be made by any other Judge of the same Court—33 Cal 193 *Yad Ram v Risal* 7 A L J 50 The complaint may be made by the *successor-in office* of the Judge who tried the case in which the offence was committed—34 Cal 551 5 C L J 176, 11 C W N 119 See sec 559 as now amended

Where a Deputy Magistrate who had tried the case was transferred from the district and the complaint was made by the District Magistrate, before whom all cases pending before the Deputy Magistrate were placed, it was held that although the cases pending in the Court of the transferred Magistrate were placed before the District Magistrate either for disposal or for re distribution among his subordinate Magistrates, still he never became the presiding Judge of the Deputy Magistrate's Court and therefore was not competent to make the complaint—*Mofizuddin v Basanta*, 16 Cr L J 640 (Cal) Where there are several Deputy Magistrates at a place and one of them is transferred, the Deputy Magistrate who comes to fill the gap is not the successor-in-office of the outgoing Deputy Magistrate, and the former cannot make a complaint under this section in respect of an offence committed before the latter—*Girish Chandra v Sarat Chandra*, 42 Cal 667 An abetment of perjury was committed in the

of an inquiry before a committing Magistrate (who was a first class Magistrate) While the proceedings were pending before him the Magistrate was transferred and was succeeded by a second class Magistrate (who had no power to commit) The outgoing Magistrate therefore sent the proceedings to the District Magistrate It was held that the District Magistrate had jurisdiction to make a complaint in respect of the offence for he was such Court referred to in clause (1) (b) of this section and was the officer on whom devolved the disposal of committal of cases in the district—*In re Ramarao* 42 Bom 190 23 Bom L R 117

Transfer of case—Where a case is transferred to another Court it is the Court which tries the case on the merits that can make the complaint, and not the Court which took cognizance of the case and issued process—*Jeeban Krista v Benoy Kristo* 6 C W N 35 *Putram v Mahomed Kasim* 3 C W N 33 Where a case was transferred by one Court to another for investigation the Court which investigated the case was the proper Court to make the complaint and not the Court which transferred the case since the Court which transferred the case ceased to have jurisdiction in the matter—40 Cal 41 see also *Emp v Bhihi* 39 Cal 1041 16 C W N 885 But where a false complaint against a public servant made to a Deputy Commissioner was simply referred (and not transferred) for inquiry and report (under section 202) to a Subdivisional Magistrate the latter could not make a complaint for the prosecution of the complainant for bringing a false case—4 C W N 366 22 M L J 419

Commitment of case—In a case committed to the Sessions it is the Sessions Court and not the committing Magistrate who can make a complaint for prosecution of a witness who made false statements before the committing Magistrate because such statements are said to be made in relation to proceedings before the Sessions Court—*Narayana v Palaniappa* 5 L W 218 1917 M W N 141 18 Cr L J 143 2 Weir 160

Court acting in a different capacity—The Collector of a District in deciding a revenue appeal came to the conclusion that a receipt filed in the case was not genuine He took no steps in this connection as Collector, but acting as the District Magistrate made a complaint It was held that the act of the District Magistrate was *ultra vires*—*Emp v Ram Sahai* 40 All 144 16 A L J 68 19 Cr L J 201

Temporary Court—The Court of the City Magistrate not being a permanent one with a perpetual succession of Judges only the Sessions Judge and not the successor of such Magistrate on his transfer is competent to make the necessary complaint for prosecution for an offence committed before such Magistrate—*Jia Lal v Phagomal* 1918 P R 22

Court abolished and re established—Where by a notification in the Gazette the Court of the Sub Magistrate at B was abolished and two years afterwards the said Court was restored with its territorial limits

somewhat curtailed it was held that it could not be said that there was any such continuity as would enable the High Court to hold that the Court that was re-constituted was the same as the one that had ceased to exist and consequently the new Court could not make a complaint in respect of an offence committed before the old Court—*In re Appa Alla* 16 Cr L J 787 (Mad)

624 No delegation of power —The power to make a complaint must be exercised by the Court before which the offence was committed. The Court cannot delegate that power even to the Public Prosecutor. The filing of a complaint by the Public Prosecutor in the absence of a complaint by the Court will not be treated as equivalent to a complaint by the Court—*Crown v Gurdita* 1917 P R 19 18 Cr L J 548

625 Clause (c) —Offences under this clause —*Offences described in Sec 463 I P C* —The word forgery is used as a general term in Sec 463 I P C and that section is referred to in a comprehensive sense in this section so as to embrace all species of forgery punishable under the Penal Code including one under Sec 467 I P C—*Q E v Tulja* 12 Bom 36 *Temi Shah v Dolat Shah* 14 C W N 479 *Khairati Ram v Malaua Ram* 5 Lah 550 (553) 26 Cr L J 537 *Ismail Panju v K E* 26 Cr L J 1115 A I R 1925 Nag 337 or an offence under Sec 468 I P C—*Asst Sessions Judge v Ramammal* 36 Mad 387 or under Sec 466 I P C —*Ratanlal* 83 *Bachu Behary v Emp* 20 Cr L J 630 (Pat) or under sec 465 I P C —*Khairati Ram v Malaua Ram* 5 Lah 550 but it does not include an offence under Sec 474 I P C —*Asrabuddin v Kahdaya* 19 C W N 125

626 Alleged to have been committed —These words have been substituted by the Select Committee of 1916 for the word committed in deference to the remarks made by Piggott J in *Emperor v Bhawanil Das* 38 All 169 at page 172. With regard to the actual wording of the sub-section under consideration it does seem to me to be somewhat lacking in precision. To forbid a Court to take cognizance of an offence committed by a party is open to the criticism that no Court can decide whether an offence was committed or not until after it has taken cognizance. It seems necessary therefore to read the word committed as equivalent to the expression alleged to have been committed. See also *Janardhan v Baldeo Prasad* 5 P L J 135

627 Document —The word document in this section means the original document. Where the original document which was proved to have been forged was not produced or given in evidence but only a registration copy of it was produced in the suit no complaint by the Court was necessary for a prosecution under secs 465 and 467 I P C —*K E v Shankari* 8 O C 313. Where the accused produced certified copies of certain forged documents in a Revenue Court held that no complaint

of the Revenue Court was necessary for the prosecution of the accused, the word produced or given in evidence in this section refer only to the production of the *original* and not to the production of a copy—*Girdhari v K E* 12 O L J 194 2 O W N 174 26 Cr L J 929

628 Produced or given in evidence —Complaint by the Court is necessary if the document was *produced* in Court—19 C W N 175 even though it was not given in evidence—22 Cal 1004 9 Bom L R 735 The word produced has been added in the Code of 1898 and did not exist in the old Codes and therefore the decisions in 15 Mad 224 1895 A W N 145 and 7 C W N 112 (in which it was held that no sanction was necessary unless the document was *given in evidence*) are no longer good law

Complaint by the Court is necessary if the document is produced & tendered in evidence although it is not exhibited and marked and considered by the Court—29 Cal 887 The mere filing of the document is sufficient to constitute the offence—39 Cal 463 19 C W N 125 17 C W N 94 Where a party to a proceeding hands up a document to the Judge who does not take the document on the file but returns it to the party the document is produced all the same within the meaning of this clause—*Gulab Chand v Emp* 27 Bom L R 1039 A I R 1925 Bom 467

This clause is wide enough to cover a document produced or given in evidence in the course of a proceeding whether produced or given in evidence by the party who is alleged to have committed the offence or by any one else—*In re Bhai Vyankatesh* 49 Bom 608 27 Bom L R 607 In other words two things are necessary under clause (c) viz —(1) the document must be produced or given in evidence in the proceeding (2) the offence must be alleged to have been committed by a party to the proceeding, but it is not necessary that the person who produces the document in Court must be the offender himself

Where a document was not produced in the suit but was disclosed in an affidavit filed therein and inspection thereof was allowed to the other side and it was filed in the office of the Translator of the High Court for translation held that these actions did not amount to producing the document in evidence as it was not *actually produced* in Court and therefore no complaint of the Court was necessary for prosecution under Secs 465 467 and 474 I P C in respect of that document—*Munisamy v Rajaratnam* 45 Mad 928 (F B) 43 M L J 375 A I R 1927 Mad 495 Where in a proceeding under Sec 145 a document comes into Court attached to a police report prior to the proceeding the document is not said to be *produced* in Court and even if it is neither of the parties to the proceeding is a party to its production consequently the complaint of the Court under this section is not necessary as a condition precedent to the institution of

criminal proceedings against the guilty party upon a charge under section 463 I P C — *Janardhan v Baldeo Prasad*, 5 P L J 135

It is not using a forged document as genuine if the document is produced in obedience to a summons from the Court. An involuntary production of a document in Court cannot amount to any use of it—*Asst Sessions Judge v Ramammal* 36 Mad 387 22 M L J 141, *Ma Ain Lon v Ma On Nu* 3 Rang 36 3 Bur L J 349

A document is said to be *given in evidence* when the meaning of this section when it is handed over by the person tendering it to the Court, although the Court may reject it as evidence for insufficiency of stamp or want of registration—*Q E v Nagin Das Ratanlal* 242

There is a conflict of opinion as to whether a complaint of the Court is necessary in respect of an offence mentioned in clause (1) (c) when such offence has been committed prior to the production of the document in Court. The Bombay High Court holds that where an offence under Sec 471 I P C (using as genuine a forged document) in respect of a document produced in Court has been committed before it comes into Court no complaint of the Court is necessary the use complained of being prior to its production in Court—*Noor Mahomed v Kaikhosru* 4 Bom L R 268. The Allahabad High Court also holds that so long as the prosecution is confined to offences connected with a document prior to its production in Court no sanction is required. All that clause (c) prohibits is taking cognizance of an offence described in sec 463 I P C when such offence has been committed by a party to any proceeding in any Court with respect to a document produced or given in evidence in such proceeding—*Lalia Prasad v K E* 10 A L J 294 34 All 654. So also the Punjab Chief Court holds that no complaint by a Court is necessary where the offence of instigation of the fabrication of false evidence (under sec 466 I P C) appears to have been committed at a time when there were no proceedings whatsoever in any Court and the police were merely inquiring into the circumstances of the case—*Crown v Ajai Singh* 1917 P R 34.

But the Calcutta High Court is of opinion that a complaint of the Court is necessary under such circumstances because the very fact that the document is produced in Court will bring the case within the purview of this section and it is immaterial that the forgery is alleged to have been committed before the production of the document in Court—*Tens Shah v Bolahi Shah* 14 C W N 479. *Nalini Kanto v Anandul* 44 Cal 1002. The same view has been taken in two Allahabad cases—*Emp v Bhawani*, 14 A L J 74 38 All 169. *Kanha Ja Lal v Bhagwan Das*, 23 A L J 956 48 All 60 26 Cr L J 1485. The Madras High Court also holds that this section is not limited to cases where the fabrication is committed *pendente lite* but it extends to cases of fabrication of false evidence *in advance*—*In re Parameshwaran* 39 Mad 677 18 M L T 32. And

the Lahore High Court has also expressed the view that where a document has been produced in Court by a party the sanction (complaint) of such Court is necessary for his prosecution in respect of an *antecedent* forgery—*Lhairats Ram v Malaua Ram* 5 Lah 550 (552) following 44 Cal 1002 and 14 C W N 479

The Court making a complaint should specify the document in respect of which the forgery has been committed as well as the particular act or acts of forgery—10 W R 41

629 Party —Complainant is necessary if the document is produced or given in evidence by a *party* to the proceeding But no complaint is necessary to prosecute a *witness* in the proceeding since a witness is not a party—5 Mad 671 3 Mad 400 *Sessions Judge v Kondeti* 26 M L J 220, 15 Cr L J 242 *Crown v Juan Mal* 1917 P R 10 *Debilal v Dhajadhari* 15 C W N 565 nor is a complaint necessary to prosecute the *agent* of a party—1879 P R 9 3 Bur L T 108 or an abettor if he is not a party—32 All 74 A claimant in insolvency proceedings is a party to the proceedings and a complaint is necessary for his prosecution in respect of statements contained in an affidavit filed by him before the Official Assignee in support of his claim—*In re Hajeer Mohamed*, 36 M L J 60 A complainant in a criminal proceeding is a party to the proceeding—*Kanhayyalal v Bhagwan* 23 A L J 956

630 Proceeding in Court —No sanction or complaint is necessary if the offence is not committed in relation to any proceeding in a *Court*. Thus where a mahal belonging to several co sharers having been sold under the Public Demands Recovery Act a surplus was lying in deposit with the certificate officer and a mukhtar filed an application to withdraw that deposit purporting to have been signed by all the co sharers but the signatures of two of them were alleged to be forged *held* that the surplus sale proceeds not having been entrusted to the certificate officer in his capacity as a *Court* no complaint by the Court was necessary for the prosecution of the alleged forgers—*Jharu Lal v Mahant Madan Das* 2 Pat 257

631 Subsection (3)—Subordination of Courts —This subsection applies only to subordination of *Courts* Thus where a Subordinate Magistrate acts as an executive officer, *his subordination must be determined* with reference to Sec 17 (1) *i.e.* he is subordinate to the Subdivisional Magistrate or the District Magistrate as the case may be) and he cannot be deemed as subordinate to the Sessions Judge—2 Weir 155

But the word *Court* in this subsection is not confined to the Courts mentioned in clauses (b) and (c) of subsection (1) but applies also to the public servant in clause (a) of that subsection when such public servant is acting as a *Court* and the offence is committed in connection with proceedings in which the public servant concerned is so acting—*Arunachalam*

v Ponnusami, 47 Mad 64 followed in *In re Buduiddin* 47 Bom 102. Therefore although a Sub-Magistrate is no doubt a public servant in his capacity of an administrative officer still if he is acting in his judicial capacity he must be deemed to be a Court and is therefore subordinate to the Court to which an appeal from his order would lie under the provisions of this subsection—*Arunachalam v Ponnusami* 47 Mad 64 35 M L J 454 20 Cr L J 78. Similarly a first class Magistrate is a public servant and as such subordinate to the District Magistrate but if he acts as a Court he must be taken to be subordinate to the Court to which appeals lie from his Court viz the Court of the Sessions Judge—*In re Buduiddin* 47 Bom, 102 24 Bom L R 810 23 Cr L J 576.

Every Court shall be deemed to be subordinate to the Court to which appeals from the former will ordinarily lie. Thus—

The District Magistrate is subordinate to the Sessions Judge—*Jiwani Mal v Beli Ram* 1917 P R 11 *In re Panchalam* 42 Mad 96 1897 A W N 2 1908 P W R 24. A first class Magistrate is subordinate to the Sessions Judge—1902 P R 7 (overruling 1901 P R 30) 1912 P R 2 as also to the Additional Sessions Judge (under the provisions of secs 408 and 409 read together)—*In re Sikandar* 44 Bom 877 14 Cr L J 195 (Cal) *Kusum v Janak Lal* 4 P L J 374. A committing second class Magistrate is subordinate to the Sessions Judge—2 Weir 160. The Assistant Magistrate is subordinate to the Sessions Judge and not to the District Magistrate—19 All 111.

A second or third class Magistrate is subordinate to the District Magistrate and not to any first class Magistrate—26 Mad 656 27 Mad 124 30 Cal 394 *Jiwani v Emp* 2 Lah L J 660 3 N L R 50 30 All 109 41 Mad 787 *Ahmad Hussain v Rahuman* 26 O C 358 *Pallikudathan v Buddu* 47 Mad 229 45 M L J 553 because an appeal from the 2nd or 3rd class Magistrate ordinarily lies under Sec 407 (1) to the District Magistrate and not to any other 1st class subordinate Magistrate to whom the District Magistrate has delegated under Sec 407 (2) his power to hear appeals from 2nd or 3rd class Magistrates—*Ibid*.

A Sub Judge is subordinate to the District Judge and not to the High Court—*Narayanan v Kadisaya* 44 M L J 320 *Ganesh v Jitlan* 17 A L J 191 *Hubbar v Sayyad Ali* 22 O C 189.

A Munsiff's Court is subordinate to the District Judge's Court—1898 P R 16 1900 P R 25 *Miran v Beli Ram* 1916 P L R 67 *Sundar Singh v Pluman* 2 Lah L J 415 but not to the Subordinate Judge's Court although appeals from the Munsiff's Court are generally transferred by the District Judge to the Subordinate Judge—*Ram Charan v Taripulla* 39 Cal 774 (Contra—2 Lah 57). But when under the law or by a notification certain appeals from the Munsiff's decrees lie to a first class Subordinate Judge the Munsiff will be deemed as subordinate not to the

District Judge but to the 1st class subordinate Judge—1918 P R 29
Ramayya v Sukayya 28 M L J 486 followed in 2 Lah 57

The Commissioners Court at Santal Parganas is subordinate to the Court of the Commissioner of Bhagalpur and not to the High Court—30 Cal 916

A first class Magistrate is not subordinate to the District Magistrate but to the Sessions Judge—5 A L J 56 6 All 98 1902 P R 7 (over ruling 1901 P R 30) *Aly Mchd v Emp* 1912 P R 7 *Ratanlal* 511
In re Budiuddin 47 Bom 102 16 Cr L J 640 (Cr) *Sant Ram v Dewan Chand* 24 Cr L J 913

A single Judge on the original side of the High Court is subordinate to the Divisional Bench on the Appellate side hearing appeals from the judgment of the single Judge—*Munisamy v Rajaratnam* 45 Mad 928 (F B) *Abhilash v Hyi Tar Mahomed* 47 Bom 70

Where no appeals lie the original Civil Court will be deemed to be subordinate to the principal Court of original Civil jurisdiction. Thus the Provincial Small Cause Court is subordinate to the District Court—*Chidda Lal v Bhajan Lal* 39 All 657 (F B) *Lalys v K E* 4 P L J 609 *Nisaran v Akshoj* 21 C W N 948 *Ram Dayal v Dwarka* 20 O C 223 42 Ind Cas 593 (Burma) 37 Cal 13 (Contra—2 P L J 1 1 P L J 206) The Mamlatdars Court is subordinate to the District Judge—5 Bom L R 206 9 Bom L R 896 The Presidency Small Cause Court is subordinate to the High Court—*Jainadas v Sabifah* 35 Mad 138 *Kalyanjee v Ram Deen* 48 Mad 395 48 M L J 290 The village Munsiff is subordinate to the District Judge—6 A L J 796 It should be noted that the latter part of subsection (3) is now restricted to civil Courts only whereas under the old law it applied to any Court and the words used were the principal Court of original jurisdiction which included a Criminal and Revenue Court and therefore it was held that in respect of an execution proceeding in a Revenue Court under the Agra Tenancy Act from which no appeal lay the principal Court of original jurisdiction was the Collector—*Ajudhsa v Ram Lal* 34 All 197 The present law has made no provisions for such cases

632 Clause (a) —Where appeals lie to more than one Court the Appellate Court of inferior jurisdiction would be the Court to which the original Court must be deemed to be subordinate—8 N L R 57 Thus the Subordinate Judge would be held to be inferior to the District Judge and not to the High Court even though the appeal in the particular instance would lie to the High Court—2 Bom 481 11 Bom 438 So also the Recorder's Court at Rangoon is subordinate to the High Court for the purpose of this section though in the particular case the appeal may lie to the Privy Council—22 Cal 487

633 Clause (b) — *or proceeding* — These words have been added in deference to the opinion expressed by the Judges in *Ajudhia Prosad v Ram Lal* 34 All 197. In this case a suit was brought in the Court of the Assistant Collector for arrears of rent exceeding Rs 100, and in execution proceeding thereof certain false statements were made. The suit being one for rent exceeding Rs 100 was appealable but the execution proceeding was not appealable according to the provisions of the Agra Tenancy Act. The question arose—to which Court was the Assistant Collector subordinate? and to determine this question it was necessary to decide whether clause (b) or clause (c) of sub section (7) of the old section was applicable. It was contended that since the case being one for rent exceeding Rs 100 was appealable (though the execution proceeding was not) clause (b) would apply but the Judges held that the word *case* in clause (b) included execution proceedings and since the execution proceeding in the present case was not appealable clause (b) could not apply as that clause applies only where an appeal lies. The case was therefore governed by clause (c) of sub section (7).

634 Subsection (4)—Abetment — A distinction has been drawn between the abetment of an offence mentioned in clause (b) of subsection (1) and the abetment of an offence mentioned in clause (c). Since clause (c) speaks only of offences committed by a party to the proceeding, it follows that no complaint by Court is necessary in respect of an abetment of an offence mentioned in clause (c) if the abettor was not a party to the proceeding—*Imperor v Gianslan* 32 All 74. But in the case of offences mentioned in clause (b) an abettor cannot be prosecuted without a previous complaint by the Court even though he was not a party to the proceeding, because no mention is made of a party to the proceeding in clause (b)—*Ram Bilas v Lachmi Narain* 45 All 140.

196 No Court shall take cognizance of any offence punishable under Chapter VI or IXA of the Indian Penal Code (except Section 127), or punishable under Section 108A, or Section 153A, or Section 294A, or Section 505 of the same Code, unless upon complaint made by order of, or under authority from, the Governor General in Council, the Local Government, or some officer empowered by the Governor General in Council in this behalf.

Change — The words or IXA have been added by sec 3 of Act XXXIX of 1920 (Election Offences and Inquiries Act)

634A A complaint of an offence under section 171E (falling under

Chapter IXA) of the I P C requires a sanction under this section—*Ponnusamy v Emp*, 42 M L J 139 23 Cr L J 148

A Magistrate has no jurisdiction to inquire into a complaint in respect of a false return of election expenses, unless the complaint is made by order of the Government—*Labb Singh v Narinjan*, 6 Lah 188 26 P L R 379 26 Cr L J 1234

635 Object of Section —The object of this section is to prevent unauthorised persons from intruding in matters of State by instituting State prosecutions and to secure that such prosecutions shall only be instituted under the authority of the Government—*Queen Emp v Bal Gangadhar Tilak*, 22 Bom 112

636 Complaint —A complaint which did not set forth the concrete facts relied on as constituting the offences but merely copied out the words of the sections of the Penal Code was held to be defective—16 C W N 1105 But it is not necessary that the complaint must consist of allegations made on oath or reduced to writing—*Apurba Krishna Bose v Emp*, 35 Cal 141 (151)

A letter of the Local Government according sanction for prosecution of a certain person under sec 121 I P C is not a complaint though it may be taken as an authority to make a complaint—*Shamal Khan v Emp*, 1890 P R 16 The person who signs the letter of authority is not the complainant and it is not necessary to take his examination under the law The person who armed with the authority makes the application to the Court for the apprehension of the accused is the complainant and his examination is to be taken—*Apurba Krishna Bose v Emperor* 35 Cal 141 (*Bande Mataram case*)

637 Order or authority —The sanction of the Local Government must be strictly proved according to the provisions contained in sec 78, Evidence Act, and the prisoner named in the sanction must be identified—1 Bur S R 389

Form and contents —This section does not prescribe any particular form of order and does not even require the order to be in writing No special mode is laid down in the Code whereby the order or sanction of Government is to be conveyed to the officer who puts the law in motion—*Q E v Bal Gangadhar Tilak*, 22 Bom 112 What the Court has to see is whether the complaint has been made by the order or under the authority of the Government—*In re Subramania* 32 Mad 3 *In re Narayan Menon* 25 Cr L J 701 A I R 1925 Mad 106 A telegram sent by the Government expressly authorising the Public Prosecutor to file a complaint against the accused for an offence under section 124A I P C is a perfectly valid authority—*In re Varadarajulu Naidu* 42 Mad 180

The sanction under this section need not be very particular about its

contents, provided its meaning and intention are clear. Where the letter of authority sanctioning prosecution for sedition did not specify the name of the printer of the newspaper but he was indicated from the first and his name was supplied at the commencement of the Police Court proceedings, it was held that this was a sufficient compliance with the section—*Apurba v Emp*, 35 Cal 141. A sanction for the prosecution of the accused in the alternative for offences under section 121 or under section 121A is not defective on the ground that it does not specify with sufficient clearness the section or the offence in respect of which it is given—*Puthen Veetil Kunhi v Emp*, 42 M L J 108, 23 Cr L J 203. Where the persons to be prosecuted were named, the offences and the period of their activity specified and the particular sections of the Penal Code set out, the mere circumstance that these persons were not described as the members of the Revolutionary society the existence of which was sought to be proved at the trial did not affect the validity of the sanction—*Pulin Behary Das v Emp*, 16 C W N 1105, 13 Cr L J 609. In a prosecution for sedition, if the sanction contains the name of the printer, publisher, editor etc of the newspaper, the name of the newspaper, the offence committed and the particular section of the Penal Code and refers to 'certain articles' appearing in the newspaper, the fact that the sanction does not specify the exact article complained of does not make the sanction insufficient or invalid—*Q E v Bal Gangadhar Tilak*, 22 Bom 112. Where the sanction contained a misdescription of the article on which the prosecution was based, and this was rectified by a subsequent sanction filed in the course of the trial, it was held that the petitioner was not prejudiced and the defect was cured by sec 537—*Apurba v Emp*, 35 Cal 141.

It is not necessary that the actual words of the complaint should be sanctioned—*In re Varadarajulu*, 42 Mad 180. *In re Subrahmanya Siva*, 32 Mad 3.

Where the telegram sent by the Local Government expressly authorised the Public Prosecutor to file a complaint against V under sec 124A I P.C., and to act immediately if the District Magistrate thought it advisable after consulting him, and formally enjoined the District Magistrate to submit the complaint prepared for issue of supplemental sanction, 'held that the last sentence must be read apart from the first portion of the telegram, and did not limit the authority given, and that a complaint issued in pursuance of that telegram but without any supplemental sanction was not illegal—*In re Varadarajulu Naidu*, 42 Mad 180.

Where the authority to prosecute was not given to any one person, but the order sanctioning the prosecution was sent to the District Magistrate, the Public Prosecutor and the Addl. S.D.O., and a prosecution was initiated by the Addl. S.D.O., 'held that the fact that the order of authorisation was not sent to the

determinate person did not affect the legality of the trial and that the alleged defect in the order was curable by sec 537 of the Code—*In re Kully Moopan* 44 M L J 166 *Apurba v Emp* 35 Cal 141 (151)

Signature—The authority under sec 196 need not in the case of a Local Government be signed personally by the Lieutenant Governor it is enough if it is signed by one of his accredited or Gazetted officers (e g the Chief Secretary in this case)—*Apurba v Emp* 35 Cal 141 The sanction must be signed by the Chief Secretary to the Government An order signed by the Deputy Secretary on behalf of the Chief Secretary is not legal—*Orinulla v Beni Madhab* 50 Cal 135

Local Government—The sanction must in order to satisfy the section have been the act of the Local Government and not of a single member of such Government—*In re Varadarajulu Naidu* 42 Mad 885

Where a sanction was duly given by the Local Government under this section and no objection was made thereto at the trial it was not open to the person convicted at the trial to challenge the sanction in appeal before the High Court on the ground that the Local Government granting the sanction was not legally constituted and had no authority to sanction the prosecution—*Pulin Behari Das v Emp* 16 C W N 1105 13 Cr L J 609

638 Want of sanction and complaint—Absence of sanction under this section vitiates the whole proceedings and the defect is not a mere irregularity curable by sec 537 A trial without sanction under sec 196 or 197 is illegal—31 Mad 80 1908 P R 8 *Shamal Khan v Emp* 1890 P R 16 1894 P R 42 A sanction given after the filing of the complaint does not fulfil the requirements of this section—*In Varadarajulu Naidu* 42 Mad 885 *Barindra v Emp* 37 Cal 467 Where there was no complaint or sanction of the Local Government the whole proceedings in the trial were without jurisdiction and the defect was not cured by the provision of Sec 537—*Barindra v Emp* 37 Cal 467 Where the law clearly says that it is a condition precedent to the prosecution that a sanction shall be obtained from the local Government it is not open to any subordinate authority to override the provision of the law by saying that the offence falls under another section of the Penal Code and that no sanction is necessary for the prosecution under that section—*Ram Nath v K F* 47 All 268 22 A L J 1106 A I R 1925 All 230

But where the accused was prosecuted upon a sanction of the Local Government without a formal complaint and no objection was taken to the absence or irregularity of the complaint at the trial the defect did not affect the trial and the irregularity or insufficiency of the complaint was cured by Sec 537—*Sami Dayal v K E* 1908 P R 8 *Pulin Behari v Emp*, 16 C W N 1105

639. Prosecution for other offences not mentioned in sanction —Where an order under section 196 authorised a particular Police officer to prefer a complaint of ' offences under secs 121A, 121 I P C or under any other section of the said Code which may be found applicable to the case and the Magistrate prosecuted the accused and committed him in respect of an offence under sec 121 I P C, it was held that since the offence under sec 121 required a sanction under this section and it was not specifically mentioned in the sanction the commitment in respect of an offence under sec 121 was illegal—*Barindra v Emp* 37 Cal 467 The reason is, that the power and discretion of determining whether cognizance shall be taken in respect of an offence mentioned in this section cannot be delegated by the Local Government to any other body of persons and if the Magistrate is allowed to prosecute a person for an offence referred to in this section when such offence was not specifically mentioned in the sanction, it means a delegation of power to the Magistrate which cannot be sustained—*Ibid* But a sanction under sec 124A authorises a prosecution under Secs 124A and 114 I P C—*In re Subramania*, 32 Mad 3

So also it is not illegal to prosecute without a sanction a person for an offence for which no sanction is necessary thus where a person has committed an offence under sec 122 I P C and by the same act abetted the offence of dacoity the fact that the Government refused sanction for the former offence would be no bar to his prosecution for the minor offence of abetting dacoity for which no sanction is necessary—25 Bom 90

196-A No Court shall take cognizance of the offence of
 Prosecution for criminal conspiracy punishable under
 certain cases of Section 120B of the Indian Penal
 criminal conspiracy Code

- (1) in a case where the object of the conspiracy is to commit either an illegal act other than an offence, or a legal act by illegal means or an offence to which the provisions of Section 196 apply, unless upon complaint made by order of or under authority from the Governor General in Council the Local Government or some officer empowered by the Governor General in Council in this behalf or
- (2) in a case where the object of the conspiracy is to commit any non cognizable offence or a cognizable offence not punishable with death, transportation or rigorous imprisonment for a term of two

or upwards unless the Local Government, or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the Local Government has by order in writing consented to the initiation of the proceedings

Provided that where the criminal conspiracy is one to which the provisions of sub section (4) of Section 195 apply, no such consent shall be necessary

640 Scope —This section applies only to a prosecution for conspiracy punishable under section 120B of the Penal Code and not for abetment by conspiracy punishable under section 109 of that Code—*Abdul Salim v Emp* 49 Cal 573 *Abdul Rahman v Emp* 3 Rang 95 26 Cr L J 1329

Initiating a prosecution under sec 120B I P C without the sanction of the authority referred to in section 196A Cr P Code is *ab initio* illegal and the subsequent addition of charges which do not require such sanction does not cure the illegality nor are the proceedings relating to such additional charges legal—*Abdul Rahman v Emp* 3 Rang 95

The proviso lays down that a sanction under this section for prosecution for criminal conspiracy to commit a non cognizable offence (e g fraudulently using as genuine a forged document or dishonestly making a false claim) is not necessary where the Court before which the forged document was used or false claim was made makes a complaint in respect of the offence under sub section (4) of section 195—*Kali Singh v Emp* 50 Cal 461 A I R 1924 Cal 53 24 Cr L J 949

196-B. *In the case of any offence in respect of which the provisions of Section 196 or Section 196A apply a District Magistrate or Chief Presidency Magistrate may, notwithstanding any thing contained in those sections or in any other part of this Code order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in Section 155, sub section (3)*

Preliminary inquiry
in certain cases

This section has been added by sec 49 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

This new section is designed to meet the difficulty which arises from the fact that cases under sections 196 and 196A cannot be properly investigated by the Police before complaints are made Doubts have arisen as to whether investigation can be ordered under section 155 (2) by a Magis

trate without his taking cognizance of the case. The new section will provide for preliminary investigation. We recognise that it does not altogether meet the case where the desirability of adding a new charge arises in the Sessions Court. It has been suggested that this difficulty might be met to some extent by substituting the words 'proceed to the trial' for the words 'take cognizance' in sections 196 and 196A. But on the whole we prefer not to make this change and to leave the sections unaltered.—*Report of the Joint Committee (1912)*

197. (r) When any Judge or any public servant not removeable from his office

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without the sanction of the Government of India or the Local Government, is accused as such Judge or public servant of any offence, no Court shall take cognizance of such offence except with the previous sanction of the Government having power to order his removal or of some officer empowered in this behalf by such Government or of some Court or other authority to which such Judge or public servant is subordinate, and whose power to give such sanction has not been limited by such Government.

197 (r) When any person who is a Judge within the meaning of Section 19 of the

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Indian Penal Code, or when any Magistrate or when any public servant who is not removeable from his office save by or with the sanction of a Local Government or some higher authority is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government.

(2) Such Government may determine the person by whom,

Power of Government as to prosecution

the manner in which, the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted and may specify the Court before which the trial is to be held.

Change:—The whole of subsection (1) has been re-drafted by sec. 50 of the Crim Pro Code Amendment Act, XVIII of 1923. "It has been pointed out to us that difficulties with regard to section 197 have recently come to light. There are certain public servants who are only removable from office by the Secretary of State, and it is unreasonable that they should obtain no protection under the section. Further, in view of section 2 (2) of the Code, the word 'Judge' has to be interpreted according to the definition given in section 19 of the Indian Penal Code, with the result that Magistrates acting in certain capacities under the Code, *e g.*, when holding inquiries, obtain no protection. We have therefore, proposed a re-draft of sub section (1) of section 197 to meet these difficulties. We have confined the operation of the section to public servants removable by a Local Government or some higher authority and have provided that the sanction required for a prosecution will be the sanction of the Local Government'—*Report of the Joint Committee (1922)*.

'While acting official duty'—These words have been substituted for the words 'as such Judge or public servant' occurring in the old section in order to amplify the words and to make the sense clear—*Statement of Objects and Reasons (1914)*

641. Judge—In section 19 of the Indian Penal Code, the word 'Judge' has been thus defined—

'The word *Judge* denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive; or who is one of a body of persons, which body of persons is empowered by law to give such judgment

"*Illustrations*—A Collector exercising jurisdiction under the Tenancy Act, a Magistrate exercising jurisdiction in respect of which he has power to pass sentence, or to commit for trial, a member of a panchayet who has power to try and determine suits"

A village Magistrate exercising jurisdiction and trying an offender under Regulation IX of 1816 is a Judge within the meaning of this section, but a village Magistrate who is merely preventing an altercation and suppressing a riot (and not trying any offender) is not a Judge—*Kandassami v Soli Goundan*, 23 Mad 540. But a Magistrate is now specifically mentioned in the present section. A village Munsiff trying a Civil suit and ordering attachment before judgment is acting as a Judge—*Sankaralinga v Avudai*, 17 Cr L J 394 (Mad). A Magistrate of a Village Panchayet constituted by Madras Act II of 1920 is a Judge—42 M. L. J. 139.

642. Public Servant—Any person, whether receiving pay or not, who chooses to take upon himself the duties and responsibilities belonging

to the position of a public servant and performs those duties and accepts those responsibilities, and is recognised as filling the position of a public servant, must be regarded as such. A volunteer in Tahsildar's office is a public servant—8 All 201. A Committing Magistrate is a public servant,—6 M H C R App 51. A chairman of a Union Committee is not a person removeable from his office only by the Local Government, and no sanction of the Local Government is necessary for his prosecution—*Md Yasin v. Emp.*, 52 Cal 431. 29 C W N 650. 26 Cr L J 1178. A member of the District Board is a public servant who is not removeable except with the sanction of the Local Government—*A. E. v. Krishna Kant*, 28 O C 155. 12 O L J 498. 26 Cr L J 1157. The Chairman of a Municipality is a public servant—*In re Chairman of Municipal Council, Ellore*, 2 Weir 243. So also a Chairman of a Union Panchayet—*Sh Abdul Kadir v. Emp.*, 1916 M W N 384. A Municipal Commissioner is a public servant—1890 P R 14. see also illustration to Sec 21 I P Code. But every Municipal Commissioner is not a public servant within the meaning of this section. The Court should not, without any reliable evidence on the record, assume that every Municipal Commissioner is not removeable from his office without the sanction of the Local Government—*Nathu v. Md Baksh*, 1916 P W R 48. 18 Cr L J 106. But a Municipal Corporation (e g the Calcutta Municipality) is not a public servant and may be prosecuted like a private person without a sanction—3 Cal 758. So also, no sanction is necessary to prosecute a Municipal Chairman Delegate for acts done by him in that capacity because the protection afforded by this section does not extend to a person to whom a public servant may delegate a portion of his powers—2 Weir 226. A Municipal Secretary is not a public servant and no sanction is necessary for his prosecution—*Kishen v. Girdhars* 23 Cr L J 750 (Lah). If a Municipal Commissioner acts as the Honorary Secretary of the Municipality and commits an offence in his capacity as Secretary, held that although a Municipal Commissioner cannot be prosecuted without the sanction of the Local Government still when he was acting as secretary and committed the wrong in that capacity, no sanction is necessary—*Kishen Singh v. Girdhars* A I R 1924 Lah 310. A Forest Ranger in the C P is not a public servant not removeable without the sanction of the Local Government—*Kripa Singh v. Emp.*, 23 Cr L J 397 (Nag).

643. 'Not removeable from his office.'—The words "not removeable from his office" etc have reference only to the expression "public servant" and not to "Judge". This is now made clear by the wording of the present section. So the sanction of the Government is necessary for the prosecution of any Judge, if a complaint is made against him as such Judge, whether he is or is not removeable from the office without the sanction of the Government—6 M H C R App 21.

The following public servants are removable without the sanction of the Government and no sanction is necessary in respect of their prosecution—a Police Patel in Bombay—4 Bom 357 an Excise Inspector in U P (who is removable from his office by the Excise Commissioner)—*Jalaluddin v Emp* 24 A L J 230 27 Cr L J 345 A I R 1926 All 271 a Sub overseer in the Mauras Presidency—*In re Reddy Venkayya* 12 M L T 351 13 Cr L J 770

The Chairman of a Union Panchayet is a public servant not removable from his office without the sanction of the Local Government even though the power to remove has been delegated by the Government to the President of the District Board. The delegation of the power of removal means only that the Local Government itself performs that act through the medium of a particular officer (President of the District Board) as the channel through which it is done. It is an ordinary case of *qui facit per alium facit per se*—*Sh Abd ul Kadir v Emp* 1916 M W N 384 17 Cr L J 168

644 Acting in the discharge of official duty.—These words have been substituted for the words as such Judge or public servant occurring in the old section and from a comparison of the old and the new sections it seems that the language of the present section has been made simpler. Under the Code of 1872 the language used in the section (466) was committed in his capacity of a public servant : & the section applied only to those acts which could have no special significance except as act done by a public servant—*Imp v Lakshman* 2 Bom 481. It applied only to those offences committed by a public servant which were peculiar to his position as a public servant (*per Pontifex J*) the section was intended to apply to those cases in which the offence charged was an offence which could be committed by a public servant only : & those cases in which the fact of his being a public servant was a necessary element in the offence (*per Field J*)—*Sreemantha Chatterjee* (unreported case of the Calcutta High Court 9 12 1881) cited in 26 Cal 852 at p 860. Under the Codes of 1882 and 1898 the language of the section was as such Judge or public servant and it indicated that the offence charged must involve as one of its elements that it was committed by a person filling that character and therefore where a Magistrate used insulting and defamatory language towards a pleader in the course of a trial no sanction was held to be necessary for the prosecution of the Magistrate as the position of his being a Magistrate was not a necessary element in the offence of defamation—*Nando Lal Basak v Miller* 26 Cal 852 followed in *Empress v Ghulam Kader Khan* 13 C P L R 126. Where a Judge or Magistrate or Public servant commits an offence which could be committed by anybody and which entails consequences neither in the way of penalty nor anything else in the least different from what it would entail if committed by any

body else, sanction is not required under this section for his prosecution. Therefore, where the Chairman of a Union Panchayet was prosecuted for the offence of criminal breach of trust in respect of Union funds held that the offence was not one which was committed by him in his capacity of a public servant to necessitate a previous sanction under this section—*In re Sheikb Abdul Kadir*, 1916 M W N 384 17 Cr L J 168. Where a Magistrate used abusive language towards another Magistrate while both of them were trying a case as members of a Bench, it was held that no sanction was necessary to prosecute the former because the offence was not committed as Magistrate *ie*, the fact of his being a Magistrate was not a necessary element of the offence—*In re Harlekar*, 2 Bom L R 1079. So also where the superintendent of the Gun Carriage Factory in Madras caused timber to be brought within the city of Madras without a license as required by section 341 of the Madras Act I of 1884 (City of Madras Municipal Act) held that no sanction was necessary to prosecute him as the offence was not one which could be committed by a public servant only, nor did it involve as one of its elements that it had been committed by a public servant—*Municipal Commissioners v Major Bell* 25 Mad 15. Where a Union Chairman while removing an obstruction to a public thoroughfare caused by the complainant used insulting and abusive language towards the latter, no sanction was held to be necessary for the prosecution of the Chairman as it could not be said to be a part of the functions of a Union Chairman to use abusive language in a public street—*In re Abdul Rahiman* 4 L W 556 17 Cr L J 46. A Magistrate or a judicial officer who was holding a trial could not be said to be acting in a judicial capacity if he abused or defamed a witness or a legal practitioner appearing before him—*Baishnab Charan v Sukhomoy* 25 C W N 957.

These cases though correctly decided under the old Codes would be of no authority now as the language of the present section materially differs from the language of the old law. Under the present section it will not be necessary to decide whether the fact of the accused being a Judge or a public servant was a necessary element in the offence or whether the offence was one which could not have been equally committed by a private person. These nice questions would no longer arise and if it is found that the Judge, Magistrate or public servant has committed an act at a time when he was doing an official duty this will be sufficient to attract the provisions of this section. In other words the Legislature has now given a greater protection to the officers concerned than it did under the old section.

Where a village Magistrate uses his authority and position as a public servant to constrain a person to give a bribe sanction is necessary for his prosecution—*In re Manapathi Naidu* - Wen 2-1. Where a Judge used

See also 8 B H C R 32 cited in Note 648 below But where the order granted sanction for an offence under sec 161 I P C or any other section of the Code that may be found applicable with respect to the offence briefly described in the schedules hereto annexed it was held that the order was no delegation because the order granting sanction had specified the acts committed by the accused and had also specified the offence and the section of the I P C and it merely left it open to the Court to convict the accused under any other section if in the opinion of the Court some other section of the I P C was more relevant than section 161—*Girdhari Lal v Emp*, 1911 P R 11

Sanction for abetment —Where a sanction has been granted to prosecute a person for a substantive offence no fresh sanction is necessary to prosecute him for abetting that offence when the conviction for abetment is based on the same facts as those on which the charge for the substantive offence is founded—30 Cal 905

Form of sanction —The Code does not prescribe any particular form of sanction under this section—*In re Kalagava* 27 Mad 54 A letter addressed to the Magistrate is a sufficient sanction—*Ratanlal* 32, 30 Cal 905 Non specification of the place in which and the occasion on which the offence was committed does not affect the validity of the sanction—

In re Kalagava 27 Mad 54 The order granting sanction need not specify the offence with the same precision as is necessary in a charge—13 C W N 1062 Thus where the Kulkarnis and the Patel of a village were charged with cheating in as much as they conspired to levy extra amounts of money from three persons who came to pay the land assessment and the sanction was given for prosecution for cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from the ryots it was held that the sanction was not invalid for vagueness in as much as it had sufficiently designated the offence or offences which might be established in connection with obtaining money from ryots —*Emp v Madhav* 43 Bom 147 20 Bom L R 607 20 Cr L J 71

Since the action of the sanctioning authority is more of the nature of executive than of judicial action the sanction need not state any reasons —*Chinna Chendrayya v Subbarayudu* (1923) M W N 77 24 Cr L J 116

Notice to accused —A sanction under this section is not void for want of notice to the accused to show cause why it should not be given The giving of such opportunity is entirely at the discretion of the Government and the Criminal Court before which he is prosecuted is not an appellate authority over the Government in the matter of sanction—*In re Kalagava*, 27 Mad 54

Inquiry by Government before sanction —There is no provision of law empowering the Government or an officer of the Government to hold a

judicial inquiry in order to ascertain whether or not he ought to grant sanction under this section and any inquiry which he may hold for this purpose is merely a departmental inquiry consequently no oath can be administered to any person examined in course of such inquiry nor can any person be prosecuted for giving false evidence therein—*Q E v Venkatarawanna* 23 Mad 223

The Government granting sanction under sections 196 and 197 acts purely in its executive and not judicial capacity and the sanction need not be based on legal evidence There is nothing in the significance of the word sanction to import a judicial element into the act of the executive—*In re Kalagata* 17 Mad 54

647 Want of sanction —The sanction required by this section must be obtained before any proceedings are taken Proceedings taken without sanction are illegal and without jurisdiction—*Emp v Bhimaji* 40 Bom 172 *Q E v Morton* 9 Bom 188 Even a sanction obtained subsequently will not validate the proceedings—9 Bom 188 42 Bom 172 Where no sanction has been granted by the Local Government the Magistrate cannot proceed with the case merely relying on a Government Resolution and yielding to the wishes of the parties—*Emp v Bhimaji* 40 Bom 172 40 Bom L R 89 19 Cr I J 342 But in an earlier Bom bay case it has been held that if no objection to the absence of sanction is taken at the inquiry or trial the proceedings will not be necessarily invalid for want of sanction Where in a commitment without any previous sanction having been obtained under this section no objection was taken as to want of sanction at the preliminary inquiry the Sessions Judge can in his discretion under sec 532 accept the commitment and proceed with the trial—*Q E v Morton* 9 Bom 288 But it is doubtful whether sec 532 contemplates absence of sanction

648 Subsection (2) —Government's direction as to prosecution —The Local Government has power under this section to authorise some particular person to prefer charges against a public servant and when it has limited the manner in which the prosecution is to be launched the specification should be adhered to Thus where in the resolution sanctioning the prosecution of a public servant for corrupt practices the Government directed that a particular person should prefer the charges against the public servant the conviction on charges preferred by a person other than the one specified was illegal and the result would also be the same if the authorised person had delegated the function to some other person —*Reg v Vinayak* 8 B H C R 32

Specification of Court —The power given by sec 197 () overrides the general rule contained in sec 177 that an offence shall be ordinarily tried by a Court within the local limits of whose jurisdiction it was committed Where the Local Government sanctioned the prosecution of a per

son who committed an offence in Upper Burma, and specified a Court in Lower Burma for the trial of such person, it was held that the Court in Lower Burma was competent 'to take cognizance of the offence and was wrong in holding that it had no power to receive the complaint—*K. E. v. Maung Ka*, 4 L. B. R. 265. This shows that the Local Government can specify any Court irrespective of local jurisdiction.

Where the Local Government sanctioned the prosecution of a Sub-Judge and specified the Sessions Court of Tellicherry as the Court which should try the offence and appointed Mr. Irvine as the officiating Sessions Judge, and subsequently by another order of Government Mr. Irvine was appointed as the Additional Sessions Judge and he tried the case, it was held that the trial was not invalid, for though Mr. Irvine was appointed as the Additional Sessions Judge still his appointment did not constitute an Additional Sessions Court. His Court was still the Sessions Court of which he was an Additional Sessions Judge, and since an Additional Sessions Judge is competent to try those cases which the Local Government may direct and since Mr. Irvine was directed by the Local Government to try the case when he was first appointed as officiating Sessions Judge, he was competent to try the case—*Q. E. v. Kunjan*, 1 M. L. J. 397.

Where the Local Government has specified a particular Court, such specification will supersede all power of transfer conferred on the High Court under sec. 526—*Nando Lal v. Mitter*, 26 Cal. 852 (at p. 862). See sub-section (7) of sec. 526.

649. Revision.—Under the old law, if an offence was committed by an Honorary Presidency Magistrate a sanction for his prosecution could be granted by the Chief Presidency Magistrate and the High Court had power under sec. 15 of the Charter Act (though not under sec. 439 of this Code) to interfere with an order granting or refusing sanction under sec. 197—*Nando Lal v. Mitter*, 26 Cal. 852. But under the present law, the power of granting or refusing sanction lies only with the *Local Government*, and the High Court will have no power to interfere even under the Charter Act.

Even under the old law, it was held in a Lahore case that the granting of sanction being an executive rather than a judicial act, the High Court had no power to interfere with the proceedings of a District Judge granting sanction for the prosecution of a Sub-Judge—*Ali Hussain Khan v. Harcharan*, 2 Lah. 305. 1922 P. L. R. 35. 23 Cr. L. J. 113.

198. No Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Indian Penal Code or under Sections 493 to 496 (both inclusive) of the same

Prosecution for breach of contract or defamations or offences against marriage.

Code, except upon a complaint made by some person aggrieved by such offence

Provided that where the person so aggrieved is a woman who, according to the customs and manners of the country, ought not to be compelled to appear in public, or where such person is under the age of eighteen years or is an idiot or lunatic or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his or her behalf

Chapter XL (comprising sections 490-492) of the I P Code relates to criminal breach of contracts of service Chapter XLI (comprising sections 499-502) relates to Defamation Sections 493-496 deal with offences relating to marriage

Change —The proviso has been added by section 51 of the Criminal Procedure Code Amendment Act XVIII of 1923

650 Necessity of complaint —A Magistrate acts without jurisdiction if he takes cognizance of a charge of defamation without complaint So where a postcard written by the accused to the complainant containing a defamatory matter was privately handed over by the latter to the Magistrate without a complaint *held* that the Magistrate acted without jurisdiction in stating a criminal prosecution thereon—*Abdulla v Clarke* 1909 P W R 3 9 Cr L J 154

Magistrate's power to add or alter charge —When a complaint presented to the Magistrate contained only charges under sections 357 and 304 I P C but did not contain a charge under section 300 I P C (defamation) but that charge was subsequently added by the Magistrate on statements made by the complainant it was held that the Magistrate could not add the charge of defamation or take cognizance of it as there was no formal complaint in respect of it such as is required by this section—*Q E v Deohi Nandan* 10 All 39 So also the Magistrate cannot alter a charge under section 301 I P C to one under section 300 I P C when there was no formal complaint by the person aggrieved in respect of the latter offence—*Crown v Uma Shankar* 1889 P R 18

But a more liberal view has been taken in the cases noted below Thus in a Punjab case where a complaint was made to the Magistrate under sec 211 I P C that the accused had made a false charge against him (complainant) of poisoning his daughter in law with a view to injure his reputation but the Magistrate treated the case as one under sec 300 I P C and tried it so it was held that having regard to the substance of the complaint the Magistrate was competent to alter the complaint under sec 211 I P C to one under sec 300 I P C when in fact the complaint was preferred by the aggrieved person—*Nur Aslam v Emp*,

son who committed an offence in Upper Burma, and specified a Court in Lower Burma for the trial of such person, it was held that the Court in Lower Burma was competent to take cognizance of the offence and was wrong in holding that it had no power to receive the complaint—*K E v Maung Ka*, 4 L B R 265 This shows that the Local Government can specify any Court in respect of local jurisdiction

Where the Local Government sanctioned the prosecution of a Sub Judge and specified the Sessions Court of Tellicherry as the Court which should try the offence and appointed Mr Irvine as the officiating Sessions Judge, and subsequently by another order of Government Mr Irvine was appointed as the Additional Sessions Judge and he tried the case, it was held that the trial was not invalid, for though Mr Irvine was appointed as the Additional Sessions Judge still his appointment did not constitute an Additional Sessions Court His Court was still the Sessions Court of which he was an Additional Sessions Judge and since an Additional Sessions Judge is competent to try those cases which the Local Government may direct and since Mr Irvine was directed by the Local Government to try the case when he was first appointed as officiating Sessions Judge, he was competent to try the case—*Q E v Kunjan*, 1 M L J 397

Where the Local Government has specified a particular Court such specification will supersede all power of transfer conferred on the High Court under sec 326—*Nando Lal v Mitter* 26 Cal 852 (at p 862) See sub section (7) of sec 326

649 Revision —Under the old law if an offence was committed by an Honorary Presidency Magistrate a sanction for his prosecution could be granted by the Chief Presidency Magistrate and the High Court had power under sec 15 of the Charter Act (though not under sec. 439 of this Code) to interfere with an order granting or refusing sanction under sec 197—*Nando Lal v. Mitter*, 26 Cal 852 But under the present law, the power of granting or refusing sanction lies only with the *Local Government*, and the High Court will have no power to interfere even under the Charter Act

Even under the old law, it was held in a Lahore case that the granting of sanction being an executive rather than a judicial act, the High Court had no power to interfere with the proceedings of a District Judge granting sanction for the prosecution of a Sub-Judge—*Ali Hussain Khan v. Harcharan*, 2 Lah 305 1922 P L R 35 23 Cr L J 113

198 No Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Indian Penal Code or under Sections 493 to 496 (both inclusive) of the same

Prosecution for breach of contract or defamation or offences against marriage.

Code, except upon a complaint made by some person aggrieved by such offence

Provided that where the person so aggrieved is a woman who, according to the customs and manners of the country, ought not to be compelled to appear in public or where such person is under the age of eighteen years or is an idiot or lunatic or is from sickness or infirmity unable to make a complaint some other person may, with the leave of the Court make a complaint on his or her behalf

Chapter XIX (comprising sections 490-492) of the I P Code relates to criminal breach of contracts of service Chapter XXI (comprising sections 499-502) relates to Defamation Sections 493-496 deal with offences relating to marriage

Change —The proviso has been added by section 51 of the Criminal Procedure Code Amendment Act XVIII of 1923

650 Necessity of complaint —A Magistrate acts without jurisdiction if he takes cognizance of a charge of defamation without complaint So where a postcard written by the accused to the complainant containing a defamatory matter was privately handed over by the latter to the Magistrate without a complaint held that the Magistrate acted without jurisdiction in starting a criminal prosecution thereon—*Abdulla v Clarke* 1909 P W R 39 Cr L J 154

Magistrate's power to add or alter charge —When a complaint presented to the Magistrate contained only charges under sections 357 and 504 I P C but did not contain a charge under section 500 I P C (defamation) but that charge was subsequently added by the Magistrate on statements made by the complainant it was held that the Magistrate could not add the charge of defamation or take cognizance of it as there was no formal complaint in respect of it such as is required by this section—*Q E v Deoki Nandan* 10 All 39 So also the Magistrate cannot alter a charge under section 501 I P C to one under section 500 I P C when there was no formal complaint by the person aggrieved in respect of the latter offence—*Crown v Uma Shankar* 1889 P R 18

But a more liberal view has been taken in the cases noted below Thus in a Punjab case where a complaint was made to the Magistrate under sec 211 I P C that the accused had made a false charge against him (complainant) of poisoning his daughter in law with a view to injure his reputation but the Magistrate treated the case as one under sec 500 I P C and tried it so it was held that having regard to the substance of the complaint the Magistrate was competent to alter the complaint under sec 211 I P C to one under sec 500 I P C when in fact the complaint was preferred by the aggrieved person—*Nur Aslam v Emp*, 1884

P. R 24 The principle is that a complaint need not state precisely the section of the Penal Code under which the accused shall be charged, it is enough if the complainant lays before the Magistrate the facts which if proved would warrant a commitment under any of the sections referred to in this section—*Emp v Ali*, 25 All 209 Thus where the husband of a woman who had committed bigamy made a complaint to the Magistrate alleging facts which seemed to constitute an offence under sec 498 I P C but in the subsequent inquiry it appeared that an offence under sec 494 I P C was committed, it was held that the Court could take cognizance of the offence under sec 494 I P C without a fresh complaint formally preferred under that section—*Emp v Ali*, 25 All 209, *In re Ujjala*, 1 C L R 523 This section is clearly designed to prevent Magistrates from inquiring on their own motion into a case connected with marriage unless the husband or other person authorised moves them to do so, but when the case is once properly instituted before the Magistrate, he can proceed in respect of any other offence proved or against any other person implicated—*In re Ujjala*, 1 C L R 523

Power of Appellate Court to alter charge—An appellate Court can under sec 423 alter a conviction under one section into one under another section and in doing so it is not bound by such restrictions as for instance, a complaint by the aggrieved person Thus, it can convert a conviction under sec 182 I P C into one under sec 500 I P C notwithstanding that there was no complaint in respect of the latter offence by the aggrieved person as required by this section—*Emp v Gur Narain*, 25 All 534

651 Abetment—A Magistrate taking cognizance of abetment of the offences mentioned in this section must be deemed to have taken cognizance of the substantive offences and therefore a complaint by the aggrieved person is a condition precedent to the taking cognizance of the abetment—*Jitmal v Emp* 1888 P R 4 But the Allahabad High Court holds that sec 198 does not apply to a charge of abetment of the offences mentioned therein Section 193 provides in express terms that a complaint is needed for a prosecution for the abetment of the offences mentioned therein or for an attempt to commit them No such provision is contained in sec 198, and it cannot therefore be said that the charge of abetment of the offences referred to therein is excluded from cognizance without a complaint by the person aggrieved by such abetment—*Munir v K L*, A I R. 1926 All 189 24 A L J 155 27 Cr L J 101

652 Person aggrieved—*Defamation*—The question as to whether the complainant is the person 'aggrieved' by the offence alleged, within the meaning of this section is to be determined by the nature of the offence and the special circumstances of each case—3 C L J 38 In the case of a married woman, it was held in an earlier Punjab case that since under

sec. 499 I P C the reputation to be harmed must be the reputation of the very person concerning whom the imputation is made, a husband could not be considered to have been harmed in his reputation by a defamatory statement concerning his wife—*Daood v Emp* 1884 P R 22. But the other High Courts are of opinion that the reputation of the husband is so intimately connected with that of his wife that it would be unreasonable to hold that the defamation of his wife (e g imputation of unchastity) would ordinarily be not as hurtful to his feelings as it is to those of his wife. Therefore the husband is undoubtedly a person aggrieved by the defamation of his wife—*Chellam v Ramasami*, 14 Mad 379 *Chotalil v Nathabai* 25 Bom 151 (F B), *Emp v Lachman*, 1882 P R 20, *Anantha v K E*, 15 M L J 224, *Appanna v Akkanna* 27 M L J 746 26 Cr L J 521 *Gurdit Singh v Crown*, 5 Lah 301 25 Cr L J 342 1 Weir 231. If, however the husband is a lunatic and the woman is living in the house and under the protection of her father in law, any allegation against the daughter in-law seriously affects the reputation and status in society of the father in law, and he is a person aggrieved within the meaning of this section and is competent to institute a complaint—*Daem Sardar v Balu Dhal*, 3 C L J 38 (This is now expressly provided by the recent amendment) Where a Hindu lady is living with her father, brother or son, she is a member of that family and her reputation is bound up with the reputation of the person in whose house and under whose charge she is living and any imputation as to her character will affect as much the relative with whom she is living as herself. Therefore the brother of a Hindu widow, with whom she has been living is an aggrieved person in respect of an imputation of unchastity made against the woman—*Thakur Das v. Adhar Chandra*, 32 Cal 425 In *Masuria Din v Jagannath*, 1893 A W N 207, however, it has been held that the son is not an aggrieved person in respect of a defamation of his mother. In a Bombay case also it was held that only the female herself, and not a male relative of hers could make a complaint for defamation under this section—*Ratanlal* 327. But under the proviso newly added by the Amendment Act of 1923 any friend or relative of the female will now be able to make the complaint with the leave of the Court.

Where certain allegations made in a newspaper against A and certain others were true as regards A but untrue as regards the others, it was held that A was not the person aggrieved by the publication of the allegations—*Subraya v Kader Routhen* 1914 M W N 351 15 C L J 357.

The complaint in respect of defamation must be made by the person aggrieved and cannot be preferred by his official superior. Thus where a police officer has been defamed a complaint by his official superior on the ground that the good name of the police force has been attacked, cannot be entertained—*Gaya v King Emp*, 20 O C 43 23 Cr L J 641. Where

a newspaper published statements, which were alleged to be defamatory, of specific acts of negligence on the part of the Health Officer and his subordinates, it was held that the President of the Municipality was not a person aggrieved within the meaning of this section merely because he had a control over those officers, and that by the imputation made against his subordinates, his own conduct and administration had not been impugned—*Beauchamp v Moore*, 26 Mad 43

The words 'person aggrieved' in case of defamation must be treated as equivalent to "person injured," the object of the section being to limit the right of complaint to the person who suffered injury. Therefore, the founder of a monastery is incapable of making a complaint in respect of a defamatory statement affecting the moral character of a certain Pongyi who presided over the monastery—1 Bur S R 617

Death of complainant in defamation—The death of the complainant, during the course of the criminal proceedings for defamation, necessarily terminates those proceedings—*Iskar Das v K E* 1908 P R 10

Person aggrieved by bigamy—In the case of an offence of bigamy committed by the wife, the husband is the only person aggrieved by such offence, and he alone can make the complaint. The father of the husband is not the "person aggrieved"—32 All 78, so also the brother of the husband is not the person aggrieved—*Emp v Imtiazan*, 25 All 132, 10 Bom 340, *Hanuman v King Emp*, 11 O C 148

Prior to the present amendment it was held that if the husband of the girl who committed bigamy was a *minor*, his mother was not competent to make a complaint as she was not the person aggrieved—*In re Sessions Judge*, 2 Weir 231 it was also held that if the husband was a *lunatic*, his brother could not make a complaint on his behalf—26 Cal 336 These two cases are now rendered obsolete by the proviso newly added in this section.

199. No Court shall take cognizance of an offence under

Prosecution for adultery or enticing a married woman.	Section 497 or Section 498 of the Indian Penal Code, except upon a complaint made by the husband of the woman, or in his absence, made with the leave of the Court by some person who had care of such woman on his behalf at the time when such offence was committed;
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Provided that, where such husband is under the age of eighteen years, or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his behalf.

Sec 497 I P C—Adultery. Section 498—Enticing or taking away or detaining with criminal intent a married woman

Change —The italicised words have been added by sec 57 of the Criminal Procedure Code Amendment Act XVIII of 1923

Object of section —The restriction imposed in this section (empowering only the husband or the guardian to make the complaint) is not to afford immunity or protection to the offender but to prevent a person unconnected with the woman from giving publicity to a matter which neither the husband nor the guardian is willing to agitate—*In re Rathua Padayachi* 17 Cr L J 363 (Mad)

653 Scope of section —The only offences referred to in this section are offences under secs 497 and 498 I P C but a charge of *house trespass* with intent to commit adultery is not contemplated by this section and such an offence may be inquired into without complaint by the husband of the woman concerned although a prosecution for the offence of adultery must be instituted by the husband alone—*Anonymous* 1 Weir 531 Where the complainant charged the accused with house trespass with intent to commit theft but it appeared that he committed house trespass with intent to commit adultery with the complainant's wife he could be convicted of the latter offence although the complainant had not made a formal complaint for that offence—*O E v Kangla* 23 All 82 *Em v Dhauntua Lodhi* 19 Cr L J 881 So also where the accused admitted that he had entered the house at night for the purpose of carrying on an intrigue with the complainant's wife but the complainant refused to charge the accused with having entered the house with intent to commit the offence of adultery but founded his complaint solely on the entry having been with intent to commit theft which was found to be false it was held that the Magistrate had the power to convict the accused of house trespass with intent to commit adultery even though the husband refused to make that charge—*Anonymous* 5 M H C R App 5 1 Weir 532 But the Magistrate in this case dismissed the charge as the husband refused to lay that complaint

But in another Allahabad case where the complainant charged the accused with house trespass with intent to commit theft but the accused stated that he had gone there to have sexual intercourse with a woman and the accused was convicted for house trespass with intent to commit adultery held that the conviction was injudicious in the absence of a complaint by the husband of the woman—*Gump v Harcharan* 1896 A W N 42

654 Complaint —The complaint referred to in this section means a complaint as defined in sec 4 (h) A Magistrate is not competent to entertain a case under sec 498 I P C on the report of a police officer,

in the absence of a complaint by the husband or guardian of the woman alleged to have been enticed away by the accused—*Bhana v Crown* 1910 P R 32 Information lodged by the complainant before the police is not a complaint sufficient to warrant a conviction under secs 497 and 498 I P C—*Tara Prosad v Emp* 30 Cal 910 *Emp v Khushal Singh* 17 C P L R 105 *In re Chidambara* 2 Weir 235 *Arumuga v Gangabai* 43 M L J 564 23 Cr L J 397 But where on a charge under sec 366 I P C the Police took up the proceeding in which the husband appeared as a witness and he asked the Magistrate to drop the proceeding there under but said that he intended to prosecute the accused under sec 498 I P C and to get him punished it was held that there was a complaint in as much as he made an allegation before the Magistrate that the offence should be inquired into—*Bhanani v Emp* 14 A L J 733 8 All 76 17 Cr L J 72

If the husband brings a complaint of any other offence and from certain statements in his deposition it appears that an offence mentioned in this section has been committed no conviction for the latter offence can be sustained because the husband has not made a formal complaint of that offence Thus where the husband preferred against the accused a complaint of rape on his wife but not of adultery and certain statements in his deposition disclosed an offence of adultery a conviction for the latter offence was illegal in as much as the husband had not preferred a formal complaint of adultery even the circumstance of the husband appearing as a witness in the case could not be regarded as amounting to the institution of a complaint for adultery *Emp v Kali* 5 All 233 *Cleman v Emp* 29 Cal 415 *Rajmatulla v Emp* 1883 P R 10 Similarly where the accused was charged with offences under secs 366 and 379 I P C but from statements in the deposition of the husband of the woman concerned an offence under sec 498 I P C was made out and the Judge convicted him of that offence it was held that the conviction was illegal in the absence of a formal complaint by the husband in respect of that offence and the statements made by the husband in his deposition could not be said to be a complaint under sec 4 (h) of this Code *Emp v Iman Khan* 14 Bom L R 141 13 Cr L J 287 Even the formal assent of the husband to a charge of adultery added at the end of his deposition would not probably be a formal compliance with this section—*Q v Lucky Narain* 24 W R 18 Where a husband charged the accused persons with theft and theft only they could not be convicted of an offence under sec 498 I P C as there was no complaint preferred by the husband under this section in respect of the latter offence—*Roda Singh v Crown* 1918 P R 2 19 Cr I J 300

The complaint referred to in this section is a complaint of the specific offence mentioned in this section and not a complaint of any offence Where a person was charged with kidnapping or with abduction and the

Judge convicted the accused on the evidence of an offence under sec 498 I P C held that the conviction was wrong as there was no specific complaint of an offence under sec 498 I P C—*Danguru Asari v Emp* 27 Mad 61 Where the accused was charged only with the offence of kidnapping a minor girl and theft of jewels and there was no complaint that the accused's purpose was to have illicit intercourse with the girl the Magistrate could not take cognizance of an offence under sec 498 I P C—*In re Arunachalam* 45 M L J 543 So also where a complaint was made of an offence under secs 494 and 498 I P C the Magistrate had no jurisdiction to try the accused for an offence under sec 497 I P C—*Q E v Na'ja Ratanlal* 531 Emp v *Badan* 1881 A W N 112 Similarly a Magistrate cannot convict a person of an offence under sec 498 I P C when the complaint was for an offence under sec 497 I P C—12 C W N 111 A committing Magistrate cannot alter a charge of rape into one of adultery on the representation of the accused without any request on the part of the husband of the woman—*Emp v Ram Bahsh* 1887 A W N 163 Where a charge of rape brought against the accused was found untrue held that in the absence of a complaint by the husband the Court cannot on the same evidence take cognizance of the offence of adultery—*Nga Po v King Lmp* U B R (1912) 4th Qr 155 14 Cr L J 84

Contra—*Ratanlal* 584 where it was held that the word complaint must be taken as including not only a written complaint but also the examination of the complainant at any rate prior to the issue of process there ore where the written complaint did not disclose an offence under sec 498 I P C but the complainant's examination made out such an offence the Magistrate had jurisdiction to try such offence And in *Jatra Seikk v Reazet* 20 Cal 483 it was laid down that upon a complaint in respect of an offence under section 366 I P C a conviction under sec 498 I P C could stand even in the absence of a complaint by the husband if his evidence was such as to justify the conviction for the latter offence In a recent case the Madras High Court is also of opinion that for the purpose of ascertaining the complaint under this section the written complaint as well as the sworn statement may be read together—*In re Arunachalam* 45 M L J 543 24 Cr L J 837

Similarly the Court cannot add a charge of an offence referred to in this section without a formal complaint in respect of that charge by the person specified Where the accused was committed to the Sessions on charges under secs 363 and 366 I P C and at the conclusion of the evidence to establish these charges the Sessions Court added a charge under sec 498 I P C and convicted the accused on all the three charges it was held that the procedure adopted by the Sessions Judge was not regular that the additional charge was prejudicial to the accused and that the

conviction under section 498 I P C must be set aside—*Lmp v Isap Md*, 31 Bom -18

655 Who can complain —The only person who can prefer a complaint of an offence referred to in this section is the husband of the woman. The husband is entitled to make the complaint even though the marriage has been dissolved before the complaint if the offence was committed before the marriage was dissolved—*Dhanna Singh v Crown* 1922 P W R 16 23 Cr L J 462

In the absence of the husband the complaint may be made by any person having the care of the woman. Thus the mother of the husband who was in charge of the wife during the absence of the husband is competent to prefer a complaint of an offence under sec 498 I P C against the person who abducts the wife—*Malbub Ali v Lmp* 24 Cr L J 780 (Lah). Where at the time of the offence the wife was left under the care of her father the fact that the husband stands by will not prevent the father from preferring the complaint—*In re Rathna* 17 Cr L J 363 (Mad). *Mir Alam v Lmp* 5 Lah L J 183 23 Cr L J 690. The absence must be from the place and therefore where the complaint was preferred by the nephew of the husband when the latter was bed ridden with paralysis it was held that the Court could not take cognizance of the offence—*Crown v Tikhomal* 3 S L R 15. But this ruling is no longer correct in view of the words 'sickness or infirmity' occurring in the proviso newly added.

If the husband be a minor he can be represented by another in a prosecution for adultery. See the proviso (The contrary view taken in 2 Weir 235 will no longer stand as good law). Thus if the husband is a minor the complaint may be lodged by the husband's father but if at the time of the offence the minor husband was absent (i.e. not living with the wife under the same roof) and the wife was living with her maternal uncle then the only person who could make the complaint was the maternal uncle (as having charge of the woman on her husband's behalf) but not the husband's father—*Wallia v Lmp* 23 Cr L J 613 (Lah).

The husband can even though he is a minor make the complaint and there is nothing in law to prevent him from doing so—*Wallia v Lmp* 23 Cr L J 613 (Lah). Even the proviso newly enacted will not debar the minor husband himself from lodging the complaint for the proviso is merely an enabling provision.

656 Miscellaneous —*Death of husband—effect* —The law only requires that the prosecution on a charge of adultery should be instituted by the husband. But it cannot be said that the death of the husband after institution of the prosecution but before trial necessarily puts an end to the prosecution although it is desirable that the charge should be with

drawn by the prosecution on the death of the aggrieved party—*Anonymus* 4 M H C R App 55 2 Weir 235 *Imp v Nur Mahomed* 1 S L R 72

Where proceedings were dropped during the lifetime of the husband it is not open to any person after the husband's death to revive the proceedings—*In re Rukhsari* 16 Cr L J 166 (Mad)

Withdrawal of case by husband—If the complainant withdraws the charge before commitment to the Sessions the Court can discharge the accused but a withdrawal after commitment will not have such effect because a commitment once made by a competent Magistrate can be quashed only by the High Court and only on a point of law—4 All 150

Acquittal for want of proper complaint—Fresh complaint—Where the brother of the husband of the woman instituted a complaint under sec 498 I P C alleging that he had authority from the husband to prefer the complaint but after taking evidence the Magistrate held that the complainant had no authority and acquitted the accused and subsequently the husband himself instituted the complaint it was held that the previous acquittal was no bar to a fresh trial—*Um ruddin v Imp* 6 A L J 66 31 All 317 *Imp v Tiharam* 17 Bom L R 678 16 Cr L J 627

199-A When in any case falling under Section 198 or Section 199 the person on whose behalf the com-

<p>Objection by lawful guardian to complaint by person other than person aggrieved</p>	<p>plaint is sought to be made is under the age of eighteen years or is a lunatic and the person applying for leave has not been appointed or declared by competent authority to be the guardian of the person of the said minor or lunatic and the Court is satisfied that there is a guardian so appointed or declared notice shall be given to such guardian and the Court shall before granting the application, give him a reasonable opportunity of objecting to the granting thereof</p>
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This section has been added by sec 53 of the Criminal Procedure Code Amendment Act XVIII of 1923

We have added a new section 199A in order to safeguard the rights of a legally appointed guardian—*Report of the Select Committee of 1916*

CHAPTER XVI

OF COMPLAINTS TO MAGISTRATES

It is most desirable that Magistrates should follow the procedure which is quite clearly laid down in this chapter dealing with complaints to Magistrates—*Balai Lal v Pannah* 21 C W N 127

Magistrates should also be prompt in disposing of complaints under this chapter. They have no right whatever to keep complaints instituted before them without passing orders for several months. Such action is in the highest degree improper and shows want of proper understanding as to what their duties are—*Sahullah v Burhan* 18 Cr L J 271 (All)

200 [* * *] A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and also by the Magistrate.

Provided as follows —

(a) when the complaint is made in writing nothing here contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under Section 192

(aa) when the complaint is made in writing nothing here contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties

(b) where the Magistrate is a Presidency Magistrate such examination may be on oath or not as the Magistrate in each case thinks fit and where the complaint is made in writing need not be reduced to writing but the Magistrate may if he thinks fit before the matter of the complaint is brought before him require it to be reduced to writing,

(c) when the case has been transferred under Section 192 and the Magistrate so transferring it has already examined the

complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant

Change —This section has been amended by section 54 of the Criminal Procedure Code Amendment Act XVII of 1923. The words "subject to the provisions of section 476" which occurred at the very beginning of the old section have been omitted and proviso (aa) has been newly added. "We would add to this clause a provision that in the case of a complaint under sec 476 the examination of the complainant shall be dispensed with"—*Report of the Select Committee of 1916*

The words "where the complaint is made in writing" have been inserted in proviso (b) by the Criminal Procedure Code Amendment Act II of 1926. The reason has been thus stated —"At present a Presidency Magistrate need not record the substance of an examination even if the complaint is not in writing. It is desirable that where there is no complaint in writing the Magistrate should record the examination in writing"—*Statement of Objects and Reasons* (Gazette of India 1925 Part V p 214)

657 Taking cognizance —A Magistrate is bound to take cognizance of an offence upon complaint. See notes under sec 190 at p 471 and "A Magistrate is bound to receive all complaints whether they be preferred orally or in writing"—*Cal G R C O* p 8

If a *pardanashin* lady makes a complaint to a Magistrate he is entitled to take cognizance of it but before he takes cognizance he must be satisfied that it is her complaint. It is comparatively unimportant by whom the complaint reaches the Magistrate if it is really her complaint.—*Abhoyeswari v Kishori Molan* 42 Cal 19 18 C W N 1020

658 Complaints —See notes under sec 4 (b)

It is clear from the wording of sections 200 and 201 that a complaint need not be in writing.—*J R Das v King Emp* 1 Rang 549

Presentation of complaint —Since the complainant is to be examined "at once" it follows therefore that ordinarily a complaint must be presented in person. A complaint shall never be accepted which is not signed by the complainant and is not preferred by a person duly authorised to prefer that specific complaint. *Abhoyeswari v Kishori* 47 Cal 19 15 Cr L J 348. The presentation of a complaint through a *Mukhtar* is illegal because the Magistrate can not at once examine the complainant.—*Ratanlal* 625

659 Examination of complainant —The object of requiring the Magistrate to examine the complainant possibly is that the facts constituting the offence may be ascertained when in a written complaint they are not given.—*Sukumar v Mofizuddin* 5 C W N 357 22 Cr L J 455. The object of the examination is further to see whether there is a *prima facie* case against the accused and to prevent the issue of process in cases

where the examination of the complainant would show that the complaint was false frivolous and vexatious and intended merely to harass the accused—*Girdhari Lal v Crown* 1311 P R 11 The object of the examination is to find out whether there is any matter which calls for investigation by a Criminal Court—*Bay Nath v Raja Ram* 10 A L J 79 13 Cr L J 704

The examination of the complainant is not to be a mere form but an intelligent inquiry into the subject matter of the complaint carried far enough to enable the Magistrate to exercise his judgment as to whether there is or there is not sufficient ground for proceeding—*Cal G R & C O p 9*

The law requires that the complainant shall be examined *at once* the Court cannot fix a future date for the examination of the complainant

A Magistrate cannot refuse to take cognizance of an offence on receipt of a complaint but he is bound to examine the complainant—13 Cal 334 Even in a case in which a charge can in the first instance be laid before the Police the Magistrate is bound to examine the complainant if the latter chooses to make a complaint—14 W R 36 Even if a Magistrate finds a complaint to be false and groundless he cannot refuse to examine the complainant—3 N H P H C R 272 Although it is competent for him to dismiss the complaint still he cannot dismiss it without examining the complainant—*Jalaluddin v Md Khalil* 1884 A W N 47 3 C W N 17

Mode of examination—On presentation of a complaint the Magistrate shall examine the complainant on oath the substance of that examination must be reduced to writing and must be distinct from the complaint itself Mere calling upon the complainant to attest the complaint is not a sufficient compliance with this section—18 All 221 If however the complaint is made in writing and is sufficiently clear it may frequently be a sufficient compliance if the Magistrate reads it over to the complainant and the complainant is on oath asked to subscribe to it—6 Bom L R 667 *Mahomed v Mahomed* 26 Cr L J 1101 (Sind) But if the written complaint is obscure and vague the Magistrate would be bound to examine the complainant at sufficient length for the purpose of clearly ascertaining the allegations on which the complaint is made—6 Bom L R 16

The substance of the examination of the complainant on oath should be read over to him (following the principle underlying sec 360) so that the accuracy of the record of the examination may be vouchsafed particularly if it is to be used as a basis for a possible prosecution for perjury in future—*Blagvrathi Bai v Emp* 26 Cr L J 1401 A I R 190 Nag 141

If the complainant is a *prodanashin* lady she may be examined by commission under Sec 503 of the Code The terms of that section are

very wide. They refer not only to an inquiry and a trial but to any other proceeding. That section authorises the examination of any witness and a complainant is certainly a witness—*Abhay stuart v Akshori Molan* 42 Cal 19. *Contra* 1876 P R 10 where it is laid down that in the preliminary stage of a proceeding the complainant is not a witness but a mere complainant and cannot be examined by commission.

Signature of complainant If the complaint is in writing it must be signed by the complainant. A complaint cannot be accepted if it is not signed by him. 42 Cal 19. *Jitendra Lemp* 1 P L T 564.

After the complainant has been examined and the substance of the examination has been reduced to writing by the Magistrate such writing shall be signed by the complainant. Unless it is signed the Magistrate cannot take cognizance of the complaint—3 B L R 67. Such is the vitiating effect of want of signature that a conviction on the alternative charges of making two statements, one in the examination under this section of the accused as a complainant and the other in his examination subsequently as a witness both the statements contradicting each other is bad if the statement recorded under this section does not bear the signature of the complainant—*Daijoo v Lemp* 6 C W N 840. The examination of the complainant being taken on oath and signed by him can be used as a basis for a prosecution for perjury. The evident object of getting the substance of the examination of the complainant signed by him is to make use of it in case of need, as against the complainant's subsequent deposition as a witness for starting against him a prosecution for perjury on the ground that the two statements contradict each other—*Bhagirathibai v Lemp* 6 Cr L J 1401. A I R 1926 Nag 141.

660 Omission to examine—Effect.—The examination of the complainant is not a mere matter of formality and when a Magistrate dismisses a complaint without making an examination himself the omission is a material one and cannot be cured by sec 537 of the Code—*Pangu Koeri v Lemp* 1 P L T 346. *In re Ramasami* 43 M L J 710. *Mool chand v Kessoomal* 13 S L R 200. U B R (190) 1st Qr 73. The cognizance of an offence by a Magistrate on complaint is not complete until the complainant has been examined on oath—*Pangu Koeri v Lemp*, 1 P L T 346. A Magistrate cannot dismiss a complaint without examining the complainant—*Lok Nath v Sanjayi* 30 Cal 923. *Kartik v Lemp* 1 P L T 142. *Iadar Rahman v Ibidhar Ralaman* 23 C W N 392. 9 C W N 191. 3 C W N 17. 1884 A W N 47. 8 W R 17. No investigation can be ordered under Sec 200 without examining the complainant—6 Cr L J 552 (Patna). *Jitan v Lemp* 1 P L T 64. 7 Cal 92. 4 C W N 305. *Ali Muhammad v Crook* 191 P R 2. (This is now expressly provided in the proviso of sec 201. No process can be issued against the

accused unless and until the Magistrate has examined the complainant—*Abhoyeswar v Kishori Mohan* 42 Cal 19

But in several cases it has been held that the omission to examine the complainant on oath before issuing process is a mere irregularity and does not invalidate the conviction in the absence of any prejudice to the accused by reason of such irregularity—*Phagun Shahu v K E*, 1 P L J 592, *Emp v Heman Gope* 1 P L T 349 1 P L T 446 *Bhairab v Emp*, 46 Cal 807 11 Mad 443 *Bateshar v Emp* 37 All 628, *Gopchand v Emp* 1 Rang 517 15 Cr L J 649 Thus where the complainants made a complaint to the Police that the accused beat them causing grievous hurt, but the police did not send up the case and the complainants applied to the Magistrate who sent for the police papers and summoned the accused without examining the complainants it was held that the irregularity did not vitiate the proceeding—*Bateshar v Emp*, 13 A L J 840 37 All 628 The omission to examine the complainant under sec 200 is a mere irregularity and not an illegality. The person prejudiced by such an irregularity is the complainant and when the case ends in a conviction he has no grievance. The accused cannot in general complain of the irregularity, as the omission to take a sworn statement from the complainant cannot prejudice the accused—*Ambajara v Pachamuthu*, 19 L W 46 25 Cr L J 730

661 Complainant by Court or public servant.—Under the new provision (aa) when a complaint is preferred by a Court or a public servant, the examination of the complainant may be dispensed with. Even before this amendment it was held in several cases that the omission to examine the Court or the public servant did not vitiate the proceedings. Thus where the complainant who was a bailiff and who was resisted by the accused in the execution of a civil process, was not examined but his report was brought on the record through the Nazir it was held that the fact of the complainant not being examined would not justify the setting aside of the conviction because there were other witnesses who gave a full account of the matter—*Muso v Crown* 8 S L R 41 15 Cr L J 649 Where the complaint in writing and signed was preferred by a responsible public official and was accompanied with a sanction of the Local Government for the prosecution of one of its servants, it was held that the failure by the Magistrate to examine the complainant on oath had not in any way prejudiced the accused or caused a failure or miscarriage of justice—*Girdhari Lal v Crown* 1911 P R 11 12 Cr L J 217 Where the Sub Inspector preferred a complaint for the prosecution of a certain person, and the Magistrate, without examining the complainant recorded the evidence and convicted the person complained against, held that the omission to examine the complainant (Sub-Inspector) did not occasion a miscarriage of justice, the irregularity being cured by the provisions of sec 537 (a)—

Chiragh Din v. Crown 4 Lah 359 25 Cr L J 125 Where the District Judge made a complaint to the District Magistrate by means of a letter and the Magistrate ordered a police investigation without examining the District Judge on oath in support of his statement in his letter it was held that the omission to examine was a mere irregularity curable by sec 537 (a)—*In re Aparao* 20 Bom L R 1018 20 Cr L J 42 Under the present law no question of irregularity would arise

201 (1) If the complaint has been made in writing to a Magistrate who is not competent to take cognizance of the case he shall return the complaint for presentation to the proper Court with an endorsement to that effect

Procedure by Magistrate not competent to take cognizance of the case

(2) If the complaint has not been made in writing such Magistrate shall direct the complainant to the proper Court

<p>202 (1) If the Chief Presidency Magistrate or any other Presidency Magistrate whom the Local Government may from time to time authorize on this behalf or any Magistrate of the first or second class is not satisfied as to the truth of a complaint of an offence of which he is authorized to take cognizance he may when the complainant has been examined record his reasons and may then postpone the issue of process for compelling the attendance of the person complained against and either inquire into the case himself or direct a previous local investigation</p>	<p>202 (1) Any Magistrate on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been transferred to him under Section 192 may if he thinks fit for reasons to be recorded in writing postpone the issue of process for compelling the attendance of the person complained against and either inquire into the case himself or if he is a Magistrate other than a Magistrate of the third class direct an inquiry or investigation to be made by any Magistrate subordinate to him or by a police officer or by such other person * * * as he thinks fit for the purpose of ascertaining</p>
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Postponement of issue of process

to be made by any officer subordinate to such Magistrate or by a police-officer, or by such other person, not being a Magistrate or police officer, as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint

Provided that, save where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of Section 200

(2) If such investigation is made by some person not being a Magistrate or a police officer, he shall exercise all the powers conferred by this Code on an officer in charge of a police station except that he shall not have power to arrest without warrant

(2) If any inquiry or investigation under this section is made by a person not being a Magistrate or a police officer, such person shall exercise all the powers conferred by this Code on an officer in charge of a police station, except that he shall not have power to arrest without warrant

(2A) Any Magistrate inquiring into a case under this section, may, if he thinks fit, take evidence of witnesses on oath

(3) This section applies also to the police in the towns of Calcutta and Bombay

(3) This section applies also to the police in the towns of Calcutta and Bombay

[Change —This section has been amended by sec 55 of the Criminal Procedure Code Amendment Act XVIII of 1923

The main changes introduced are the following —

(1) Third class Magistrates have been given power to make preliminary inquiries personally. (2) Authority to make a preliminary inquiry has been given in any case in which the Magistrate thinks fit for reasons to be recorded in writing. The only ground contemplated by the old section was if the Magistrate is not satisfied as to the truth of the complaint. This is thought to be undesirably narrow. (3) The words in

quiry or investigation have been substituted for the expression previous local investigation and power is given to take evidence upon oath in the case of such a preliminary inquiry (4) Presidency Magistrates are enabled to act under this section without special authorisation — *Statement of Objects and Reasons* (1914)

Or which has been transferred to him under section 19 — We have made a small amendment in sec 202 (1) to cover cases which have been transferred to a Magistrate under sec 19 as well as cases of which he has taken cognizance himself—*Report of the Select Committee of 1916* This amendment supercedes the ruling in 18 C W N 95

The present proviso to subsection (1) has been substituted by the Cr P Code Amendment Act II of 1926 in place of the old proviso which was added by the Amendment Act of 1913 and which ran thus —

Provided that no such direction shall be made—(a) unless the complainant has been examined on oath under the provisions of section 200 or (b) where the complaint has been made by a Court under the provisions of this Code

Thus this proviso laid down that a Magistrate receiving a complaint need not direct an inquiry or investigation if the complaint was made by a Court This has caused difficulties in the case of a Court complaining under sec 476 of the Code Under that section the Court has only to record a finding that it is expedient that an inquiry should be made into an offence which appears to have been committed and it seems clear that cases will arise in which an inquiry or investigation should be made before a person is put on his trial The difficulty was brought to light by the Bombay High Court and the Local Government and the other High Courts have all agreed that some provision is required This clause gives effect to this proposal — *Statement of Objects and Reasons* (Government of India, 1925 Part V p 214)

The present proviso lays down by implication that an inquiry or investigation may be directed in any case including the case of a Court complaining under sec 476 but that in such a case the examination of the complainant is not necessary before the inquiry or investigation

662 Scope and application of section — This clause lays down the procedure to be followed by a Magistrate upon taking cognizance of an offence upon complaint and when he takes cognizance under sec 190 (a) and not when he takes cognizance upon a Police report or information mentioned in clauses (b) and (c) of sec 190 See 2 V 25 243 This section applies only to cases where there is a complaint distinguished from a mere information A Magistrate taking cognizance of information cannot be said to be acting upon complaint — 1889 P R 24 So also a Magistrate taking cognizance of a case

a police report cannot proceed under this section and cannot therefore refer the case to a subordinate Magistrate for local investigation—*Abdulla v Emp*, 40 Cal 854, *Imp v Shoukaimal*, 7 S L R 75, *Sarba Mahton v Emp* 17 C W N 824 *Tiloki v Emp*, 2 P L T, 220 22 Cr L J 735

The old section applied only to those cases where the Magistrate was not satisfied as to the truth of a complaint—27 Cal 798, 2 Weir 241, *Narain v Emp* 1888 P R 24 Under the present section the Magistrate can direct inquiry on any ground See notes under 'Change' above

If the complainant is not speaking from personal knowledge, a Magistrate taking cognizance would exercise a wise discretion in making the inquiry under this section—*Sukumar v Mofizuddin*, 25 C W N 357

This section applies to a complaint of an offence A petition for maintenance under Sec 488 is not a complaint of an offence, and therefore this section is inapplicable to proceedings in maintenance The Magistrate to whom a maintenance petition is preferred has no power to refer it to a Subordinate Magistrate for inquiry and report, but must inquire into it himself—1905 P R 29

663 Recording reasons —If the Magistrate on examining the complainant distrusts the statement of the complainant, he is bound to record his reasons before directing a local investigation—*Balai Lal v Pasupati* 21 C W N 127 17 Cr L J 396 and failure to do so is not a mere irregularity but a grave illegality as the provisions of this section in this respect are imperative—27 Cal 921 14 Cal 141, 40 Cal 41 But in some cases it has been held that omission to record the reasons is at most an irregularity which will be cured by section 537 of the Code unless it has occasioned a failure of justice—2 Weir 241 25 Mad 546, *In re Arula*, 10 M L T 120 *Madho v Rashid Ahmed*, 15 A L J 642, 11 A L J 754, *Rim Saran v Md Jan Khan* 26 Cr L J 1394 A I R 1926 Pat 34, *Balai v Pasupati*, 21 C W N 127

664 "Postpone the issue of process —The process shall ordinarily issue after the examination of the complainant unless the Magistrate has reason to doubt the truth of the complaint, when only he is authorised to postpone the issue of process and order an inquiry or local investigation—27 Cal 798

The procedure prescribed by this section can be adopted when no process has been issued to compel the attendance of the accused A Magistrate who after issue of process directs an inquiry and report acts in contravention of the procedure prescribed by law—1896 A W N 140 Once a process has been issued against the accused the Magistrate cannot exercise his option of holding a preliminary inquiry He must proceed with the trial—*Gaji v Jumanshah*, 6 S L R 83 13 Cr L J 749, 1901

A W N 44 Thus it is illegal to order a preliminary inquiry after the accused has been brought before the Court under a warrant—21 W R 44 When a Magistrate has accepted a complaint and issued process upon it and taken evidence for the complaint he or his successor cannot refer the case to the Police for inquiry and report—9 Mad 282 Where a subordinate Magistrate has taken cognizance of a case and has issued process the District Magistrate has no power to interfere and order an inquiry—27 Cal 798, and it is doubtful whether he can make such order even after withdrawing the case to his own Court for trial—*Ibid* On the other hand if a Magistrate directs a local inquiry he cannot issue process before he receives the report of the inquiry—*Krishna Bala v Nirodabala* 41 C L J 170 A I R 1925 Cal 989 But where after the Magistrate had issued processes against two accused persons one of them appeared and laid a cross-complaint and then the Magistrate rescinded the order of issue of process and sent forth the cases to a subordinate Magistrate for local inquiry and report held that the action of the Magistrate was right and proper—*Lalit Mohan v Nani Lal* 39 C L J 329 25 Cr L J 464

665 If the accused appears—This section speaks of postponement of issue of process If however the accused appears of his own accord without a summons he is entitled to require that the complaint shall be proceeded with or dismissed If no evidence is offered against the accused he must be formally discharged—26 Bom 55

666 Inquiry—Under the old section the inquiry was to be conducted by the Magistrate himself who tried the case he could not direct the inquiry to be held by a subordinate Magistrate or a police officer These persons could only hold a local investigation See 38 Cal 68 *Gangadhar v K E* 43 Cal 173 20 C W N 63 *Md Imamuddin v Debendra* 18 C W N 95 The present amendment now empowers these persons to hold an inquiry as well as an investigation See also *Amrit Mahji v K E* 46 Cal 854 23 C W N 623 in which the order referring the complaint to a subordinate Magistrate for inquiry and report was held to be legal

The inquiry contemplated by this section does not necessarily mean an inquiry by the Magistrate himself examining witnesses or holding investigation into the case It is open to the Magistrate to investigate into the matter in order to ascertain the truth or falsity of the complaint in any way he thinks proper Where an investigation has been made by the police and witnesses had been examined by the investigating police officer there is nothing in law to prevent the Magistrate from looking into the police papers for the purpose of ascertaining the truth or falsehood of the complaint If upon looking into the police papers the Magistrate is satisfied that this is not a fit case in which process should issue he can dismiss the complaint—*Ramanand v Ali Hassan* A I R 1924 Pat 797

Before the present amendment the only Magistrate who could make an inquiry under this section was the Magistrate *taking cognizance* of the case a Magistrate to *whom a case was transferred* could not hold an inquiry under sec 202 See *Md Imamuddin v Debendra* 18 C W N 95 Under the present amendment such Magistrate is empowered to hold the inquiry by reason of the addition of the words *or which has been transferred to him under section 19*

Under this section the Magistrate has the option of only one of two alternatives viz either to *inquire into* the case himself or to direct a *local investigation* He cannot have recourse to both the alternatives, and if he after partially inquiring into the case himself makes an order directing local investigation the procedure is irregular—*Emp v Durga Prasad* 20 A L J 355 44 All 550 3 Cr L J 279

The police inquiry contemplated by this section cannot take the place of such evidence as the complainant may desire to produce before an adjudication is made of his complaint Such inquiry can be ordered before evidence is recorded to enable the Magistrate to determine how far the complaint was *prima facie* well founded When the Magistrate decides to record the evidence himself he should complete the inquiry and determine upon the evidence adduced how far the complaint is borne out—*Mahalei v Ram Sahai* 22 O C 371 The inquiry under this section cannot take the place of hearing the Magistrate who takes cognizance of the case cannot refer the case under this section to a subordinate Magistrate for calling upon the accused to show cause against prosecution and for submitting a report thereon—*Bharrab v A E* 46 Cal 807 23 C W N 484 29 C L J 318

This section makes no provision for the manner in which the evidence in an inquiry should be recorded The failure to take down the deposition of the witnesses by the Magistrate in a case in which he had before him the final report of the police containing a detailed account of the statements of witnesses examined by the police and the witnesses repeated the same statements before him is not an error of law—*Tilakhdari v Misri* 26 Cr L J 1346 A I R 1925 Pat 584

Second inquiry —A Magistrate may hold an inquiry even after a local investigation has been made by a subordinate officer If he is dissatisfied with the result of such investigation—38 Cal 68 But in *Ram Prasad v Mohi* 11 A L J 754 it has been held that the Magistrate taking cognizance cannot hold a further inquiry after the holding of a local investigation

667 *Local investigation* —The object of the local investigation is to ascertain the truth or falseness of the complaint a local investigation was not intended by the Legislature to supersede a regular trial The object of this section is to prevent the issue of process where there is some

initial ground for doubting the truth of the complaint and where on a local investigation there appears no evidence to support it. Where it is found that there is some evidence in support of the complainant's charge the function of the officer making the local investigation is fulfilled. Process should then be issued and the truth or falsity of the evidence should be determined in a regular manner—U B R (1910) 1st Qr 73

A local investigation can be ordered when there is a quarrel about boundaries or any matter of that kind. Otherwise the Magistrate taking cognizance should make an inquiry himself—*Barj Nath v Paja Ram* 10 A L J 79 13 Cr L J 704

The words local investigation are not restricted to the investigation of the physical features only but they mean an inquiry into the truth or falsity of the allegations made in the complaint petition. The word local is used with a view to hold the investigation in the locality for the convenience of the parties and their witnesses and also it may in certain cases necessitate an inspection of the place of occurrence but certainly it is not confined only to the inspection of the locality—*Munshi Mian v Emp*, 19 Cr L J 126 (Pat)

668 Who can investigate —If the offence is one triable only by a Court of Session the local investigation must be directed to some Magistrate who is competent to deal with a case triable by the Court of Session. It should not be directed to a second class Magistrate—4 C W N 305. But see 6 C W N 295 where it has been held that a Magistrate holding a local investigation under this section need not be competent to entertain the complaint which he is asked to investigate.

A local investigation can be directed to a subordinate Magistrate and not to a superior Magistrate—*Emp v Dhatu Hossein* 39 Cal 1041 18 C W N 885. This section does not contemplate the subordination of a 1st class Magistrate to a District Magistrate. Both are first class Magistrates and the latter cannot direct the investigation to be held by the former—*Aly Mohd v Emp* 1912 P R 2. A Deputy Magistrate attached to the sub-division is subordinate to the Sub Divisional officer—*Munshi Mian v Emp* 19 Cr L J 126 (Pat)

The investigation may be made by any person subordinate to the Magistrate even though he be a clerk—36 Cal 1

A Magistrate has no jurisdiction to order a local inquiry by a pleader in the nature of a commission in a civil case—*Molan Khan v Gayzuddin* 18 C W N 399

It is not a proper course to make indiscriminate use of police agency for investigating complaints. The object of law is to give persons who have been injured an access to justice independent of Police and it is improper for the Magistrate when a complaint is made to him to refer

complaint to a Police officer. Such a course would foster abuses and defeat the purpose of the law—*In re Jankidas* 12 Bom 161. In petty cases of assault and the like the Police ought not to be directed to make inquiries because in petty matters the Police are under a strong temptation of making money out of the complaint. In such matters the proper course for the Magistrate is to take action at once upon the complaint—1894 P. R. 19.

Magistrates are cautioned against the indiscriminate use of Police agency for the purpose of ascertaining matters as to which a Magistrate is bound to form his own opinion upon evidence given in his presence. This caution is specially needful in respect of all cases regarding offences not cognizable by the Police—*Cal. C. R. & C. O.* p. 9.

If the complaint is made against a police officer it is improper for the Magistrate to call for a report from the police officer who is himself the accused person—14 Cal. 141 or from some other police officer—1884 A. W. N. 47. *Meena Lal v. Emp.* 18 A. L. J. 620 or even from a superior police officer or the Superintendent of Police—9 C. W. N. 179. *Shana v. La* 18 A. L. J. 731. In such cases the inquiry had better be held by the Magistrate himself—40 Mad. 387. *Shana v. Eza Ahmad* 18 A. L. J. 731. *Meena Lal v. Emp.* 18 A. L. J. 620. 21 Cr. L. J. 416. *Mahadev v. Ram Sahai* 22 O. C. 321. 21 Cr. L. J. 343 (All).

669 Proviso—Examination of complainant.—Before directing a local investigation the complainant must be examined either by the Magistrate who receives the complaint or by some other Magistrate to whom the case might have been transferred—*In re Bai Kashi Ratanlal* 368. Unless the complainant is duly examined an inquiry and report under this section cannot be called for and if made are without jurisdiction and can not form the basis of any further action—27 Cal. 921. 4 C. W. N. 305. *Jitan v. Emp.* 1 P. L. T. 564. 20 Cr. L. J. 552 (Pat.) and the complainant who was not examined cannot be prosecuted in respect of his complaint (if it is false) which was dismissed on a report called for under this section—*Aly Mohd v. Emp.* 1917 P. R. 2. 27 Cal. 921. *Ram Sarup v. A. E.* 4 O. C. 177.

Where after the complainant was examined by the Magistrate who took cognizance of the case a superior Magistrate transferred the case to his own file and without re-examining the complainant and without recording any reasons referred it to the police for inquiry and report it was held that the procedure was illegal and the fact that the complainant was previously examined by the Magistrate who took cognizance was of no avail—2 Weir 244.

670 Powers of the investigating officer.—A Magistrate conducting a local investigation can exercise all the powers of a Magistrate including the power to administer oath (see the new subsection 2A). Such a

proceeding is a judicial proceeding within the meaning of Sec 476—1 Cr L J 118 (Mad), and the investigating Magistrate can direct the prosecution of the complainant under sec 476 if the complaint turns out to be false—*Kanchan v Ram Krishun* 36 Cal 72 *Conly* — *Kachu Madar v Emp.*, 21 M L J 795 12 Cr L J 323 where it was held that a preliminary investigation made by a Magistrate under this section was not a judicial proceeding and therefore a person could not be prosecuted for an offence brought to the notice of the Court during such investigation. This ruling is no longer correct.

The Magistrate holding the investigation is not disqualified thereby from afterwards trying the case, when there is nothing to indicate that he initiated or directed the proceedings or took any personal interest in the matter of the complaint presented before him—24 Cal 167. The fact that the investigating Magistrate expressed an opinion in submitting the report is no bar to his holding the trial—4 C W N 604. But where a Magistrate took an active part in forwarding the police inquiries and collecting evidence against the accused he is disqualified from trying the accused—23 Cal 328. So also where a Magistrate during a local investigation himself discovered the evidence of crime and collected or ascertained the evidence in support of it and thereafter directed recommended or invited the institution of criminal proceedings it is undesirable that he should try the case—*Bhop Singh v Kermoti*, 8 N L R 1.

In a recent Patna case it has been held that if a Magistrate sends a cognizable case to the police to investigate under this section, the police officer making the investigation can arrest and send up a charge sheet. The Magistrate's order under this section does not debar the police from exercising their general powers of arrest and investigation in regard to the same matter as formed the subject of the complaint. It is possible to conceive of cases where although the Magistrate may distrust a complaint or delay in passing orders (i.e. postpone the issue of process and order an investigation under this section), the police would be failing in their duty if they did not arrest an offender against whom a cognizable offence has been made out. Much more so would this be the case where the Magistrate after recording the complaint finds that a regular police investigation would be more suitable and intentionally keeps the complaint pending in order that the police may exercise their powers of investigation and arrest independently of the Magistrate.—*King Emperor v Bhola Bhagal*, 2 Pat. 379 (382, 383).

671. Position of the accused —A person complained against does not become an 'accused' person or a 'person against whom any proceedings have been instituted' until it has been decided to issue process against him under Chapter XVII, Sec 340, therefore, does not entitle

him to be represented by a pleader during the preliminary inquiry held under this section—*Shaikh Chand v Mahomed Hanif* 4 N L R 81 *Golap Jan v Bholanath* 38 Cal 880 (887) or during the proceeding when the Magistrate is considering the report of the local investigation ordered by him—*Balai Lal v Pasupati* 21 C W N 127 17 Cr L J 396 If he chooses to attend the proceedings he may do so like any other member of the public but has no *locus standi* as a party the purpose of the law being clearly to exclude him until sufficient ground for joining him has been made out by the complainant Therefore the Magistrate can refuse him permission to cross examine the complainant's witnesses—*Shaikh Chand v Md Hanif* 4 N L R 81 See also *Glands Charan v Manindra* 27 C W N 196 A I R 1923 Cal 198 In a proceeding under this section the Magistrate acts illegally in sending for the accused person and calling for a report from him as to the truth or falsity of a charge preferred against him—5 P L J 61 14 Cal 141 A preliminary inquiry should not be held in the presence of the person complained against and he should not be allowed to cross examine the complainant's witnesses—*Bh n lai v Emp* 40 Cal 444 17 C W N 290 19 Cr L J 527 4 P L W 307 When a Magistrate holds an inquiry under this section he should not hear arguments on behalf of the accused—*Bachoo v Anwar* 26 Cr L J 305 A I R 19 5 Cal 576 *Contra*—In *Ram Baran v Mohd Jan* 26 Cr L J 1394 the Patna High Court did not object to the action of the Magistrate in calling the accused to the inquiry and in *Sheikh Akbar v France* 12 Cr L J 207 (Cal) it was held that the accused should be permitted to watch the proceedings and his pleader should be allowed to act as *amicus curiae* But this practice has been severely condemned in all the other cases cited above

Statements made by the person complained against during an inquiry under this section cannot be regarded as having been recorded under sec 164 or Sec 364 Such person does not stand in the position of an accused person during the inquiry and such statements cannot be admitted in evidence against him—32 Cal 1085

672 Evidence in the inquiry —The Magistrate conducting the preliminary inquiry need not confine himself to the evidence of the complainant alone but he may examine such witnesses as he thinks fit—*Ratanlal* 669 There is nothing in section 202 to prevent the investigating officer from making a full inquiry by obtaining information from the complainant and his witnesses and the defendant and his witnesses if any—33 Cal 1282

673 Submission of report —The officer who conducted the investigation must submit the report of his investigation to the same Magistrate who had originally ordered him to investigate he is not authorised to

submit it to another Magistrate for the purpose of dismissing the complaint and declaring that no offence had in reality been committed—*Thakur Singh v Kirpal*, 1918 P L R 53 19 Cr L J 436

674 Revision —If an irregularity in procedure has not resulted in any miscarriage of justice, the High Court will not make an order which can result only in harassment and waste of public time. In a case in which a perfunctory inquiry has been made by the Police and the report considered in a perfunctory manner by the Magistrate the High Court will interfere and insist on the provisions of this section being strictly enforced. But where the inquiry has been carefully made and carefully considered, the High Court will refuse to re-open the matter—*Sheonandan v Emperor*, 4 P L W 114 19 Cr L J 263

203 The Magistrate before whom a complaint is made, or to whom it has been transferred, may dismiss the complaint, if, after examining the complainant, and considering the result of the investigation (if any) made under Section 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing.

203 The Magistrate before whom a complaint is made, or to whom it has been transferred, may dismiss the complaint if *after considering the statement on oath (if any) of the complainant and the result of the investigation or inquiry (if any) under Section 202*, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing.

This section has been amended by sec 56 of the Criminal Procedure Code Amendment Act XVIII of 1923. The words 'the investigation or inquiry (if any)' have been substituted recently by the Cr P C Amendment Act II of 1926, for the words 'any investigation or inquiry' occurring in the Amendment of 1923. See Note 677 below.

675 Dismissal of complaint —Where on a complaint made against several persons the Magistrate proceeded against only one of them and convicted him, but refused to issue process against the others held that the order of refusal was to all intents and purposes an order of dismissal of complaint against those persons under sec 203—*Girish Chandra v Emp*, 29 Cal 457 *Hari Lal v Emp*, 20 Cr L J 835 (Pat). Where on a complaint being filed the Magistrate called for a police report, and subsequen-

on a consideration of that report passed the order. Enter mistake of law and refused to issue processes *held* that the order must be regarded as an order dismissing a complaint—*Shah Siddik v Shah Chakuri* 17 C W N 451 14 Cr L J 123 17 C L J 608

An application under Sec 107 does not fall within the definition of a complaint and therefore sec 202 does not apply to it but every Magistrate has the inherent power of refusing an application which he finds to be groundless and so if he is satisfied after making an inquiry that the apprehension of a breach of the peace complained of does not exist he can refuse the application under sec 107 without taking any evidence which the applicant wanted to produce—*Shamsuddin v Ram Dayal* 25 Cr L J 89 A I R 1924 Lah 630

Dismissal when can be made—This section gives very large powers to the Magistrate to dismiss a complaint without issuing a process at all against the accused persons but certain conditions are laid down in the chapter in which the section occurs and those conditions must be strictly fulfilled in making an order under this section. A Magistrate may dismiss a complaint (1) if upon the statement of the complainant reduced to writing under sec 200 he finds that no offence has been committed (2) if he distrusts the statement made by the complainant (3) if he distrusts that statement but his distrust not being strong enough to warrant him to act upon it he directs further inquiry as provided by sec 202 and after considering the result of the investigation he finds there is no sufficient ground for proceeding—*Daidyanath v Muspratt* 14 Cal 141 *In re Ganesh Narain* 13 Bom 600

There can be no dismissal of complaint under sec 203 after process has issued. This section refers to cases falling within Chapter XVI where there has been no issue of process. Where the accused has been summoned to answer a charge there is a proceeding within the meaning of Chapter XVII and the complaint cannot be dismissed under sec 203—*Q L v Budhunbhai Ratanlal* 544. Even an order directing withdrawal of process issued against the accused will not amount to an order of dismissal of complaint—12 C W N 68

Who can dismiss complaint—The complaint can be dismissed either by the Magistrate who took cognizance of it or by the Magistrate to whom it was transferred for local investigation. The District Magistrate has no power to pass any order for dismissal of complaint unless he first removes the case to his own file—6 C W N 843. When a case has been transferred to a subordinate Magistrate and is pending on his file the District Magistrate has no power to pass an order of dismissal of complaint—3 C W N 490. Unless he withdraws the case to his own file the District Magistrate cannot pass any orders in the case and the only person who can deal with the case is the subordinate Magistrate—*Q v Belhios* 12

W R 53 A complaint was originally made before a Deputy Magistrate. The Deputy Magistrate sent the case to the District Magistrate with a view to the Dt Magistrate transferring it to another Court but the Dt Magistrate instead of transferring the case to another Court examined the record and came to the conclusion that the complaint was wholly without foundation and so he dismissed it held that the District Magistrate was sufficiently seized of the case and the order passed by him was not without jurisdiction—*Gaund v Ram Das* 25 Cr L J 555 A I R 1974 All 666

Duty of Magistrate before dismissal—Before a Magistrate can dismiss a complaint he must according to the words of this section examine the complainant and consider the result of the investigation (if any) made under sec 207. In other words a Magistrate cannot dismiss a complaint without complying with the provisions of law as laid down in sections 200 and 207. Where there was no previous local investigation ordered under sec 202 nor any examination of the complainant as directed by sec 200, the Magistrate had no jurisdiction to dismiss the complaint under this section—30 Cal 923

If a Magistrate holds an inquiry under sec 207 he should not dismiss the complaint without giving the complainant an opportunity to adduce evidence in support of his case—*Dr Sandyal v Kunjeswar* 16 C W N 143. It is improper for a Magistrate to dismiss a complaint while sitting in his private room and without giving the complainant or his pleader an opportunity of being heard—10 C W N 1036

676 *Examination of complainant*—Before dismissing the complaint the Magistrate is bound to examine the complainant. Until he has at least examined the complainant he is not in a position to exercise the discretionary power to issue process or to dismiss the complaint. Therefore an order dismissing the complaint without examining the complainant is illegal—*In re Ningappa* 46 Bom 360 *In re Ganesh Narain* 13 Bom 590 *Rajgaram v Sabapathy* 4 M II C R 16

When a deposition in the shape of a complaint is made orally or in writing and is sworn to the requirements of this section as regards examination of complainant are fulfilled—9 All 666 *Thakoor Das v Bhagvan Das* 4 Bom L R 609. But merely cross examining the complainant or taking the deposition of certain witnesses in the preliminary inquiry held under sec 159 is not a sufficient compliance with the requirements of this section—30 Cal 923

Where a Magistrate examined the complainant and only one of his witnesses and without examining the rest of the witnesses dismissed the complaint it was held that the entire evidence for the prosecution should have been received by the Magistrate unless for some very strong he considered the evidence unnecessary—*Gokul Chand v Mah* A L J 451 14 Cr L J 412

In the case of a complaint of a serious offence like murder, the dismissal of the case without any judicial examination of the complainant or his witnesses is extremely illegal—*Ful'ar Rahman v Abidhar*, 23 C W N 392 20 Cr L J 175 29 C L J 50

There is nothing in this section to show that the Magistrate must at once consider the complaint and may not take time to consider the complaint petition and the examination on oath—*Laua v Jadu* 19 Cr L J 28 (Patna)

677 Investigation or inquiry (if any) —This section empowers a Magistrate to dismiss the complaint without any investigation under sec 202 if after examining the complainant he considers there is no sufficient ground for proceeding—*Lawati v Jadu Dhanuk* 19 Cr L J 228 (Patna) The Amendment of 1923 contained the words any investigation or inquiry and the words if any were omitted This led to the view that an investigation or inquiry under sec 202 was compulsory before dismissing a case under sec 203 Hence the recent amendment made in 1926 in which the words if any have been restored The Calcutta High Court in a recent decision (in the case of *Srish Chandra Bose v Madan Lal Surena*) has held that under sec 203 an investigation or an inquiry under sec 202 is necessary in all cases because the words if any have been omitted from Sec 203 after the words investigation or inquiry No such change was intended by the amendment made by Act XVIII of 1923 and the proposed addition is to make this matter clear—*Statement of objects and Reasons* (Gazette of India, 1925 Part I p 215) See also *Dukhiram v Jamuna* 6 P L T 727 26 Cr L J 921 A I R 1925 Pat 704

Where an investigation has been ordered under sec 202 the Magistrate is not bound after receipt of the report of such investigation to examine any witnesses or hold any inquiry before he dismisses the complaint It is sufficient that he takes into consideration the result of the investigation arrived at by the subordinate officer—*Munshi Mian v Enp* 19 Cr L J 126 (Patna)

678 Grounds of dismissal —A complaint can be dismissed if the Magistrate thinks that there is not a sufficient ground for proceeding The expression 'sufficient ground' in this section points exclusively to the facts which the complainant brings to the knowledge of the Magistrate and to their establishing a *prima facie* case against the accused In exercising his discretionary power of summary dismissal of complaint the Magistrate should not allow himself to be influenced by considerations altogether apart from the facts adduced by the complainant in support of the charge nor by a consideration of the motive by which the complainant is actuated What he has to consider is whether there is a *prima facie* evidence of a criminal offence which in his judgment calls upon the alleged offender to

answer—*In re Ganesh* 13 Bom 590 The decision whether there is sufficient ground must be reached by the exercise of discretion based upon judicial considerations That the Magistrate considered the probable result of the proceeding undesirable or the motives and conduct of the complainant discreditable are not relevant considerations—*Ganga v Samarapathi* 38 Mad 512 In the absence of any finding that the complaint was false or unsustainable on the evidence likely to be available the passing of an order of dismissal under this section constitutes an irregularity with which the High Court can interfere in revision—*Ganga Reddi v Samarapathi* 38 Mad 512 25 M L J 510 14 Cr L J 633

The reasons for dismissing a complaint should be based on inference of facts arising from or disclosed by (1) the complaint (2) the examination of the complainant and (3) the investigation if any made under Sec 202 This provides a wide field Anything outside it is extra judicial and must be discarded—*Mustafa v Motilal* 9 Bom L R 742

A Magistrate ought to dismiss a complaint where the subordinate Magistrate to whom the case was made over for inquiry and report under sec 20, held an elaborate inquiry examined a number of witnesses and submitted a report that there was no case against the accused In such a case the trying Magistrate acts wrongly in disregarding the report and ordering issue of summons against the accused—*Abdullah v Emperor*, 40 Cal 834 (857)

What are not proper grounds of dismissal —If the allegations contained in the complaint disclose a criminal offence a Magistrate should not dismiss the complaint simply because the case is one in which a civil remedy is obtainable —*Koshal Singh v Toolshee* 10 W R 40 A complaint cannot be dismissed on the ground that the entertaining of the complaint would encourage hundreds of such complaints and would stir up old religious feelings of animosity between the Hindus and Mussalmans—*Q L v Ram Chandra Ratanlal* 562 or on the ground that a more responsible person ought to have preferred the complaint—*Boodhoo v Ram Dyal* 18 W R 55 or on the ground that the complainant is a man of low caste and the alleged offence is theft of a turban merely a harm under Sec 95 I P C rather than an offence—*Q L v 35* or on the ground that the complainant is actuated by a private grudge and that the alleged offence was committed six years ago and that the act of the accused was held criminal a large part of the evidence would go to jail—*Q L v Manji Ratanlal* 549 or on the ground that the complainant had no personal knowledge of the facts alleged—*In re Kankuchand Ratanlal* 667 or on the ground that the complainant has been exonerated in a previous proceeding as to the facts alleged in the complaint—1887 P P 22

679 Recording reasons.—The Magistrate is bound to record his reasons for dismissing the complaint, for if that is not done, it would be impossible for the High Court to consider whether the discretion vested in the Magistrate under this section has been properly exercised or not—*Baidyanath v Muspratt* 14 Cal 141, 2 P L T 142, *Harnandan v Atul*, 26 Cr L J 1502 (Pat). An order of a Magistrate dismissing a complaint under this section without recording any reasons for dismissal but merely stating that he agrees with the police report, is improper and will be set aside—*Ahmed v Ameena* 7 M L T 175, 11 Cr L J 331.

The words in this section are he shall record therefore failure to record reasons is a direct disobedience of law and not a mere irregularity—*Maniruddin v Abdul Rauf* 40 Cal 41. *Contra*—5 M L T 79 where such failure was held to be a mere irregularity but in this case the omission was supplied by a statement under Sec 441.

680 Effect of dismissal.—A dismissal of a complaint after hearing the complainant and after considering the result of an investigation ordered under sec 202 amounts to a legal determination of the complaint, and the complainant can be prosecuted for making a false charge under sec 211 I P C—6 C W N 295. Until a complaint is dismissed under this section or is otherwise disposed of, no proceedings can be taken under sec 211 I P C against the complainant—3 C W N 758, followed in 4 C L J 88. Where a complaint has been illegally dismissed (e.g. without examining the complainant), the complainant cannot be prosecuted under sec 182 or 211 I P C for bringing a false charge—*In re Ningappa*, 48 Bom 360, 26 Bom L R 153, 27 Cal 921, *Aly Mohd v Emp* 1912 P. R. 2, *Ravi Sarup v A L* 4 O C 127.

When a complaint has been dismissed under this section, before the issue of process to the accused no compensation to the accused (Sec 250) can be awarded—*Azam v Mir Abdulla*, 1897 P R 14, *Harphul v Manku*, 1906 P R 3. It can be awarded only when the accused being summoned to attend Court is discharged or acquitted, and the complaint is found to be frivolous or vexatious—*Har Phul v Manku*, 1906 P R 3.

So also, no suit for malicious prosecution will lie against the complainant, when the complaint is dismissed under this section—25 M L J 1.

681. Power to rehear complaint or hear fresh complaint.—A dismissal under this section is a dismissal without a trial, it is therefore open to a Magistrate to rehear a complaint which he has dismissed under sec 203 or to hear a fresh complaint, though the order of dismissal has not been set aside by a higher Court—*Emp v Chinna Kaliappa*, 29 Mad 126 (T. B.), *Subbareddi v Kamal*, 16 Cr L J 814 (Mad), *Q L v Dolegoind*, 28 Cal. 211, 9 All 85, 36 Cal 415, *Makkhatambi v Hassan Ali*, 1 N L R 18, *Emp v Heryer*, 36 All 53, 5 A L J 137, 29 All 7, *Jai Kishen*

v Kalla 1 Cr L J 379 (All) 1907 P R 9 1911 P R 10 (overruling 1894 P R 33) *H E v Nga Pu* 2 L B R 27 (F B) (Contra—*Kamal chandra v Gour Chand* 4 Cal 286 73 Cal 983 18 Mad 255 where a fresh complaint was held to be barred) In *Jasua v Enp* 21 A L 215 it has been held that the Magistrate cannot reopen the same case but there is no bar to the entertainment of a second complaint on the same facts

Where a first complaint has been dismissed under sec 259 it is not a sufficient ground for refusing to entertain a second complaint and dismissing it again under sec 203—*Bulchand v Chandoomal* 8 S L R 196

When a Magistrate has dismissed a complaint his successor or any other Magistrate can entertain a fresh complaint on the same facts—36 All 129 *Bijoo v H E* 2 P L J 34 18 Cr L J 296 *Sheogovind v Emp* 1 P L T 293 In *re Mahadev* 27 Bom L R 357 26 Cr L J 991 (But in 22 All 106 it has been held that a Magistrate of co ordinate authority cannot entertain a fresh complaint on the same facts or re open the old complaint as if it were an appeal or matter of revision In 2 C W N 290 it is laid down that a complaint once dismissed by a Magistrate can not be revived by his successor in office)

But although a previous order dismissing the complaint or discharging the accused is no bar to the institution of a fresh case against the same accused still a new complaint on the same facts should not be entertained unless new facts which could not with reasonable diligence have been brought forward in the previous proceedings would be adduced or unless there was some manifest error or manifest miscarriage of justice in the previous proceedings—*U Shue v Ma Sein* 26 Cr L J 284 A I R 1925 Rang 114 *M Tha Kin v Nga E Tha* (1904) U B R 119

682 Further inquiry —Where a complaint has been dismissed under this section the High Court or Sessions Judge may direct further inquiry See Sec 436 Where a further inquiry having been ordered under sec 436, the Magistrate after taking some evidence again dismissed the complaint under sec 203 and the Sessions Judge being moved was of opinion that the Magistrate could not dismiss the complaint under sec 203 for the second time but was bound to issue process against the accused held that the Sessions Judge's view was wrong and the second order of dismissal by the Magistrate was perfectly legal—*Nidaran Chandra v Sital Chandra* 25 C W N 317 But see 11 C W N 316

It has been held in some Calcutta cases that if an order of dismissal of complaint or discharge of accused is passed by a Presidency Magistrate, the High Court has no power to direct further inquiry under any of the provisions of this Code Sec 36 does not apply to orders of discharge passed by a Presidency Magistrate sec 439 confers on a

Court all the powers of an Appellate Court under sec 123 but that section does not enable a Court of Appeal to direct that further inquiry be made into a case in which an order of *dismissal* or *discharge* may have been passed but it confers a power to direct further inquiry only in respect of a case of an appeal from an order of *acquittal*. Hence it follows that the High Court cannot order further inquiry under this Code after discharge or dismissal of complaint by a Presidency Magistrate but the High Court can do so only under sec 15 of the Charter Act. And its powers of interference under the Charter Act are very limited. It cannot interfere on the ground of any error of law but only on a ground affecting jurisdiction i. e. where the subordinate Court refused or failed to exercise jurisdiction or erred in the exercise of its jurisdiction—*Charoobala v. Barendra*, 27 Cal 126 (129) *Debi Bux v. Jismal* 33 Cal 1282 *Kedar Nath v. Akhetranath* 6 C. L. J. 705. But in several other cases it has been laid down that secs 435 and 439 of this Code confer upon the High Court the power of sending for the records of Presidency Magistrates and of reversing the order of the Magistrates and ordering a further inquiry in the case of dismissal of complaint or discharge of accused—*Cohille v. Krishno Krishore* 26 Cal 746 *Duarka Nath v. Beni Madhab* 28 Cal 65- (1 B) *Malik Pratap v. Khan Mahomed* 30 Cr L 994 and the High Court can direct further inquiry, if there are good reasons for doing so although no question of jurisdiction arises in the case—36 Cal 994.

683 Death of complainant—Effect.—As there is no abatement of a criminal case on the death of the complainant a fresh complaint on the same facts need not be made but the old complaint must be treated as pending and proceeded with to its disposal—*In re Ramasamiar*, 16 Cr L J 713 (Mad.)

CHAPTER XVII

OF THE COMMENCEMENT OF PROCEEDINGS BEFORE

MAGISTRATES

204 (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground
 Issue of process for proceeding, and the case appears to be one in which, according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one which, according to that column, a warrant

should issue in the first instance, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has not jurisdiction himself) some other Magistrate having jurisdiction

(2) Nothing in this section shall be deemed to affect the provisions of Section 90

(3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, and if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint

685 Magistrate taking cognizance —Where a Joint Magistrate who took cognizance of a case made over the case to a Deputy Magistrate for disposal the former ceased to have any control over the case. The case having been transferred to the Deputy Magistrate that officer alone had jurisdiction to deal with an application for summons until the case was withdrawn from his cognizance. Therefore if he refused to issue process is unnecessary the Joint Magistrate had no jurisdiction to order for its issue—*Ijab Lal v. Imp.* 3 Cal 783; *Fant Bhu an v. Imp.* 10 C W N 1086

Offence —Process can issue only for an offence already committed. It is not competent for the Magistrate to issue process in anticipation of an offence. Such a case is for the interference of the Police and not of the Magistrate—Ratanlal 90

A neglect to maintain a wife is not an offence therefore an application for maintenance under sec 488 should not be dismissed under subsection (3) of this section owing to the applicant's failure to comply with an order for the payment of process fees—16 Mad 234

686 Sufficient ground —The only condition requisite for the issue of process is that the complainant's deposition must show some sufficient ground for proceeding. Unless the Magistrate is satisfied that there is sufficient ground for proceeding with the complaint or sufficient material to justify the issue of process he should not issue process—*Jogesh v. Abdul* 18 Cr L J 626 (Cal). Where the complainant who instituted the prosecution had no personal knowledge of the allegations made in the complaint, the Magistrate should satisfy himself upon proper materials that a case had been made out for the issue of process—*Thakur Prosad v. Imp.* 10 C W N 1090; *Chamroo v. Imp.* 11 C W N 170

In exercising the discretion under this section as to whether a should issue, the Magistrate must be guided by his own independent

ment and not by the judgment of others e g an expression of opinion by the Police—4 M H C R 162

687 Issue of process —Proceedings are said to commence under this chapter when processes are issued against the accused, after the issue of process a complaint cannot be dismissed under sec 203—Ratanlal 544 See Note 675 under sec 203

If the Magistrate issues a warrant in a case in which he ought to have issued a summons the error of the Magistrate is not a ground for questioning the proceedings—1 W R 16 Under such circumstances the Magistrate can cancel the warrant and issue summons instead—1 S L R 69 *Crown v Zaki Khan* 7 S I R 40 14 Cr L J 604

An order directing issue of process is not a judgment within the meaning of sec 369 and therefore a Magistrate making the order of issue of process can rescind the order on sufficient grounds—*Lalit Mohan v Nani Lal* 27 C W N 631 A I R 1923 Cal 662

When unnecessary —Process is unnecessary when the accused voluntarily appears to answer the charge against him—Ratanlal 8 Where the complainant has taken process against some of the accused the others are entitled to appear and insist that the complaint against them shall be proceeded with or dismissed—76 Bom 557

Refusal to issue process —Where the Police report is true and the Magistrate has directed the case to be entered as such he cannot refuse to issue process simply because there is no chance of conviction and no useful purpose would be served by an inquiry the complainant is entitled to a process against the accused and for the attendance of his witnesses—29 Cal 410 In an inquiry before the Magistrate in a Sessions case the evidence for the prosecution discloses a *prima facie* case against the accused and the evidence stands un rebutted the Magistrate cannot discharge the accused simply because the evidence appears to be improbable In doing so the Magistrate is really trying the case instead of merely considering whether there are sufficient grounds for commitment—1904 A W N 5

So also when from the examination of the complainant it appears that there is reason for the issue of process against *all* the accused the Magistrate exercises a wrong discretion in issuing process against *some* of the accused and in refusing to issue process against the others He must issue process against all—*Bishan Dayal v Chedi Khan* 4 C W N 560

But where two counter complainants preferred complaints before a Magistrate and he issued process in one case and postponed the issue of process in the counter case until after the disposal of the first case held that the action of the Magistrate was not illegal—*Lali v Naurangi* 24 Cr L J 120 3 P L T 764 A I R 1922 Pat 618

688 Sub sec (3)—Process fee —An application for maintenance under sec 488 cannot be dismissed for default to pay process fees See 16 Mad 234 cited in Note 685 above

If the case is *adjourned* the witnesses should be told to appear on the adjourned date and the party should not be required to repeatedly summon his witnesses on payment of fresh process fees A dismissal of complaint on failure to pay such fees in such a case is not proper—*Balinaki and v Naval Chand* 1917 P I R 60 13 Cr L J 176

205 (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do dispense with the personal attendance of the accused and permit him to appear by his pleader

(2) But the Magistrate inquiring into or trying the case, may, in his discretion at any stage of the proceedings, direct the personal attendance of the accused and if necessary enforce such attendance in manner hereinbefore provided.

689 Scope of section —Although this section speaks of issue of summons it is not confined to summons cases only If in a warrant case the Magistrate issues a summons instead of a warrant to a *pardanashin* lady he can dispense with her personal attendance—21 Cal 588 *Prem Katar v Mai Sham* 1908 P W R 20 8 Cr L J 454

Again the section applies only where a summons has been issued to the accused if however a warrant is issued against him his personal attendance cannot be dispensed with unless he is too ill to attend the Court—13 C W N cl In a Patna case where the accused had been arrested by warrant the High Court held that it was illegal to dispense with his personal appearance and to allow him to be represented by a pleader even though he was ill—*Abdul Hamid v K E* 2 Pat 793 4 P I T 648 24 Cr L J 872 Where the accused absconded after the charge had been framed against him and he was convicted and sentenced in his absence held that as in this case a warrant had been issued for his arrest in the first instance the Magistrate could not dispense with his personal attendance—*Crown v Sardar* 1917 P R 36 18 Cr L J 975

690 *Pardanashin lady* —A *pardanashin* lady cannot as of right claim exemption from personal attendance in Court and the Magistrate cannot dispense with her appearance simply because she is a *pardanashin* lady—5 All 92 But in a summons case the Magistrate should use his discretion under this section by dispensing with her personal attendance and allowing her to appear by a pleader until he has before him clear direct

and *prima facie* proof of an offence committed by her—6 All 59 *Prem Anar v Maisham* 1908 P W R 20 *Hablu v Crown* 1909 P W R 5 *Crown v Bachat* 7 S L R 161 15 Cr L J 539, *Crown v Zalikhhan* 7 S L R 40 14 Cr I J 604 In a Sessions case she may be permitted to appear by a pleader before the committing Magistrate as well as before the Sessions Court but she will have to appear before that Court to hear the sentence in case of conviction—*Raj Rajeswari v King Emp*, 17 C W N 1248 *In re Ka damani* 45 Mad 350 42 M I J 337 23 Cr L J 266

69 *Appearance by a pleader*—On service of summons the accused need not personally attend but may appear by a pleader. Such appearance is a valid appearance and the Magistrate cannot prosecute the accused under section 171 I P C for non appearance (disobedience to summons)—27 Cal 985 no can the Magistrate proceed *ex parte* and decide the case—24 W R 25 If however the Magistrate requires personal attendance he should direct such appearance on a fixed date and in default may issue a warrant—27 Cal 985

The pleader appearing for the accused may perform all the acts which devolve upon the accused in the course of the trial, thus he can answer the questions put to him by the Court in his examination under sec 342 he can plead or refuse to plead to a charge under sec 255—*Crown v Jamal Khatoon* 6 S L R 206 14 Cr I J 272

Although the Magistrate can, under sub-section (2) revoke the permission to appear by pleader and enforce the personal attendance of the accused still the Magistrate ought not to do so in a trivial case (e g a case under the Income Tax Act) and on a trivial ground e g merely on the ground that the accused objects to the case being tried by that Magistrate and wants it to be transferred to some other Magistrate—*Dwijendra v Emp* 38 C L J 9 24 Cr L J 902

Appearance by other persons—Where the accused was represented by her mother in law and the Magistrate proceeded with the case and convicted the accused the conviction was set aside by the High Court as there was no proper representation of the accused in the case—*Q E v Vithi Ratanlal* 205 but where in an extremely trivial case the accused was represented by her father in law and convicted the High Court refused to interfere—*Q E v Chandrabhaga Ratanlal* 206

CHAPTER XVII

OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT

692 **Object of preliminary inquiry** —The object of the law in requiring an inquiry before a trial in the Court of Session is to prevent the commitment of cases in which there is no reasonable ground for conviction. This provision of law while it saves the accused persons from detention in custody and prolonged anxiety of undergoing trials for offences not brought home to them also saves the time of the Court of Session from being wasted over cases in which the charge is obviously not supported by such evidence as would support a conviction—*Lachman v Juala* 5 All 161. A preliminary inquiry also affords the accused an opportunity of becoming acquainted with the circumstances of the offences imputed to him and enables him to make his defence—*Rama Larma v Q* 3 Mad 351.

No accused can be committed to the Sessions without a preliminary inquiry under this chapter—*Emp v Bu Malalaxmi* 17 Bom L R 910 16 Cr L J 747.

206 (1) [* * * * *] Any President v Magistrate District Magistrate Sub Divisional Magistrate or Magistrate of the first class, or any Magistrate (*not being a Magistrate of the third class*) empowered in this behalf by the Local Government may commit any person for trial to the Court of Session or High Court for any offence triable by such Court.

(2) But save as herein otherwise provided no person triable by the Court of Session shall be committed for trial to the High Court.

Change —The words *Subject to the provision of sec 443* occurring in the old section at the very beginning have been omitted by section 9 of the Criminal Law Amendment Act (XII of 1923) because the old section 443 which specified the Magistrates competent to inquire into or try a charge against an European British subject has now been repealed and substituted by an entirely new section. See Chapter XVIII.

The italicised words have been added by sec 57 of the Criminal Procedure Code Amendment Act (XVIII of 1923). This amendment is

on the same lines as that of section 144 (1). We do not think that the powers under this section should be granted to a Magistrate of the third class—*Report of the Select Committee of 1916*.

693 Committal by Magistrate without jurisdiction.—Where the committing Magistrate has authority to commit but has no territorial jurisdiction in the place where the offence is committed the irregularity will be cured by sec 531 unless it has occasioned a failure of justice—*Mad 640 17 Mad 402 In 11 C L R 55 3 All 251 and Ratanlal 977* such a committal was held to be void.

Committal to wrong sessions—See Note 549 under sec 177.

649 Offence triable by such Court.—The procedure to be adopted under this chapter is not confined to cases exclusively triable by the Court of Session but is also applicable to cases which in the opinion of the Magistrate concerned ought to be tried by such Court—*6 All 477* as for instance cases in which the Magistrate cannot inflict a adequate punishment upon the accused—*24 Cal 429 4 Bom L R 85*. In such cases the Magistrate must state his grounds in the order of commitment so as to enable the High Court in revision to judge whether he has exercised a proper discretion—*11 Bom I R 18 Diwan Chand v Crown 8 S L R 73 15 Cr L J 664*.

If the case is one which the Magistrate can try and in which he can inflict adequate punishment he cannot commit it to the Sessions but should try it himself—*Diwan Chand v Crown 8 S L R 23 Emp v Asha Bhatti 15 Bom L R 908 K E v Dharam Singh 3 A L J 14 Emp v Ram Jatan 21 A L J 470*.

If the offence is one triable exclusively by the Court of Session the Magistrate is bound either to discharge the accused or commit him for trial but he cannot make over the case for trial to a Deputy Commissioner with special powers under sec 30—*7 C W N 457* nor can he try it himself—*Ratanlal 953*.

It is illegal to commit summons cases to the Sessions—*K E v Dharam Singh 3 A L J 14*.

207 The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate ought to be tried by such Court.

Procedure in inquiries preparatory to commitment

695 Ought to be tried.—The words ought to be tried in this section and sec 347 must be read with sec 254. A case which ought to be tried by the Court of Session is one which the Magistrate is not

competent to try or one in which in his opinion adequate punishment cannot be inflicted by him—4 Bom L R 85 16 Bom 580 1886 A W N 256 *Emp v Hanuman* 20 Cr L J 97 (Nag) *Emp v Ismail* 11 S L R 79 *Dixitichand v Crown* 8 S L R 23 Q L v *Kayimulla* 24 Cal 429 See also *Emp v Jagmohan* 6 A L J 989 *Emp v Bindeshin*, 41 All 424 If the case is one which he has jurisdiction to dispose of or if he can inflict adequate punishment he should not send up the case for trial to the Court of Session—*Dixantichand v Crown* 15 Cr L J 664 8 S L R 23 A L v *Dharam Singh* 3 A L J 14 *Emp v Asha Bhatti* 15 Bom L R 998 14 Cr L J 637 he should not commit the case if he can try it himself, on the sole ground that the accused had been committed in another case—*Emp v Hanuman*, 20 Cr L J 97 (Nag) But in *Crown v Ali* 1917 P R 13 and *Crown v Bhagatathi* 42 Mad 83 (dissenting from the above cases) it has been held that the incompetency of the Magistrate to try the case or to pass adequate sentence is not the only ground for committal The Magistrate may commit for any other sufficient reason Thus where the Magistrate committed certain persons to the Sessions on charges under sec 147 I P C not because he could not pass adequate punishment but because other persons on the other side have been committed to the Court of Session on charges under Secs 304 325 148 and 149 I P C it was held that the committal was not illegal—*Crown v Ali* 1917 P R 13 18 Cr L J 524

208. (1) The Magistrate shall when the accused appears **Taking of evidence** or is brought before him, proceed to hear **produced** the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate

(2) The accused shall be at liberty to cross examine the witnesses for the prosecution, and in such case the prosecutor may re-examine them.

(3) If the complainant or officer conducting the prosecution, **Process for production of further evidence** or the accused, applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so

(4) Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons

696 Remand of accused before taking evidence—A person arrested under a warrant should be brought promptly before the Magistrate and the Magistrate has then no authority to further detain him in custody or remand him to prison without sufficient cause—70 W R 23 If from the absence of the witness or from any reasonable cause it becomes necessary or advisable to defer the inquiry the Magistrate instead of immediately examining the complainant and his witnesses is required by this section may remand the accused person If there is some evidence available and further evidence is forthcoming it may be desirable to postpone the inquiry for a short period in order that when commenced it may be continuous But the fact that there is or may be a great body of evidence forthcoming against the accused is not a ground of detention for an inordinate period—6 Mad 63 Similarly where there is no evidence at all to begin with a Magistrate will not be justified in remanding the prisoner in the expectation that evidence might turn up 4 B L R App 1

697 Taking evidence pro d ced A commitment made without taking any evidence on a preliminary inquiry is illegal Ratanlal 100 Under this section it is the duty of the Magistrate to take all evidence tendered by both sides before framing a charge—Crown v Po Njan 1 L B R 348 In every inquiry into a Sessions case it is the duty of the committing Magistrate to make a full and careful inquiry and to record the whole evidence in the case He should do so even when the accused has made a confession as confessions are in many cases retracted at the trial—Ratanlal 842 The Magistrate is bound to take all such evidence as may be produced (1) in support of the prosecution (2) on behalf of the accused and (3) as may be called for by the Magistrate—Durga Dutt v K E 10 A L J 144 13 Cr L J 443 A commitment or discharge without examination of all the witnesses for the prosecution is illegal—4 Mad 227 4 Mad 329 The prosecutor is bound to produce all evidence in his favour directly bearing on the charge and to call those witnesses who prove their connection with the transaction in question and are able to give important information unless there is reasonable belief that they will not speak the truth—8 Cal 121 The prosecutor should not refuse to call or put into the witness box any witness for the prosecution merely because the evidence of such witness might on some respects be favourable to the defence—15 All 84 It is his duty to call all witnesses who can throw any light on the inquiry whether they support the prosecution theory or the defence theory—1 P L T 161 But if the prosecutor is of opinion that a witness is a false witness or is likely to give false testimony he is not bound to call that witness—16 All 84 14 All 521 15 All 6

If all the witnesses are not called for the prosecution without sufficient cause the Court may properly draw an inference adverse to the prosecution—8 Cal 121 But no corresponding inference will be drawn against the

accused for non production of his witnesses. He may rely on the witnesses for the prosecution or call his own witnesses or meet the charge in any other way he chooses—8 Cal 121 *Ashraf Ali v K E* 21 C W N 1152 19 Cr L J 81. In a recent Patna case it has been laid down that if the prosecution did not send up all the material witnesses it is the duty of the committing Magistrate to call and examine them himself in order to determine which side was speaking the truth—*Pers ad v Emp* 26 Cr L J 1589 A I R 19 6 Pat 5.

The Magistrate is competent to cross examine the prosecution witnesses in order to consider whether the witnesses are credible or not—*Emp v Bai Mahalaxmi* 17 Bom L R 910 16 Cr L J 747.

Evidence for the accused—The Magistrate is not empowered to frame a charge or make out an order for commitment until he has taken all such evidence as the accused may produce or is prepared to produce before him for hearing—*Q E v Ahmed* 20 All 264 *Emp v Muhammed Hadi* 26 All 177 *Jaswant Singh v Emp* 21 A L J 911 46 All 137. The accused must be given an opportunity of adducing evidence on his behalf and the Magistrate cannot refuse to take it without recording his reasons—Ratanal 100.

698 Sub section (2)—Right of cross examination—Under this subsection the accused has a right to cross examine the witnesses for the prosecution. Refusal by a Magistrate to allow the accused to cross examine the prosecution witnesses during the inquiry is arbitrary and improper. The deposition of the prosecution witnesses during the inquiry are not to be deemed as duly taken if the accused had not had an opportunity to cross examine them and cannot be treated as evidence at the Sessions trial—*Q E v Sagal* 21 Cal 642.

Under this section the accused has the right to cross examine the prosecution witnesses before the proceedings have reached the stage in which it may be necessary to draw up a charge—5 C W N 110 21 Cal 642 *Durga Dutt v K E*, 10 A L J 144 *Baldeo v K E* 19 O C 239 18 Cr L J 105. Where an application to cross examine was made before the charge was framed and before the Magistrate had decided to commit the case to the Court of Session, he was bound to allow the accused to cross-examine the prosecution witnesses—*Jyotsna Nath v Emp* 31 Cal 44 (445). The proper time for cross examination of a witness in an inquiry under this chapter is in the ordinary course immediately after the examination in-chief of that particular witness—*Emp v Arnold* 6 L B R 129 5 Bur L T 239 *Tam v Emp* 9 L B R 109 11 Bur L T 144. As each witness is examined by the prosecution he should be then and there cross-examined by the accused and re-examined by the prosecution and allowed to go home.

and it is not a convenient procedure to allow cross examination to be reserved until after the examination in chief of all the prosecution witnesses has been finished—*Durga Dutt v K E* 10 A L J 144 13 Cr L J 443 *In re Mahomed Hasim* 14 M L T 532 15 Cr L J 29 *Tam's v Emp* 11 Bar L T 144 *In Jogendra v Mohlal*, 39 Cal 885 16 C W N 1155 however, it has been held that it is open to the Magistrate to allow cross examination of the prosecution witnesses even after a charge is drawn up See this case cited under sec 213 (2)

But where a case was at first begun as a warrant case and the accused had not cross examined the witness because in a warrant case he could reserve his rights to do so until after the framing of the charge but after hearing the prosecution evidence the Magistrate came to the conclusion that the case was a Sessions case and thereupon converted the proceeding into one under this chapter held that the accused had a right to have the witnesses recalled for cross examination as he had been prejudiced by the sudden change of procedure—*Diamirchi v Emp*, 19 A L J 463 23 Cr L J 496

The procedure of this section is to be followed in cases under sec 347 See sec 347 as now amended

699 Sub section (3) —Summoning witnesses —Before committing the accused to the Sessions the Magistrate should if so required by the accused compel the attendance of witnesses for the defence If he commits an accused to the Sessions without examining the witnesses applied for under this subsection the order of commitment is invalid—*Emp v Muhammal Hadi* 26 All 177 The accused (as well as the complainant) has the right to call upon the Magistrate to compel the attendance of witnesses who have been summoned but failed to attend—1 C W N 548 But the Magistrate has also a discretion to refuse to issue process if he thinks it unnecessary to do so He may refuse process where there has been an inordinate delay in asking for it e g when the accused made the application for process not until the charge was about to be drawn up—*Sessions Judge v Kangaya* 36 Mad 321 23 M L J 368 The Magistrate may reject the application for summoning witnesses if it is made on the date fixed for passing the order of commitment—*Emp v Sarath* 42 Cal 608 19 C W N 335

Moreover it is not incumbent on the Magistrate to summon every person named as a witness by the complainant 23 W R 9 For instance Hindu ladies of respectability and secluded habits would not be compelled to attend as witnesses when no distinct case is made out against the accused—3 W R 46

If the Magistrate refuses to issue process he must record his reasons for so doing if he rejects the application for process without recording reasons he acts illegally—3 All 392

But if the Magistrate issues process for the attendance of witnesses, he is bound to examine them and cannot refuse to do so. Therefore where on the application of the accused the Magistrate summoned witnesses for the defence and consented to make a local inspection, but under a direction from the Sessions Judge committed the accused for trial without examining those witnesses and without making the local inspection it was held that the commitment was illegal and should be set aside—*Emp v Mathura*, 1906 A W N 306 4 C L J 451

209 (1) When the evidence referred to in Section 208, sub-sections (1) and (3), has been taken, and

When accused person to be discharged

he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless

700 Examination of the accused.—The object of examining the accused is to enable a Judge to ascertain from time to time particularly if the accused is undefended what explanation he may offer regarding any facts stated by a witness appearing against him so that these facts should not stand unexplained—1 M H C R 199 6 Cal 96 But the accused should not be examined for the purpose of making him confess his guilt or admit facts which may go to incriminate him—2 C W N 702 1 C L R 436, 1 M H C R 199 10 Mad 295 6 C L R 431 See Note 974 under sec 342

Moreover, the accused should not be examined for the purpose of filling up gaps in the evidence for the prosecution—26 Cal 41 nor for the purpose of supplementing the evidence where it is deficient—1 C L R 436 The accused must be examined as an *accused* and not as a *witness*. Where on a complaint against two persons for an offence the committing Magistrate inquired into the case against one of them and examined the other as a *witness*, the second accused could not be committed to the Sessions in the absence of a preliminary inquiry into his case and without examining

him as an accused—*Emp v Bai Mahalaxmi* 17 Bom L R 910 16 Cr L J 747

It is not left to the discretion of the committing Magistrate as to whether he should examine the accused or not he is bound to examine It is the duty of the Magistrate before committing the accused to examine him for the purpose of enabling him to explain any circumstances appearing in the evidence against him If the Magistrate commits the accused without examination the commitment should be quashed if it has occasioned a failure of justice—3 Mad 636

The accused should not be ordered to file any written statement—Weir 255 but if he chooses to make any statement the Court should not refuse to allow him to do so—10 C L R 54

701 Duty of Magistrates—sufficient grounds —A Magistrate should not commit an accused to the Sessions simply because the case is a Sessions case and because the evidence for the prosecution discloses an offence He may examine the accused and his witnesses and decide whether there are sufficient grounds for commitment—*Emp v Dukes* 1899 A W N 135

The words sufficient grounds of commitment are ambiguous and have led to a difference of opinion among the High Courts as to whether the Magistrate should weigh the evidence and decide whether the conviction of the accused is certain or whether the Magistrate should merely see if a *prima facie* case has been made out and there is a possibility of conviction

On the one hand it has been laid down that in deciding whether there are sufficient grounds for commitment the Magistrate is to see whether there are credible witnesses to facts which if believed by a jury would justify the conviction of the accused but it is not the duty of the Magistrate to weigh the evidence If he proceeds to weigh the evidence to accept some statements and reject others to deal with probabilities or to draw inferences as to knowledge or intention he is in reality dealing with the question of the guilt or innocence of the accused and is usurping the functions of the trial Court He must not in any way encroach upon the functions of the jury—*National Bank v Kotlandarama* 14 M L T 200 14 Cr L J 529 The Magistrate has not to pronounce a definite judgment on the question whether the accused is guilty or innocent The only question he has to decide is whether there are sufficient grounds for committing the accused for trial i.e. whether there is or is not sufficient legal evidence or reasonable ground of suspicion—*Fattu v Fattu* 26 All 564 The words sufficient grounds of commitment do not mean sufficient grounds of conviction but evidence which is sufficient to put the accused on his trial and such a case arises when credible witnesses make statements which if believed would sustain a conviction The weighing of their testimony with

regard to improbabilities and apparent discrepancies is more properly a function of the Court which is to try the case than that of the committing Magistrate Ratanlal 319 11 Bom 372 27 Bom 84 1903 P R 14 When the Legislature speaks of sufficient grounds for committing for trial it should not be supposed to have spoken of sufficient grounds for conviction The intention of the legislature is to make a distinction between grounds of commitment and grounds for conviction Satisfactory proof of the guilt of the accused is the ground for conviction Satisfactory evidence to go to trial must be regarded as the ground for committing for trial What the inquiring Magistrate has got to try and determine is not whether the case has been made out by the prosecution but only whether there is a case for trial There is always a case for trial when the evidence is of such a nature that the guilt of the accused can be held to be proved or disproved only as the result of the valuing and the weighing of evidence But if the evidence be of such a nature that no reasonable person and no tribunal Judge or jury would ever on that evidence hold the accused guilty it follows that there is no case for trial and it is then a case for the enquiring Magistrate to discharge—*In re Mania Manicka* 48 Mad 874 49 M L J 155 26 Cr L J 1570 A I R 1925 Mad 1061 What the Magistrate has to consider is not whether the conviction of the accused is reasonably certain but whether there is evidence on which a conviction is possible in law—27 Bom 84 Where the prosecution produced a good deal of direct evidence it is no function of the Magistrate to weigh the evidence but he should commit the accused person for trial It is the duty of the Magistrate to commit when the evidence for the prosecution is sufficient to make out a *prima facie* case against the accused—*Manila v Crown* 4 Lah 69 5 Lah L J 276

On the other hand there are some cases in which it has been laid down that a Magistrate is competent to weigh the evidence and to decide whether it is credible or not Thus in an earlier Allahabad case it has been held that the power given to Magistrates under this section extends to weighing of evidence and the expression sufficient grounds must be understood in a wide sense so as to indicate such evidence as would justify a conviction—5 All 161 Notwithstanding direct evidence adduced against the accused it is not incompetent to a Magistrate to examine the credibility of the evidence to see whether the prosecution case is improbable and the evidence unreliable—*Rash Behari v Emp* 1 C W N 117 *In re Bai Parbati* 35 Bom 163 *Munshi Mander v Haru* 25 Cr L J 1089 6 P L T 146 *Tinkhori v Emp* 1 P L T 153 21 C L J 328 1922 M W N 326 *Sultan v Crown* 1909 P R 10 *Mir Abdulla v Crown* 1910 P L R 215 11 Cr L J 751 The Magistrate has discretion and power to weigh the evidence in order to see whether the case is a fit one for the jury to decide

or whether there is no *prima facie* case for the accused to meet—*Thun Malai I anlaya v Lmp* 42 M I J 49 30 M I T 77 23 Cr L J 209 It is open to the committing Magistrate to form his opinion with regard to the credibility of the witnesses called before him but of course it is not his duty to closely criticize their evidence—*Tarapada v Kalipada* 51 Cal 81 (852) 24 C W N 587 Where charges exclusively triable by a Court of Session are brought before a Magistrate and some evidence is offered in support thereof it is not his duty in all cases to commit the accused to the Sessions The Magistrate should exercise his discretion and after weighing the evidence decide whether or not he should try the case himself—*Lmp v Hari Das* 37 C I J 34 *In re Kalyan Singh* 21 All 265

702 When Magistrate should commit—(1) Where there is credible evidence which if believed shows that there is a *prima facie* case which ought to be tried at the Sessions the Magistrate should commit the case to the Sessions and not try it himself—15 Mad 39 *Tarapada v Kalipada* 51 Cal 849 (852) 1908 P R 14 *National Bank v Kathandarama* 14 M L T 200 *Jamal Mahomed v Moideen* 9 M L T 71 12 Cr L J 20 2 Weir 258 1904 A W N 5 11 Bom 372 *Makhni v Iarand Ali* 18 A L J 23 21 Cr L J 318

(2) Where the question of discharge or commitment turns on probabilities the Magistrate ought rather to leave the decision to the Sessions Court than to order a discharge on the improbabilities of the case by giving the benefit of doubt to the accused—*Fattu v Fattu* 26 All 564 *Chiranj Lal v Ram Lal* 1904 A W N 5 *Akbar Ali v Raja Bahadur* 27 Cr L J 2 (All) *Makhni v Far and Ali* 18 A I J 23 *In re Bai Parvati* 35 Bom 163 11 Bom 372 14 W R 16 1917 L B R 3rd Qr 29 *Idas Tekchand v Saban* 15 S L R 1

(3) Where a person is charged with an offence triable exclusively by the Court of Session and there is some evidence to support the story of the complainant it is the duty of the Magistrate to commit the accused for trial by that Court and not to disregard the graver charge merely because he considers the prosecution story to be an exaggeration and to convict the accused of other minor offences immediately connected with the graver offence—23 C W N 1021

(4) Where the evidence discloses a circumstance of aggravation which makes the offence one cognizable by a higher Court it becomes the duty of the Magistrate to use the proper procedure for sending the case to the higher Court and not to try it himself It is an evasion of law to treat an aggravated offence as an ordinary offence and thus to introduce a different jurisdiction or a lower scale of punishment—13 Bom 502 *Jamal Mahomed v Moideen* 9 M L T 71 12 Cr L J 20 10 Cal 85 24 M d 675

703 When Magistrate should not commit—(1) Where no *prima facie* case has been made out—15 Mad 39 2 Weir 255

(2) When the Magistrate is clearly of opinion that the evidence for the prosecution is on the whole untrustworthy and that there is no reasonable probability of the case ending in a conviction—7 C W N 77 *Tarapada v Kalipada* 51 Cal 849 *Fattu v Fattu* 6 All 564 *In re Bai Parvati* 35 Bom 163 *In re Damappa* 15 Cr I J 373 (Mad) 5 All 161 *Thirumalais v Emp* 42 M L J 49 *In re Naramban* 19 A M W N 376 *Manlu v Crown* 4 Lah 69 23 Cr I J 601 (Lah) *Dharam Singh v Jyoti Prasad* 37 All 355 *Id Abdul v Baldeo* 44 All 57 *Akbar Ali v Raja Bahadur* 27 Cr I J 2 (All) *Emp v Ganpat* 46 All 537 (538) 27 A I J 411 *Tinkouri v Emp* 1 P I T 153 15 S L R 1 1917 U B R 3rd Qr 29 If the Magistrate is satisfied that the charge is without foundation he is entitled and indeed it is his duty to discharge the accused even though the statements of the prosecution if accepted at their face value might make out a *prima facie* case against the accused—*Emp v Ganpat Lal* 46 All 537 (dissenting from *Chiranjil Lal v Ram Lal* 1904 A W N 5) Though in case of doubt the Magistrate may be justified in leaving the case for the jury to decide still if he is convinced that the evidence is false it is his duty to discharge the accused—*Kasim Ali v Sarada* 30 C. W N 336 But the Magistrate must exercise a proper discretion in ordering the discharge of any person charged with a serious offence. It is not enough for the Magistrate merely to doubt some portions of the prosecution evidence. He must be satisfied that the prosecution will fail and rightly fail in the sessions Court—*Citlida v Emp* 1 O W N 402 11 O L J 654 25 Cr L J 1189

(3) Where no evidence is forthcoming against the accused owing to the absence of the prosecutor and his witnesses and the case is not one in which the Magistrate ought to adjourn the inquiry—15 W R 53

In all the above cases the Magistrate should discharge the accused

(4) Where the charge is not so serious as to justify a committal the Magistrate should not shirk the responsibility of trying the case by committing it to the Sessions—*Crown v Ahmed Shah* 1 S I R 103

704 Recording reasons—A Magistrate discharging an accused person under this section should record his reasons for so doing. But if he omits to record reasons it cannot be said that the order of discharge is illegal—41 B R 36 But the Magistrate is not authorised to write a judgment. All that he is empowered to do is to record reasons for a discharge if he makes such an order and to sign the order of discharge—*Haid Rim v Ganga Sahai* 40 All 615 16 A L J 486 19 Cr I J 706

705 Effect of discharge—fresh proceedings—An order of discharge does not amount to an acquittal. The discharge of a person accused of offence triable exclusively by the Court of Session is no bar to his

apprehended and brought before a Magistrate with a view to his commitment—*Q v Telkoo*, 8 W R 61 10 Bom 319 See sec 437 Even if the Magistrate purports to *acquit* the accused such an acquittal is really a *discharge* and is no bar to fresh commitment Thus where a complaint was made of an offence triable exclusively by the Court of Session and the Magistrate took evidence and framed a charge for a minor offence and acquitted the accused the order of acquittal was in effect an order of discharge in respect of the original offence complained of, and the Sessions Judge in revision could order the commitment of the accused on the original charge under sec 436 (now sec 437)—24 Mad 136 *Khaun v Emp* 25 Cr L J 1368 (Sind) *Contra*—20 Cal 633 23 Mad 225 See these cases cited under sec 437

The District Magistrate or Sessions Judge directing further inquiry or commitment under sec 437 is bound to consider all the grounds upon which the order of discharge has been passed including a consideration of the evidence which has been disbelieved or held to be insufficient to establish a *prima facie* case—7 C W N 77

Compensation—No compensation should be awarded to the accused person discharged under this section on the ground that the charge is vexatious if the case is one triable exclusively by the Court of Session—*Q E v Lalbu Ratanlal* 961 See sec 250

706 Subsection (2)—Discharge at early stage—Subsection (2) relieves a Magistrate from the necessity of going on with an inquiry or trial when he is reasonably convinced on what has been already deposed to that a criminal charge cannot be sustained—*Dhanjibhai v Pyarji Ratanlal* 201 *Thirumalais Pandaya v Emp* 42 M L J 49 23 Cr L J 209

707 Interference by High Court—See secs 436 437 If an order of discharge is passed by a *Presidency* Magistrate the High Court can interfere and direct a commitment not merely by virtue of the power given by sec 15 of the Charter Act but also by the powers conferred by sec 439 of this Code—*Emp v Varjundas* 27 Bom 84 (following 26 Cal 746 and dissenting from 27 Cal 126) See Note 682 under sec 203

210 (1) When, upon such evidence being taken and such examination (if any) being made, the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged

(2) As soon as *such* charge has been framed, it shall be read and explained to the accused, and a copy thereof shall, if he so requires, be given to him free of cost

Charge to be explained, and copy furnished to accused.

Change —The words "such charge" have been substituted for the words "the charge" by section 58 of the Criminal Procedure Code Amendment Act XVIII of 1923 "We have made this verbal amendment to meet a suggestion of the Bengal Government"—*Report of the Select Committee of 1916*

708 "Upon such evidence" —See section 208 It is illegal to commit an accused without taking any evidence in the preliminary inquiry—*Ratanlal 100* So also, it is illegal to frame a charge or order commitment without taking *all* the evidence produced by the accused—20 All 264 If the case is transferred from the Court of one Magistrate to another, the latter can commit the case to the Sessions acting upon the evidence recorded by the former—*K E v Nanhua*, 12 A L J 467 36 All 313 13 Cr L J 354

709. Sufficient grounds —See Note 701 under section 209 A commitment can be made only when there are sufficient grounds for committing, that is to say, not merely sufficient allegations as to the offence which may or may not be credible but such grounds as satisfy the Magistrate as being sufficient to support a charge A District Magistrate cannot therefore order a Subordinate Magistrate to commit a case unless it appears that the latter had no good reason to discredit the prosecution witnesses and that their evidence was *sufficient in law to form the basis of a conviction*—*Emp v Rauji*, 9 Bom L R 225 5 Cr L J 213

The discretion given to Magistrates to decide whether there are sufficient grounds for commitment is a judicial discretion and must be exercised with care and on some proper ground It is an improper exercise of discretion to add a grave charge without sufficient evidence, for the mere purpose of committing the case to the Sessions—*Emp v Mahomed Khan*, 11 Bom L R 18 9 Cr L J 163

710 Commitment of case triable by Magistrate —A Magistrate is competent to commit a case not exclusively triable by the Court of Session, if he cannot inflict adequate punishment in the case See notes under sections 206 and 207

But a Magistrate going on leave does not exercise proper discretion if he commits a case triable by himself to the Sessions simply because the witnesses for the accused are not in attendance and it would be inconvenient for his successor to begin the trial afresh—*Anonymous*, *Ratanlal 110*, so also, a Magistrate ought not to commit the accused in a case of theft

merely because the case was connected with another case which he was bound by law to commit—*Imp v Asha Bhatti* 15 Bom L R 998 14 Cr I J 657

When two or more persons are jointly indicted and the jurisdiction of the Magistrate is ousted in the case of one of them by reason of the offence committed by him being one triable only by the Court of Session the proper course is to commit all of them to the Sessions and not to try the others himself and commit that one person to the Sessions—*Anonymous* 1 Weir 418 *Probodh Kumar v Mohini* 22 Cr L J 480 (Cal)

711 Frame of charge—See section 216 as to the procedure in case of commitment without any charge or with an erroneous or imperfect charge

The Magistrate when he has framed a charge is bound to read it out to the accused and to ask him if he wishes to have any witnesses summoned to give evidence on his behalf before the Sessions Court—*Q v Hurnoth* 2 W R 50

When a Magistrate has given his reasons for committing the case for trial the Sessions Judge must either accept the charge as framed or frame others himself. But the Code does not authorise him to insist on a re-drawing of the charge by the Magistrate unless he specifies the charge which he wishes to be set up—*In re Randhona* 25 W R 17

The framing of a charge does not amount to an order of commitment and after the charge is framed the Magistrate does not become *functus officio* in respect of the case. He can amend the charge or can proceed with the case himself. He can consider whether he ought to commit or not—*Emp v Vankatesh* 1 Bom L R 571 11 Cr L J 486. He can even discharge the accused. See sec 213 (2) and notes thereunder. The ruling in *Ratanlal* 161 is no longer good law. But once an order of commitment is passed under sec 213 the Magistrate has no power to proceed any further with the case—12 Bom L R 51

211 (1) The accused shall be required at once to give in
List of witnesses for orally or in writing a list of the persons
defence on trial (if any) whom he wishes to be summoned
to give evidence on his trial

(2) The Magistrate may, in his discretion allow the accused
Further list to give in any further list of witnesses at a
subsequent time and, where the accused
is committed for trial before the High Court, nothing in this
section shall be deemed so preclude the accused from giving,
at any time before his trial, to the Clerk of the Crown a further

list of the persons whom he wishes to be summoned to give evidence on such trial

712 Magistrate's duty to require list—The Magistrate is bound under this section to require the accused to give a list of the witnesses he desires to call. It is not enough to put him the question: Have you any evidence? such a question is ambiguous and might suggest to the accused only an inquiry as to whether he had witnesses ready in Court—*Emp v Konds* 7 Bom L R 723 2 Cr L J 601

If a Magistrate commits an accused person to the Sessions without asking him if he wishes to have any witnesses to be summoned on his behalf to give evidence before the Sessions the omission may be supplied subsequently—*Q v Hurnath* 2 W R 50

Refusal of accused to give list of names of witnesses—If an accused person, on being called upon under sec 211 declines to give the list he cannot compel the Magistrate after committal to issue any summons for witnesses on his behalf. He is of course entitled to call any witnesses in the Sessions Court whom he may have in Court whether or not he has caused such witnesses to be summoned. The Sessions Judge may in his discretion cause any witnesses to be summoned on the application of the accused and is bound to summon them if he considers that their evidence may be material—19 All 507

The accused is entitled before the committing Magistrate to refuse to disclose the names of the witnesses he wishes to call at the trial and the Magistrate cannot force him to disclose their names or the nature of the evidence they would be called upon to give—14 All 242

Refusal of Magistrate to summon and examine witnesses—On receipt of the list of witnesses the Magistrate is bound to exercise his discretion and state distinctly whether he would summon the witnesses or not. If he is of opinion that the witnesses were included in the list for the purpose of vexation delay or of defeating the ends of justice he ought to proceed under the second proviso of section 216—*Q v Rajeswar* 16 W R 14

But a Magistrate should not refuse an application for summons on the ground that the witnesses are implicated in the offence with which the accused is charged—*Ram Sahai v Sankar* 15 W R 7 or on the ground that the number of witnesses is very large—11 Cal 762 or on the ground that he entertains doubts as to the value of their evidence—*In re Mohima Chunder* 15 W R 15

212 The Magistrate may, in his discretion, summon and

Power of Magistrate to examine such witnesses examine any witness named in any list given in to him under Section 211

713. Discretion of Magistrate—This section gives the Magistrate the widest possible discretion to summon and examine any of the witnesses named in any list given under sec 211 even in cases where the accused has reserved his defence for the Sessions trial. The Magistrate is not bound to record reasons before exercising his powers—18 All 380. The Magistrate is not bound to examine any witness named in the list—*Sessions Judge v Kangaya* 36 Mad 321 23 M I J 368 13 Cr I J 778.

The discretion of the Magistrate ought not to be interfered with by the Sessions Judge. Therefore when the Magistrate intended to summon some witnesses for the accused and to make a local inspection but had to commit the case to the Sessions at the direction of the Sessions Judge it was held that the Sessions Judge's direction was *ultra vires* as it unduly interfered with the discretion of the Magistrate and the committal was bad in law—*Emp v Mathura* 1906 A W N 306 4 Cr L J 451.

213 (1) When the accused on being required to give in a list under Section 211 has declined to do so or when he has given in such list and the witnesses (if any) included therein whom the Magistrate desires to examine have been summoned and examined under Section 212 the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session (as the case may be) and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment.

(2) If the Magistrate after hearing the witnesses for the defence is satisfied that there are not sufficient grounds for committing the accused he may cancel the charge and discharge the accused.

714 Commitment—As to when the Magistrate should or should not commit, see Notes 702 and 703 under sec 209.

A commitment made in the absence of the accused is illegal—C W N 110 but where the accused was allowed to appear by an agent under section 205, a commitment made in the absence of the accused but in the presence of the agent is not illegal—*Q v Hurnath* 2 W R 50.

Commitment after discharge—Where a Magistrate after examining four witnesses for the prosecution discharged the accused but subsequently becoming aware that there was a fifth witness he cancelled his order of discharge examined the witness and committed the accused to Sessions it was held that the commitment was not illegal—*Anonymous* 7 M H C R App 40 2 Weir 258.

Commitment to wrong Sessions —See Note 549 under section 177

Signature of Magistrate —The signature of the Magistrate to the warrant of commitment should not be impressed with a stamp. But such a signature is only an irregularity and does not vitiate the proceedings—6 Mad 396

Reasons for commitment —The Magistrate shall briefly record the reasons for commitment. If a Magistrate commits a case triable by himself he is bound to record his reasons for commitment so as to enable the High Court to judge whether the committal is a sound exercise of discretionary power—11 Bom L R 18 *Emp v Nanji* 38 Bom 114 he must state why the case was not disposed of by himself—8 S L R 73

The Magistrate in his grounds of commitment should specify exactly and precisely the proof against each particular prisoner and the manner in which it is supported—*Q v Kodat Kahar* 5 W R 6

Commitment of some trial of others —Where several persons are jointly charged with the same offences and it is considered necessary to commit one of them to the Sessions the most convenient course is that all the prisoners should be committed and not that the one person should be committed and the others tried by the Magistrate himself. If however the Magistrate adopts the latter course it cannot be said that he has acted in contravention of any provision of law—*In re Kallu Chandelugadu* 2 Weir 258 *Anonymous* 1 Weir 44^a

Joint commitment —Where several persons are jointly charged with having committed an offence especially in cases of rioting etc where there are two hostile parties each person should be committed for trial separately and not all together and the trial should also be separate—*Q v Sheikh Ba oo* 8 W R 47 but a commitment is not to be set aside as illegal because all the accused were jointly committed. The sections of the Code relating to joinder of charges and the Privy Council ruling in 25 Mad 61 refer to trials only and not to commitments—26 Mad 592 1909 A W N 206 7 Bom L R 457 (*Contra*—*Ratanlal* 925). In such cases of joint commitment the Sessions Judge should frame separate charges and try the accused separately as if there had been separate commitments—26 Mad 92 1900 A W N 66

715 Subsection (2)—Scope —Subsection (2) is intended to apply for cases where the evidence recorded after the charge so charges are of the case as to leave no reasonable doubt that a conviction is sustainable but it does not apply where the evidence for the offence casts some doubts on the case—*Crown v Po Nyah* 11 B P 248 Under this section the Magistrate has a discretion even after the charge of cancelling it if after hearing the evidence he considers that there are no longer sufficient grounds for the trial.

on his trial—*Nga Hmyin v A L U B R* (1917) 3rd Or 29 19 Cr L J 102 If the Magistrate after hearing the defence witnesses comes to the conclusion that their evidence rebuts the evidence produced for the prosecution or renders it so incredible or unreliable that a conviction will not follow he may act upon his opinion and pass an order of discharge under this subsection He is not bound to commit merely because there was some *prima facie* evidence—*Id Abdul v Baldeo* 44 All 57 19 A L J 831 22 Cr L J 703

The words witnesses for the defence in subsection (2) are wide enough to cover evidence extracted by cross examination of the prosecution witnesses and therefore it is open to a Magistrate after he has drawn up a charge to allow the accused to cross examine the witnesses for the prosecution and as a result to cancel the charge—*Jogendra v Mahlal* 39 Cal 885 16 C W N 1155 13 Cr L J 774

214 'Repealed']

This section has been omitted by section 10 of the Criminal Law Amendment Act (XII of 1933) It provided that if an European British subject and an Indian subject were jointly accused of an offence triable by a Court of Session the Magistrate must commit the case to the High Court and not to the Sessions Judge

<p>215 A commitment once made under Section 213 or Section 214 by a competent Magistrate or by a Court of Session under Section 477 or by a Civil or Revenue Court under Section 478, can be quashed by the High Court only, and only on a point of law</p>	<p>215 A commitment once made under Section 213 [* *] by a competent Magistrate [* *] or by a Civil or Revenue Court under Section 478 can be quashed by the High Court only and only on a point of law</p>
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Change —The words or section 214 occurring in the old section have been omitted by sec 11 of the Criminal Law Amendment Act, XII of 1923 This is consequential to the repeal of sec 214

The words or by a Court 477 have been omitted by sec 59 of the Criminal Procedure Code Amendment Act XVIII of 1923 This is consequential to the repeal of section 477

716 Scope of section —This section applies only to commitments made under the two sections specified therefore an order of commitment

under sec 436 (now section 437) cannot be quashed under this section—31 Cal 1 *In re Kalagava* 27 Mad 34 but can be quashed under the revisional powers of the High Court—*Pirthi Chand v Sampatta* 7 C W N 327 and in that case the High Court can quash the commitment on points of law and of fact—*Tambi v Emp* 12 Bur L T 6 9 L B R 208 Similarly an order of commitment made by the Sessions Judge under sec 423 cannot be quashed under this section but can be dealt with by the High Court under its revisional powers—*King Emp v Nga Thet She* 1 Bur L J 230 But an order under sec 576 clause (iv) can neither be quashed under this section nor under the High Court's revisional powers—*In re Kalagava* 27 Mad 34

This section does not apply to a commitment which is *ab initio* void e.g. a commitment made by a Magistrate having no territorial jurisdiction over the offence No reference to the High Court is necessary to set aside such a commitment—*Emp v Ahim Mundle* 11 C L R 55

717 Commitment—This section refers only to a commitment actually made Where a Sessions Judge under sec 436 (now 437) set aside a Magistrate's order of discharge and directed a commitment to be made the High Court could interfere in its revisional powers and could consider the facts as well as the question of law involved—*Muthia Chetty v Emp* 30 Mad 224 16 M L J 59

A commitment once made stands unless quashed by the High Court and if the High Court is not moved to quash the commitment the trial of the persons must take place in pursuance thereof If a trial has already taken place it serves no purpose to impugn the commitment and it is futile to contend in appeal or in revision that the commitment was illegal—*Nair v Emp* 7 Lah L J 18 26 P I R 767 A I R 1925 Lah 527

When cannot be quashed—A commitment cannot be quashed after the accused has been put on his trial and has pleaded to the charge before the Sessions Judge—*Emp v Sagambar* 11 C L R 120 1 S L R 6 2 Weir 261 *Kasim Mulla v Emp* 4 C L J 114 6 Cr L J 1560 In such a case the Judge should proceed according to law and discharge of the case or the Public Prosecutor may with the consent of the Court withdraw the prosecution under sec 494—*Sessions Judge v Arohin* 2 Weir 261 In 6 Cal 584 however it has been held that the High Court can quash a commitment at any stage of a criminal proceeding

Only by the High Court—A commitment can be quashed only by the High Court A Magistrate cannot quash the commitment and discharge the accused even though the complainant wishes to compound the case—4 All 150 2 W R 57 A Sessions Judge cannot set aside the commitment and direct the Magistrate to try the case himself—*In re Bheema* 16 M L J 525 5 Cr L J 99

The Judicial Commissioner when sitting in the Sessions division is not divested of his capacity as a High Court Judge and he has full power to make an order under sec 15 even when sitting as a Sessions Judge—*Uthbai v Crown* 17 S L R 188 26 Cr L J 148

Where the commitment is made to the High Court (original criminal jurisdiction) the Appellate Criminal Bench of the High Court cannot quash the commitment. In such a case the practice is to apply to the Judge exercising original criminal jurisdiction in the High Court—*Phanindra v Emp* 36 Cal 48 *Contra—Crown Prosecutor v Bhagavathi* 42 Mad 83 (84) and *Em v Ma lay* 30 C W N 276 (F B) A I R 1926 Cal 470 where it was held that an application to quash such a commitment should be made to the Appellate or revisional side of the High Court and not to a Judge exercising original criminal jurisdiction. In *Venkatagiri v N M F r* 43 Mad 361 an order of commitment was made by the original civil side of the High Court under sec 478 and an appeal against the order of commitment was preferred to the Appellate side of the High Court.

718 Point of law —The High Court cannot quash a commitment made under sections 213 and 478 except upon a point of law—*Emp v Goda Ram* 15 A L J 756 19 Cr L J 224 Though an appeal lies under clause 15 of the Letters Patent from an order of commitment made under section 478 by a Judge of the High Court in the original civil side the order cannot be set aside except on a point of law—*Venkatagiri v N M Firm* 43 Mad 361

The High Court can quash a commitment on the following points of law —(1) Where the Magistrate who committed the case was competent to try it himself and to inflict adequate punishment in the case—*A E v Dharam Singh* 3 A L J 14 *A L v Jagmohan* 6 A L J 989 *Emp v Asha Bhatti* 15 Bom L R 998 *Uthbai v Crown* 17 S L R 188 (2) Where the order of commitment rests upon a misapprehension and there is no evidence upon which it can be supported—*In re Jagathanbal* 2 Weir 262 (3) Where the case was triable exclusively by the Magistrate and the Sessions Court had no jurisdiction over it e g a commitment for an offence under the Opium Act (Act I of 1878)—19 All 465 or under Madras Act I of 1866—5 M H C R 277 or under sec 29 of Police Act V of 1861—*In re Indrabeer* 1 W R 5 (4) When there is absolutely no evidence sufficient to warrant a commitment—2 C L J 46 *Nga Hinyin v A E* 1917 U B R 3rd Or 29 19 Cr L J 10 *Tambi v Emp* 9 L B R 208 12 Bur L T 62 5 C W N 411 6 All 98 but see 13 Bom L R 201 and 27 M L J 593 cited below (5) Where the commitment was made in the absence of the accused—5 C W N 110 (6) Where the commitment was based on evidence recorded while the accused was not arrested

on the charge at all—Weir 259 (7) Where the commitment was made by the Magistrate not in the exercise of his own discretion but at the suggestion of the District Magistrate and without examining the witnesses for the defence—*Emp v Mathura* 1906 A W N 306 15 Mad 39 (8) Where the commitment was made without examining the witnesses for the prosecution—1 Mad 27 or without examining the witnesses for the defence—*Emp v Md Hadi* 20 All 177 *Emp v Mathura* 1906 A W N 306 *Q E v Ahmadi* 20 All 204 (9) Where the Magistrate committed the approver who had broken the conditions of pardon tendered to him, along with the other co-accused—23 Bom 493 *Q E v Briji Varain* 10 All 529 or where such approver was committed before the trial of the other accused was finished—*Q E v Sudra* 14 All 336 (10) Where the committing Magistrate had no territorial jurisdiction over the offence—*KE v Nga Taung*, 1 Bur L T 26 (11) Where the committing Magistrate held the inquiry without the certificate of the Political Agent which was necessary in the case—*Rim Charan v Crown* 5 Lah 416 see this case and other cases cited under sec 188

719 What are not proper grounds for setting aside commitment—

- (1) The High Court cannot set aside a committal merely because the Magistrate made a joint commitment of several accused—see 26 Mad 592 1906 A W N 306 and 7 Bom L R 457 cited under sec 213 (2) A commitment can be quashed only on a point of law and cannot be quashed on the ground that there was no evidence on the committing Magistrate's record to support the charge *Emp v Suleman* 13 Bom L R 201 1 Cr L J 256 *Emp v Emp* 6 Cr L J 1045 (Nag) *In re Session Judge* 7 M L J 503 1 Cr L J 665 so also a commitment cannot be quashed because of its reliance on the credibility of the evidence for the prosecution if there is at least some evidence which would justify the Sessions Judge in his conclusion of guilt or innocence to the jury *Mohomed Moideen v Emperor* 1 Rang 526 25 Cr L J 61 A commitment cannot be quashed on the ground that the evidence was doubtful The proper remedy in a case will be for the District Magistrate to instruct the Prisoner to withdraw from the prosecution under sec 491 *A F v Emperor* 7 Bur L T 20 (3) Where a Magistrate going on leave committed a case triable by himself on the ground that the witnesses were not in attendance and that his successor would find it difficult to try the case afresh it was held that the commitment was not illegal and not illegal so as to justify the High Court in setting it aside (4) A commitment is not illegal because it is made by a Magistrate or Judge who gave the direction for the prosecution of a witness (giving false evidence) committed before him *Emp v Emperor* 7 Bur L T 20 (5) A commitment for false complaint (sec 211 I P C) is not illegal

Magistrate has proceeded on the report of a police officer and has not made a judicial inquiry into the complaint—6 Cal 582 (7) The fact that some of the accused were committed while other persons who were concerned in the offence had not yet been arrested is not a ground for setting aside the commitment—7 M L T 187 (8) A commitment ought not to be quashed on the ground that a civil suit is pending in respect of the subject matter of the offence—18 Bom 581 but the trial of the case may be postponed until the determination of the civil suit—2 Weir 260 (9) Where the Sessions Judge had no jurisdiction over the place of offence but the objection taken on this point was overruled by the Sessions Judge the High Court held that there was no sufficient ground for questioning the commitment—17 Mad 402 (10) The High Court cannot interfere when the Magistrate being of opinion that he cannot adequately punish the accused exercises his discretion by committing the case to the Sessions—*King Emp v Baldeo* 11 A L J 439 14 Cr L J 304 (11) The High Court cannot quash a commitment where the Magistrate though he can inflict the maximum sentence provided for the offence commits the case being of opinion that it should for other reasons be tried by a Court of Session—*Crown Prosecutor v Bhagpathi* 35 M L J 559 19 Cr L J 997 *Ghani v Crown* 21 Cr L J 791 14 S L R 83 (12) A commitment will not be quashed on the ground that the committing Magistrate has failed to observe the provisions of sec 360 in respect of some of the witnesses in such a case the trial Court will be directed to recall the witnesses in respect of whom sec 360 was not complied with and to comply with those provisions so far as these witnesses are concerned—*Iblur Rahim v Emp* 29 C W N 698 A I R 1925 Cal 928

216 When the accused has given in any list of witnesses

under Section 211 and has been committed
 Summons to witnesses for defence when accused is committed for trial, the Magistrate shall summon such of the witnesses included in the list, as have not appeared before himself, to appear before the Court to which the accused has been committed

Provided that, where the accused has been committed to the High Court, the Magistrate may, in his discretion leave such witnesses to be summoned by the Clerk of the Crown, and such witnesses may be summoned accordingly

Provided, also that if the Magistrate thinks that any witness is included in the list for the purpose

Refusal to summon unnecessary witness unless deposit made of vexation or delay, or of defeating the ends of justice, the Magistrate may require the

accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and if he is not so satisfied may refuse to summon the witness (recording his reasons for such refusal) or may, before summoning him, require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses

719A Shall summon —Where the accused has made an application for summoning witnesses the Magistrate must deal with the application and pass an order either granting the prayer of the petition or refusing it. He should not simply order the application to be filed—6 C W N 548. Where a witness once summoned failed to appear there being some delay in the service of summons the Magistrate is bound to make a second attempt (the first attempt being a nominal one) to secure the attendance of the absent witness—*Emp v Ruknuddin* 4 All 53

720 Second proviso —The second proviso is not intended to enable the Magistrate to inquire generally into what the defence of the accused is to be and to consider whether on learning the nature of the defence he is absolutely to abstain from summoning the whole of the witnesses cited by the accused. The meaning of this proviso is that if among the persons named by the accused as witnesses the Magistrate considers that any particular witness is included for the purpose of vexation and delay he is to exercise his judgment and inquire whether such witness is material—3 Cal 573. And he can require the accused person to satisfy him that the evidence of the witnesses to be summoned is material *only when* he thinks that the witnesses were included in the list for the purpose of vexation etc otherwise not—*In re Raja of Kantis* 8 All 668

Refusal to summon witnesses —The accused is entitled to have the witnesses mentioned in the list summoned and examined and the only ground on which a Magistrate can refuse summons is when the Magistrate thinks that the witnesses have been included in the list for the purpose of vexation and delay. The Magistrate should not refuse to summon the witnesses named in the list merely because he thinks that their evidence would not be reliable or material—*In re Maring Reddi* —Weir 463. Indeed he cannot decide beforehand on the credit to be attached to the evidence of a particular witness unless he has an opportunity of hearing him. By thus prejudging he exceeds the discretion given by this section—Q E v *Virasami* 19 Mad 375. Again the fact that the accused declined to examine witnesses at the close of the case would be no reason for refusing to summon them to meet fresh evidence taken by the Magistrate subsequent to the close of the defence—6 Cal 714

Recording reasons for refusal —When a Magistrate refuses to summon witnesses he must record his reasons for such refusal and the reasons must show that the evidence of such witnesses is not material. The fact that the Magistrate thought that the reasons assigned by the accused for summoning a witness were not sufficient is not a good ground for refusing to summon him—*In re Raja of Kantu* 8 All 668

Order to deposit expenses —Though the Magistrate is competent to refuse to summon witnesses still he should fix the amount which he considers necessary to defray the cost of the attendance of persons named in the list and intimate his readiness to issue summons on that amount being deposited—*In re Subbaraya* 4 M H C R 81. An order refusing to issue summons should be sparingly passed and such an order is improper in a case where the accused is unable or unwilling to deposit money and in consequence is convicted without his witnesses being heard especially if the case is one in which a severe sentence is inflicted—*Qadu v. Lm press* 1898 P R 7

217 (1) Complainants and witnesses for the prosecution and defence, whose attendance before the Court of Session or High Court is necessary and who appear before the Magistrate, shall execute before him bonds binding themselves to be in attendance when called upon at the Court of Session or High Court to prosecute or to give evidence, as the case may be

(2) If any complainant or witness refuses to attend before the Court of Session or High Court, or to execute the bond above directed, the Magistrate may detain him in custody until he executes such bond or until his attendance at the Court of Session or High Court is required, when the Magistrate shall send him in custody to the Court of Session or High Court as the case may be

721 Whose attendance is necessary —There is no law which obliges the committing Magistrate to cause the attendance at the Sessions Court of every one of the witnesses examined by him irrespective of their evidence being material for the prosecution. It is for the Magistrate to judge as to the necessity of the attendance of those witnesses—*Fimp v. Naik Lal* 1883 A W N 37

218. (1) When the accused is committed for trial, the

Magistrate shall issue an order to such person as may be appointed by the Local Government in this behalf notifying the commitment and stating the offence in the same form as the charge unless the Magistrate is satisfied that such person is already aware of the commitment and the form of the charge

and shall send the charge the record of the inquiry and any weapon or other things which is to be produced in evidence to the Court of Session or (where the commitment is made to the High Court) to the Clerk of the Crown or other officer appointed in that behalf by the High Court

(2) When the commitment is made to the High Court and any part of the record is not in English an English translation of such part shall be forwarded with the record

219 (1) The Magistrate may if he thinks fit summon and examine supplementary witnesses after the commitment and before the commencement of the trial and bind them over in manner hereinbefore provided to appear and give evidence

(2) Such examination shall if possible be taken in the presence of the accused and where the Magistrate is not a Presidency Magistrate

219 (1) *The committing Magistrate or in the absence of such Magistrate any other Magistrate empowered by or under Section 206* may if he thinks fit summon and examine supplementary witnesses after the commitment and before the commencement of the trial and bind them over in manner hereinbefore provided to appear and give evidence

(2) Such examination shall if possible be taken in the presence of the accused and where the Magistrate is not a Presidency Magistrate

a copy of the evidence of such witnesses shall, if the accused so require, be given to him free of cost. a copy of the evidence of such witnesses shall * * be given to the accused free of cost.

Change —The italicised words in subsection (1) have been substituted for the words 'The Magistrate' by section 60 of the Criminal Procedure Code Amendment Act, XVIII of 1923. This amendment provides that the supplementary witnesses may be examined not only by the committing Magistrate but by any other Magistrate in his absence who is empowered to commit for trial.

The words "if the accused so require" occurring in subsection (2) of the old section have been omitted by the same Amendment Act. The accused is now given an absolute right to a copy of the evidence.

722 Scope —This section provides for cases in which there may be an accidental gap in the evidence. In such a case, the Sessions Judge may call additional evidence at the trial under sec 540 or the committing Magistrate may himself take steps before the trial, under sec 219 to supplement the evidence—*Mahabir v Emp*, 23 Cr L J 79 (Oudh).

The power of the committing Magistrate to call and examine supplementary witnesses ceases with the commencement of the trial. After the trial has commenced the Sessions Judge can cause witnesses to be summoned before himself or under certain circumstances have them examined by commission. But he cannot direct the committing Magistrate to call additional witnesses and hold an inquiry—*Hassan v Emp*, 1888 P R 29. If after receiving the order of commitment the Sessions Judge, in view of the Magistrate's recorded opinion thinks that further evidence should be taken the proper course is to point out to the committing Magistrate that he should summon and examine any supplementary witnesses who can give evidence and bind them over to appear at the trial, and not to send the case to the Magistrate after the conclusion of the trial and after the opinions of the assessors have been taken—*Azalkhan v Emp*, 1892 P R 4.

220. Until and during the trial, the Magistrate shall,

Custody of accused subject to the provisions of this Code pending trial
regarding the taking of bail, commit the accused, by warrant, to custody

CHAPTER XIX

OF THE CHARGE

Form of Charges

221 (1) Every charge under this Code shall state the offence with which the accused is charged

(2) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only

(3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give notice of the matter with which he is charged

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case

(6) In the presidency towns the charge shall be written in English elsewhere it shall be written either in English or in the language of the Court

(7) If the accused has been previously convicted of any offence and it is intended to prove such previous conviction for the purpose of affecting the punishment of a different kind for

(7) If the accused having been previously convicted of any offence is liable by reason of such previous conviction, to enhanced punishment or to punishment of a different kind for

which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If such statement is omitted the Court may add it at any time before sentence is passed.

subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence the fact, date and place of the previous conviction shall be stated in the charge. If such statement *has been* omitted, the Court may add it at any time before sentence is passed.

Illustrations

(a) A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in Sections 299 and 300 of the Indian Penal Code, that it did not fall within any of the general exceptions of the same Code, and that it did not fall within any of the five exceptions to Section 300, or that, if it did fall within Exception I, one or other of the three provisos to that exception applied to it.

(b) A is charged under Section 326 of the Indian Penal Code, with voluntarily causing grievous hurt to B by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by Section 335 of the Indian Penal Code, and that the general exceptions did not apply to it.

(c) A is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property mark. The charge may state that A committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property mark, without reference to the definitions of those crimes contained in the Indian Penal Code, but the section under which the offence is punishable must, in each instance, be referred to in the charge.

(d) A is charged, under Section 184 of the Indian Penal Code, with intentionally obstructing a sale of property offered for

sale by the lawful authority of a public servant The charge should be in those words

Change —Subsection (7) has been amended by sec 61 of the Criminal Procedure Code Amendment Act XVIII of 1923 There is some doubt whether under section 221 it is permissible to prove a previous conviction if the enhanced punishment which it is sought to award is *not beyond the competence of* the Court and the amendment directs that in such a case evidence of the previous conviction may be given —*Statement of Objects and Reasons* (1914) This amendment supercedes the ruling in 2 Weir 464 where it was held that if the sentence passed was within the Magistrate's competency the details of the previous conviction need not be given

723 Particulars to be stated in the charge —The object of these sections is to enable the accused to know the substantive charges which he will have to meet and to be ready for them before the evidence is given—*Ram Chandar v Emp* 17 Cr L J 411 (All) An accused is entitled to know with accuracy and certainty the exact value of the charge brought against him Unless he has this knowledge he will be prejudiced in his defence especially in cases where it is sought to implicate him for acts not committed by himself but by others with whom he is in company —11 Cal 106 *Amritlal v K F* 42 Cal 937 *Chhakari v Emp* 26 Cr L J 567 (Cal) *Kedar Nath v K F* 29 C W N 408 26 Cr L J 849 An accused is entitled to be informed with the greatest precision what acts he is said to have committed and under what section of the Penal Code the acts fall *Shes Sa Far v K F* O W N 962 27 Cr L J 62 Failure to state in any substantial form the nature and particulars of the offence alleged against the accused would in some cases be a fatal defect which would vitiate the whole proceedings Where an offence charged involves consequences which may be charged in general terms such as may arise in a case of arson where a man may by one act of arson set fire and destroy several stacks of hay or several persons no particular is required, the nature of the offence being sufficiently stated by the date time and place of the setting fire but extortion or obtaining money from persons by unlawful means involves stating with some approach to accuracy the approximate amounts alleged to have been obtained from each person and the nature of the extortion used against each person—*Ram Chandar v Emp* 17 Cr L J 411 (All)

In a charge of rioting the common object of the unlawful assembly should be specified—9 C W N 599 11 Cal 106 33 Cal 295 Where the object of the unlawful assembly is to take possession of some property the property must be specified in the charge—33 Cal 295 Where there are two objects of an unlawful assembly both the objects must be

fel and not one—22 Cal 276 For a charge of conspiracy only an agreement is sufficient so it is sufficient to include in the charge the agreement which is alleged to have been arrived at between the conspirators—*Dishambhar v K E* 2 O W N 760 26 Cr L J 1602 Where a conspirator is present at the commission of the offence he may under the provisions of sec 114 I P C be deemed to have committed the offence but if that is the way in which the accused is to be made responsible for the offence he should be specifically charged with such offence as read with the provisions of sec 114 I P Code—*Alimuddi v K E* 52 Cal 253 29 C W N 173 40 C L J 541

Where a particular intention is an important element in the offence the intention must be specified—22 Cal 391

In a charge of sedition the actual seditious words need not be set out in the charge if the substance of the words is given—1 S L R 14

The existence of aggravating circumstances which go to enhance the punishment must be set out in the charge—*Ratanlal* 55

Subject matter of offence —Where the law and the section as well as the words of the section are mentioned in the charge the subject matter of the offence need not be specified Thus where the illegal act charged is the unlawful and malicious possession of explosive substances within the meaning of Sec 4 of the Explosive Substances Act it is not essential to specify in the charge the explosive substance which the accused had in their possession—*Amrita Lal v K E* 10 C W N 676 42 Cal 957 16 Cr L J 497

Liability to whipping —Where the accused is liable to be punished under the Whipping Act the charge must state the liability—5 Mad 158

Law and section of the law —A charge for an offence under the Penal Code must refer to the section of the Penal Code under which the offence is punishable—9 W R 33 Moreover in framing the charge the Court should adhere to the language of the section as far as practicable—42 Cal 957 *Chhakari v Emp* 26 Cr L J 567 (Cal) Where the law and section were mentioned in the charge and the accused fully understood the nature of the offence with which they were charged the omission of the words unlawfully and maliciously and in British India occurring in the section was held not so material as to prejudice the accused—*Amritalal v K E* 42 Cal 957

724 Sub section (7)—*Previous conviction* —The prosecution is bound to prove the previous conviction and the identity of the accused with the person previously convicted—2 Weir 266

Where the previous conviction is not mentioned in the charge it cannot be used for the purpose of enhancing the sentence —*Ratanlal* 70 *et seq* for the purpose of adding the sentence of whipping to imprisonment—*Apony*

moss, 2 Weir 265 and 267. In 7 M. L. T. 77 and 1917 P. R. 29 however, it is held that the omission to set out the previous conviction is not a sufficient reason for interfering with the enhanced sentence in appeal or revision unless there has been a failure of justice by reason of such omission. See sec. 225, see also 8 L. B. R. 461 where it has been held that the omission to state the fact, date and place of previous conviction is not material where the previous conviction was put to the accused and admitted by him before judgment was passed.

The previous conviction must be entered in the charge and the accused should be called on to plead thereto: the mere admission by the accused that he had once been in jail is insufficient to show that he pleaded guilty to a previous conviction—4 Bom. L. R. 177.

Fact, date, place of previous conviction—When a person is charged with previous convictions it is not sufficient to state that the accused is an 'old offender', as that does not sufficiently bring home to the accused person the particular offence or class of offences which renders him liable to a more severe sentence than would otherwise be imposed—*In re Yip-pakka* 2 Weir 266. If the fact, date and place of the previous conviction are not stated, no enhanced sentence can be passed on the accused—1883 A. W. N. 110. But where the accused was at the time lying under sentence of the previous conviction referred to, the omission to mention the particulars of the previous conviction would in no way prejudice the accused and would afford no ground for interfering with the enhanced sentence—1881 A. W. N. 32.

In passing an order under sec. 365 it is not necessary that the details of the previous conviction should be mentioned in the charge—9 N. L. R. 88 (cited under Sec. 365).

222 (1) The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so far

shall be deemed to be a charge of one offence within the meaning of Section 234

Provided that the time included between the first and last of such dates shall not exceed one year

725 Particulars as to time, place et c. The charge must contain sufficient particulars as to time place person and circumstance so that the accused may have notice of the matter with which he is charged *Q E v Fakirappa* 15 Bom 491 *Oates v Emp* 38 C L J 163 A charge for house breaking and theft is bad for vagueness if it does not specify the articles stolen or the name of the person whose house was broken into and omits to mention one of the places where the offences were committed—*Subbadu v A E* 28 M L J 381 16 Cr L J 298 A charge of defamation is defective if it does not set forth the particular occasion on which it was committed—30 Cal 402 A conviction under sec 377 I P C is illegal on a charge which does not set forth the time place or the person with whom the offence was committed but only states that the accused habitually wore women's clothes and exhibited physical signs of having committed that offence—6 All 204 In a charge of adultery it is sometimes impossible to specify the particular date or dates on which the sexual intercourse took place it is sufficient to specify two dates between which the offence is alleged to have been committed *Bhola Nath v Emp* 51 Cal 488 (492) 28 C W N 3-3 25 Cr L J 997

The test as to the sufficiency of the particulars of time place etc is whether the accused has reasonable notice of the offence with which he is charged In one case it may be necessary to specify accurately the time and place while in another it may be unreasonable to require the prosecution to do so *Ratanlal* 659

7 6 Subsection (2) This subsection did not exist in the Code of 1882 The ruling in 2 C W N 341 and 24 Cal 193 to the effect that particular items and exact dates of the misappropriation must be mentioned is no longer good law As the law stood before there was great difficulty in convicting where there was a running account and where the prosecution were unable to put their hands on a specified item out of which the particular sum was embezzled also there was the difficulty of joinder of charges under sec 234 These difficulties have been removed after 1898 *Akshrod Kumar v Emp* 29 C W N 54 40 C I J 555

This subsection applies only to a charge of criminal breach of trust or misappropriation it does not apply to a charge under sec 477A I P C—*Kalka P asid v Emp*, 33 All 42 26 Cal 560 *Raman B Jari v Emp* 41 Cal 7 or to a charge of cheating—1 A L J 599

Again it applies only to misappropriation of money and not to mis

appropriation in respect of a number of *things*—*Raghavultra v Emp.* (1911) 2 M W L 47 12 Cr L J 567

727 Gross sum only need be mentioned—This is an enabling section and it enacts that it is sufficient to specify the aggregate sum without going into details. It dispenses with the necessity of enumeration of various items but it does not prohibit such enumeration—*Emp v Datto Hanmant* 30 Bom 43 It is optional with the complainant either to mention the gross sum or to specify all the items misappropriated. And this section does not make compulsory either the one or the other. The complainant may choose to specify all the particular items instead of mentioning the gross sum and this will be treated as a mere superfluity but not an illegality—*Samiruddin v Akram* 31 Cal 98 or the complainant may mention only the gross amount even where the particular items can be specified—*Thomas v Emp.* 3 M L 558

But although it is sufficient to frame a general charge of the gross amount the Magistrate should also see that the charge does not become so general as to be vague and the accused is not prejudiced thereby—1907 P W R 16 Though it is sufficient to mention only the gross sum and not necessarily the particular items still the prosecution must prove what total sum the accused has unlawfully expended or failed to account for in such a way as to leave no doubt that he has been engaged in a criminal misappropriation and how that total sum is made up. There must be a definite finding of a certain *definite sum* traced to the accused and clearly shown to have been wilfully and unlawfully appropriated to his own use. It is not sufficient to fling into the charge an alleged balance or net profit which the accused, an agent of the complainant is supposed to have earned and say that in respect of that net profit he is guilty of misappropriation of every rupee which he cannot produce or explain—*Mohun Singh v Emp.* 4- All 522

If the particular items are specified the charge will not be illegal by reason of the fact that the items exceed three in number—*Emp v Gulzari Lal* 24 All 254 This section is not controlled by Sec. 234 but rather modifies it.

728 Charge so framed charge of one offence—This section clearly limits of the trial of any number of acts of breach of trust committed within the year as amounting only to one offence—*Emp v Datto Hanmant* 30 Bom 49 A charge in respect of a gross sum without specifying several items is a charge of one offence and not of several offences—33 All 36 Where an accused person is tried on charges of criminal breach of trust in respect of two cheques and also on another charge in respect of a gross sum made up of three distinct items which might have been were not specified the trial is in fact not on five distinct charges but

for three offences (2 cheques *plus* gross sum) and is therefore legal under Sec 234—*Thomas v Emp* 29 Mad 558 see also *Emp v Ishlaq* 27 All 69 32 Cal 1085

Thus subsection enacts that the charge in respect of a gross sum shall be treated as a charge for *one offence* within the meaning of Sec 234 but it does not provide that the several acts of misappropriation will be treated as forming *one transaction* within the meaning of Sec 235—*Kasi Viswanathan v Emp* 30 Mad 328

One year —The time covered by the several acts must not be more than one year where the charges related to items misappropriated in the course of two years the conviction was quashed—*Dhanjibhoy v Kaim Khan* 1905 P R 14

223 When the nature of the case is such that the particulars

mentioned in Sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for the purpose

Illustrations

(a) A is accused of the theft of a certain article at a certain time and place The charge need not set out the manner in which the theft was effected

(b) A is accused of cheating B at a given time and place The charge must set out the manner in which A cheated B

(c) A is accused of giving false evidence at a given time and place The charge must set out that portion of the evidence given by A which is alleged to be false

(d) A is accused of obstructing B a public servant in the discharge of his public functions at a given time and place The charge must set out the manner in which A obstructed B in the discharge of his functions

(e) A is accused of the murder of B at a given time and place The charge need not state the manner in which A murdered B

(f) A is accused of disobeying a direction of the law with intent to save B from punishment The charge must set out the obedience charged and the law infringed

729 The question as to whether further particulars are necessary under this section is a question of discretion in each case—*Kudru's v. Imp.* 33 Cal 781. In a case of cheating the charge must set out the manner in which the offence was committed. Whether the words of the charge are reasonably sufficient to give the accused notice of the accusation in which he has got to meet depends upon the circumstances of each particular case. The omission to state the manner of cheating is reasonable as material or not accordingly as the accused has or has not in fact been misled by the omission and the omission has or has not occasioned a failure of justice (see sec. 225 III b and c)—*Kedar Nath v. Imp.* 23 C. S. 438 4 C. I. J. 17 26 Cr. I. J. 54. Where the manner of the offence was set out as follows:—By deceiving with false representations and promises as well as by concealment held that the expression was vague and indefinite to give the accused proper notice of the nature of the offence—*Kedar Nath v. Imp.* (supra).

A charge of an attempt to cheat must specify the person to be cheated and the manner in which the attempt was made—*sec. 278*

224 In every charge words used in description shall be deemed to have been used in the sense attached to them by the law under which the offence is punishable.

Words in charge taken in sense of law under which offence is punishable

225 No error in stating either the particulars required to be stated and no omission to state particulars, shall be regarded at any stage unless the accused was in fact misled by and it has occasioned a failure of justice.

Effect of errors

Illustrations

(a) A is charged, under section 242 with 'having been in possession of counterfeit at the time when he became possessed was counterfeit,' the word 'fraud' in the charge. Unless it appears that this omission, the error shall not be

(b) A is charged with cheating B he cheated B is not set out in the charge

A defends himself calls witnesses and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B and A had no means of knowing as to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of cheating was in the case, a material error.

(d) A is charged with the murder of Khoda Baksh on the 21st January 1882. In fact the murdered person's name was Haidar Baksh, and the date of the murder was the 20th January 1882. A was never charged with any murder but one and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that A was misled and that the error in the charge was immaterial.

(e) A was charged with murdering Haidar Baksh on the 20th January 1882 and Khoda Baksh (who tried to arrest him for that murder) on the 21st January 1882. When charged for the murder of Haidar Baksh, he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled and that the error was material.

730. *Error or omission*—Where the common objects of an unlawful assembly were to steal mangoes and to cause the death of a person and the Judge in summing up the case to the jury spoke of the two objects but the charge mentioned only the latter object it was held that the omission to specify both the objects in the charge was material in as much as it is difficult to say which of the two common objects had been accepted by the jury and if the jury had accepted that object which was not mentioned in the charge there had been a failure of justice—22 Cr. 276. When the charge against the accused was that he embezzled some deeds but he was convicted of embezzling some amounts obtained by dealing with those deeds it was held that the charge was materially defective and the conviction must be set aside—12 C. W. N. 577.

A charge of sedition is not defective if it omits to state the particular passages or particular words used by the accused. It is sufficient if the

substance of the words is set out. Even if it is defective it will be cured by this section—*Imp v Tithuani* 33 Bom 77 & Mad 384 32 Mad 3. The omission of words such as dishonestly or unlawfully or in British India is not material and is cured by this section—*Reg v Jahlma* 10 B II C R 373. *Aurital v Imp* 42 Cal 95.

If the charge is drawn up in a somewhat informal manner but is sufficiently explicit as to give the accused notice of the charge the irregularity will be cured by this section—*Imp v Tribunal* 33 Bom 77.

Test to determine whether error is material—In determining whether the error or omission has occasioned a failure of justice the Court should have regard to the manner in which the accused has conducted his defence and to the nature of the objection raised whether the objection could and should have been raised at an earlier stage of the proceedings—*Reg v Rakhma* 10 B II C R 373. *Q L v Ramji* 10 Bom 124. Where the charge did not correctly set out the facts of the case for the prosecution upon which it was founded but it was clear from the answer which the accused gave to the Court when examined under the provisions of sec 347 that he understood exactly what the case against him was held that the defect in the framing of the charge did not prejudice the accused in any way—*Gokul v Imp* 23 C W N 483 26 Cr L J 906.

Duty of Magistrate—Where a charge is erroneous as to the intention with which the offence was committed it is the duty of the Magistrate before convicting the accused for committing the offence with a different intention to amend the charge to that effect so as to give notice to the accused of what he is charged with. Thus where the charge was house breaking with intention to commit theft but it was found that the intention was criminal intrigue with a woman in the complainant's house the Magistrate before convicting the accused of house breaking with the latter intention should clearly draw up a charge to that effect—*Mahomed Hosain v Imp* 41 Cal 743. *Hajari v King Imp* 26 C W N 344. But see 44 Cal 358 in which it has been held under the identical circumstances that it is not necessary for the Magistrate to amend the charge the accused having been charged with criminal trespass with a guilty intention it is competent to the Court to convict him with criminal trespass with some other guilty intention and in such a case the accused is not in fact prejudiced by the conviction.

226. When any person is committed for trial without a charge or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the Crown may frame a charge or add to or otherwise alter the

Procedure on commitment without charge or with imperfect charge

charge, the Court, or, in the case of a High Court, the Clerk of the Crown may frame a charge or add to or otherwise alter the

charge as the case may be having regard to the rules contained in this Code as to the form of charges

Illustrations

1 A is charged with the murder of C. A charge of abetting the murder of C may be added or substituted

2 A is charged with forging a valuable security under Section 467 of the Indian Penal Code. A charge of fabricating false evidence under Section 193 may be added

3 A is charged with receiving stolen property knowing it to be stolen. During the trial it incidentally appears that he has in his possession instruments for the purpose of counterfeiting coin. A charge under section 235 of the Indian Penal Code cannot be added

731 Charge —Throughout this Code the word charge is generally used as the statement of a specific offence and not as indicating the entire series of offence of which a prisoner is accused and it is in the former sense that the word is used in this and the following sections—*Q E v Appa Subhanna* 8 Bom 200

Without charge —These words apply not only to the cases where there is no charge at all but also to cases in which there is no charge in respect of such offence as the Sessions Judge or Clerk of the Crown may think the accused ought to be tried for—8 Bom 200

Frame a charge —At the beginning of the trial if the Judge finds that the Magistrate has omitted to frame a charge he may supply the omission and frame the charge that is made out on the evidence recorded by the Magistrate—*Dodo v Emp* 9 S L R 37 16 Cr L J 573

732 Addition of charge —If the charge framed by the Magistrate is imperfect or erroneous the Sessions Judge may alter or add to the charge having regard to the offences disclosed in the evidence recorded by the Magistrate. But the Sessions Judge cannot go beyond the evidence recorded by the Magistrate in adding to or altering the charge. He cannot add or alter a charge upon the evidence recorded by *himself* at the trial. If he does so the effect is that he takes cognizance of an offence without any preliminary inquiry in respect of it by the Magistrate and the provisions of Sec 193 of this Code are rendered nugatory. Thus where the charge drawn up by the Magistrate was under Sec 201 I P C and the Sessions Judge on the application of the Public Prosecutor added a charge for an offence under secs 109 and 201 I P C upon the evidence of a person

who was examined as a witness for the first time by the Sessions Judge it was held that the action of the Judge was *ultra vires* and the addition of the charge was not merely an error of procedure but an improper assumption of jurisdiction—*Rama Larma v Q* 3 Mad 351

Again the Sessions Court can add or alter a charge with reference to the immediate subject of the prosecution and committal and not with regard to a matter not covered by the indictment. Thus where a prosecution was instituted by A on a charge under sec 417 I P C and the Sessions Judge altered the charge into one for an offence under sec 420 I P C for cheating B it was held that the procedure was illegal inasmuch as there was no complaint by B and the prosecution was instituted by a person in respect of a matter with which B was not concerned and the Magistrate did not commit the accused with respect to any offence committed against B—3 Cal. Similarly where the accused was committed to the Sessions for the murder of A the Sessions Judge could not add a charge for causing grievous hurt to B—*Shah Din v Crown* 1909 P W R 20 11 Cr L J 131 (In 8 All 665 however such a procedure was not treated as an illegality but a mere irregularity and the High Court refused to interfere because no prejudice was caused to the accused.) But where the committing Magistrate committed the accused for the murder of A and for causing grievous hurt to B the Sessions Judge could add a charge for the murder of B—*Hussenul a v Emp* 28 C W N 561 A I R 19 4 Cal 63

The Sessions Judge's power to add a charge is not fettered by the fact that a complaint in respect of it had been previously preferred before the Magistrate and dismissed by him—*Q E v Vajiram* 16 Bom 414

Power to expunge a charge—The Sessions Judge has power to frame add or alter a charge but he has no power to expunge a charge duly framed by the committing Magistrate—*Emp v Poreslolah* 7 C L R 143

Charge when can be added or altered—Though the Sessions Judge has power to add a charge at any stage of the proceedings before judgment still he should exercise a sound and wise discretion and he does not exercise such a discretion when he adds a new and grave charge after the close of the defence—5 C W N 72 A charge cannot be altered after delivery of verdict—*Reg v Shek Ali* 5 B H C R 9

733 Alteration of charge—The Sessions Judge can substitute a charge of abetment for a charge of the substantive offence—11 B H C R 278 If the committing Magistrate does not frame a charge with separate heads for each distinct offence the defect may be remedied by the Sessions Judge—7 W R 8 In a case in which the accused was charged with 45 offences and committed to the Sessions the proper procedure is to amend the charge and to hold separate trials and not to confine the prosecu

to three heads of charges acquitting the accused of all the rest—8 Cal 450

Altering a charge includes the *withdrawal* of a charge which has been added by the Sessions Judge after commitment—12 All 351

227. (1) Any Court may alter or add to any charge at any time before judgment is pronounced, or Court may alter charge in the case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed

(2) Every such alteration or addition shall be read and explained to the accused

734 Addition or amendment of charge—Where a Magistrate summoned the accused under a certain section of the Penal Code but the evidence disclosed an offence under another section he can amend the charge—*Birao Sarlar v. Ariff* 6 Cr L J 302 (Cal) Sessions Judge, when they receive an indictment should compare the charge sheet with the section and when necessary amend the charge sheet using the words of the section so far as possible—*Bhulan v. Emp* 27 Cr L J 57 (Oudh)

A Court of Session though vested with large powers of amending and adding to charges can only do so with reference to the immediate subject of the prosecution and commitment and not with regard to a matter not covered by the indictment—*Muthu Goundan v. Emp* 27 M I T 231 1 Cr L J 57

In amending a charge the Magistrate should not write over the original charge but should leave it on the file for reference and should write the new charge separately—*Nga Pan v. Emp* 8 Bur L T 17 16 Cr L J 7

The Court in substituting one charge for another cannot ignore the preliminary requisites of a charge thus a charge for rape cannot be altered into a charge for adultery because the complaint of the husband is a preliminary requisite in the latter offence—9 Cal 415 nor can the Court alter a charge of rape into a charge for rape and adultery in the alternative—5 All 33 See notes under sec 193

But the power to add a charge is not limited by the terms of the certificate under section 188 Once a certificate has been obtained the Court has power to add any charge for any offence disclosed by the facts though not specified in the certificate—*Emp v. Krishna Nath* 33 All 514 See Note 581 under sec 188

Where a prisoner has been extradited for dacoity, the Court may alter the charge of dacoity into theft—17 Bom 369

An nlm nt must not prejudice accused — Although this section gives power to the Court to add to or alter a charge still this power should be exercised with discretion and it is the duty of the Court to see that the accused is not prejudiced by the addition or alteration of the charges—*Dolls v Emp*, 9 S L R 37 *Reg v Goudis* 6 B H C R 76 Thus an addition or alteration of charges at a late stage of the proceedings would prejudice the accused in his defence and would be illegal See 6 C W N 73 31 Bom 218 Where upon the trial of an accused person upon specific charges in a Court of Session it is found at the conclusion of the trial that the charges as framed disclose no offence against the accused it is illegal and prejudicial to the accused to alter or amend the charges and to convict him thereon without affording him an opportunity of meeting the amended or altered charges The fact that the accused cross examined the prosecution witnesses to prove the unsustainability of the charges as originally framed is no ground for holding that by substantially altering the charges the accused was not prejudiced—*Muthu Gounder v Emp*, 27 M L T 231, 21 Cr L J 57.

Amendment cannot cure illegality — An illegal charge cannot be amended or altered and such amendment will not cure the illegality Thus where a charge is drawn up of 4 offences it is wholly illegal under sec 234, and the illegality cannot be cured by striking out one of the offences, and convicting the accused for the remaining three—*Mananala Chetty v Empress* 23 Mad 563 *Chito v Emp* 49 Cal 353 So also where a Magistrate at first framed a charge under secs 352 and 304 I P Code, but finding that the two distinct offences which were in no way connected with one another could not be tried together he struck out the charge framed and framed a charge under sec 304 alone *Id* that the procedure adopted by the Magistrate was illegal—*Krishna Murthi v Narayanaswami*, 49 M L J 93 26 Cr L J 1618 A I R 1925 Mad 1065

735 Addition or alteration when to be made — A charge must be amended before the judgment is pronounced If a charge is defective e g if more than three offences are included in one charge which is invalid under section 234 the Magistrate cannot remedy the defect by saying in his judgment that he would proceed on only three charges If he wishes to strike out any of the charges he should do so before concluding the trial, and should give the accused an opportunity of making such defence as he thinks fit, otherwise the trial is vitiated—*Chetty v Emp* 49 Cal 535 24 Cr L J 86

Although a charge may be added or altered at any time before the judgment is pronounced, still it is illegal to do so at a late stage of the proceedings e g after the prosecution case has been closed and the defence evidence has been recorded—*Emp v Isaf Mahomed*, 31 Bom 6 C W. N 73

If the complainant compounds the offence the Court should acquit the accused upon the presentation of the petition of composition and has no power to alter the charge already drawn up—1914 P R 29

In a trial by jury or assessors the Sessions Court has no power to alter the charge after the delivery of the verdict of the jury or the opinion of the assessors.—*Reg v Shek Ali* 5 B H C R 3 *Harbans v Crown* 1916 P R 33 The word, return of verdict means the return of the final verdict which the Judge is bound to record—3 Bom 200

Application for alteration of charge.—An application for alteration of charge must be made immediately after the original charge has been read and explained by the Magistrate—27 Cal 839 and the Magistrate should consider the application at once and not postpone passing his order on the application—*Q E v Vajram* 16 Bom 414

735. Sub-section (2).—An alteration of charge must be read over and explained to the accused. It is not the intention of the legislature to empower a Court to convict an accused person of an offence of which he has not been told anything. Where a person was summoned to answer a charge under sec 34 Police Act but the Magistrate finding that the facts did not prove such offence convicted him under sec 279 I P C without his being informed of the alteration of the charge he'd that the conviction was illegal.—*Dhum Singh v Emp* 23 A L J 436 A I R 1925 All 448 26 Cr L J 1057 *Raghunath v Emp* 24 A L J 168 27 Cr L J 152 A I R 1925 All 227 When a new charge was read aloud to the jury but was not specially explained to the prisoner and he was not called upon to plead to that charge but his counsel on being asked did not require a new trial (under section 229) it was held that the accused was not prejudiced by the addition of the new charge and the omission did not affect the trial.—*Q E v Appasubhana* 3 Bom 200

223 If the charge framed or alteration or addition made

When trial may proceed immediately after alteration under section 226 or section 227 is such that proceeding immediately with the

trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecution in the conduct of the case the Court may, in its discretion, after such charge or alteration or addition has been framed or made proceed with the trial as if the new or altered charge had been the original charge

737 The addition or alteration of a charge does not open up the trial from the beginning and the Court may immediately proceed with the trial if it is of opinion that there will be no prejudice to the accused

If the accused has already been examined under sec 342 before the amendment of the charge and before he has been called upon to enter on his defence it is not incumbent on the Court to re examine the accused after the amendment of the charge—*Shamlal v A L J Pat 54 3 P L T 91 3 Cr L J 146*

229 If the new or altered or added charge is such that
 When new trial may be directed, or trial suspended, proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary

738 New trial —Sec 8 Bom 200 (cited in Note 736 under sec 227) where the right to a new trial was waived

Where the original and the altered charges are nearly related to each other (the original charge being one of murder and the altered charge being one of abetment of murder) and the accused did not object to the amendment it was held that there was no such material prejudice as would have necessitated a new trial under this section—11 B H C R 278 If however the amendment of charge would raise different questions of law and would admit of a different line of defence the accused would be prejudiced and a new trial would be necessary—*Reg v Govindas* 6 B H C R 76

In a new trial the Court would not be justified in referring to the record of the former trial as a whole but he may refer to such depositions as are especially put in evidence—7 C L R 193

230 If the offence stated in the new or altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded
 Stay of proceedings if prosecution of offence in altered charge require previous sanction

739 Sanction for one offence, conviction for another —The mere fact that the sanctioning authority is of opinion that the facts constitute an offence under one section of the Act is in itself no bar to a conviction of the accused person for another offence under another section provided of course that the facts stated in the order giving sanction are the same as those upon which the conviction is based In such a case it is not necessary

vary that fresh consent to the trial upon such altered charge would have to be given by the sanctioning authority. Section 230 of the Code makes full provision for a case of this kind—*Amar Singh v Crown* 1919 P R 31 11 Cr L J 230

Where sanction has been obtained in respect of a substantive offence it will avail in respect of abetment of such offence and no fresh sanction is necessary. Therefore where sanction was obtained for the prosecution of a Sub Registrar for an offence under Sec 468 I P C the trial of the Sub Registrar for the abetment of that offence required no further sanction—30 Cal 905

231 Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or resummon, and examine with reference to such alteration or addition any witness who may have been examined and also to call any further witness whom the Court may think to be material

740 Under this section it is imperative on a Court when it alters or adds to a charge after the commencement of a trial to allow the prosecutor and the accused to recall or resummon and examine with reference to such alteration or addition any witness who may have been examined and also to call any further witness whom it may deem material. If the Court adds or alters a charge after the commencement of the trial without allowing the accused to recall and re-examine the witnesses and the accused has been misled thereby the High Court will order a new trial to be had upon a charge framed in the proper manner—*Harlans v Crown* 1916 P R 33 17 Cr L J 454. Where the committing Magistrate at first framed a charge and then at a late stage of the commitment proceedings altered the charge without giving the accused an opportunity of re-examining the witnesses for the prosecution and producing his defence in regard thereto and committed the accused to the Sessions on the charge so altered held that the procedure of the Magistrate was entirely illegal and likely to prejudice the accused in his trial before the Court of Session—*Mohan Lal v Emp* 2 A I J 39 25 Cr I J 798

When a charge is amended the accused has a right to recall and cross-examine all the prosecution witnesses. The right is not restricted to the recalling of those witnesses only who have deposed to the subject matter of the amendment in the charge—*Harara Singh v Emp* 26 Cr I J 1497 (Lah)

232 (1) If any Appellate Court or the High Court in the Effect of material exercise of its powers of revision or of error its powers under Chapter XXVII is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit

(2) If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction

Illustrations

A is convicted of an offence under section 196 of the Indian Penal Code upon a charge which omits to state that he knew the evidence, which he corruptly used or attempted to use as true or genuine was false or fabricated. If the Court thinks it probable that A had such knowledge, and that he was misled in his defence by the omission from the charge of the statement that he had it it shall direct a new trial upon an amended charge, but if it appears probable from the proceedings that A had no such knowledge it shall quash the conviction

741 Errors in the charge.—If the Chief Court (High Court) thinks that in consequence of material errors in a charge the accused has been misled it is bound to direct a new trial to be had upon a charge framed in the proper manner—*Harbans v Crown* 1916 P R 33. Where the owners of land were charged under sec 154 I P C for omission to give information of the riot to the thana but they were convicted for the omission on the part of their agents and not of themselves it was held that the error in the charge prejudiced the accused and a new trial was ordered by the Appellate Court—7 C W N 201. Where the charge framed against the accused was to the effect that they caused hurt under sec 324 I P C to a certain person by means of a *dao* (a cutting instrument) but they were convicted under sec 334 I P C for assault with a *lathi* it was held that the accused might have been prejudiced in his defence by this error in the charge and a retrial was ordered—*Sital Chandra v Emp* 17 C W N 419 14 Cr L J 712

742 Charge for one offence—Conviction for another.—Where the accused were charged with and convicted of rioting and on appeal

Sessions Judge set aside the conviction for rioting but convicted them for house trespass and hurt it was held that the latter offences being distinct and separate offences from rioting should have formed the subject of separate charges and the accused had been prejudiced within the meaning of this section by the omission of charges for the latter offences—30 Cal 288 See also *Har Narain v Emp* 18 C W N 1274 and *Genu Manjhi v K E* 18 C W N 1276 where the conviction was quashed on similar grounds

Where the accused was charged for dishonestly using as genuine a forged instrument but was convicted for defamation it was held that not only should the conviction be set aside but also as there was nothing to show that any valid charge could be preferred against the accused for the offence of defamation no trial could be held (see sub-sec 2)—28 Cal 63

Joinder of Charges

233 For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 234 235 236 and 239

Separate charges for distinct offences

Illustration

A is accused of a theft on one occasion and of causing grievous hurt on another occasion A must be separately charged and separately tried for the theft and causing grievous hurt

743 Object of Section —The object of this section is to see that the accused is not bewildered in his defence by having to meet several charges in no way connected with one another—*Ram Subheg v K E* 19 C W N 972 and to see that he is not prejudiced by being accused of several things at once—15 Bom 491 Another object is that the mind of the Court might be prejudiced against the prisoner if he were tried in one trial upon different charges resting upon different evidence It might be difficult for the Court trying him on one of the charges not to be unduly influenced by the evidence against him on the other charges—7 All 174

The general law as to the trial of accused persons is embodied in this section which provides for separate trial of each accused person for every distinct offence and the exceptions are laid down in sections 234 235 236 and 239 which must be strictly construed so as not to defeat the right of independent trial conferred by the general law—*Tapanidhi v J F* 5 P L J 11 1 P L T 180 21 Cr L J 161

744 Scope of Section —These sections (233-239) relating to joinder of charges refer to the trial of the accused. The ruling in *Subrahmanya Aiyar's case* 15 Mad 61 (cited below) cannot be extended to preliminary inquiries held by Magistrates committing a case to the Sessions so as to render the commitment itself illegal on the ground of misjoinder of offences or offenders at the preliminary inquiry—26 Mad 592. *In re Sessions Judge* 35 M L J 259. 20 Cr L J 514. See notes under sec 215.

This section applies not only to warrant cases but also to summons cases although it is not necessary to frame a charge in the latter cases. Therefore a joint trial and conviction for several distinct offences in summons cases is illegal—*A. E. v. San Dun* 3 L B R 52. 2 Cr L J 739. It also applies where the accused is charged with a summons case and a warrant case—*A. E. v. Maung Gale* 3 L B R 113. 3 Cr L J 350.

It also applies to trials under the Bengal Excise Act and the fact that the trial has taken place as in a summons case does not exclude the operation of this section—*U. N. Biswas v. K. E.* 18 C W N 486. 41 Cal 694.

This section applies not only to original trials but the Appellate Court is also bound by it thus an Appellate Court acting under section 423 (1) (b) and altering the finding cannot act in contravention of the provisions of section 233 —(1905) P R 38.

Distinct offences —When two offences are committed and each of these two offences has no connection with the other they are distinct offences—*Ram Subheg v. K. E.* 19 C W N 972.

745 What are distinct offences —(1) Offences falling under different sections of the I P C e.g. theft and escape from lawful custody—*K. E. v. Po Hla* 3 L B R 221 kidnapping a boy and assaulting the mother who demanded the boy—26 Mad 454 theft and receiving stolen property—28 Cal 10. 1 C W N 35 receiving stolen property and habitually dealing in stolen property—8 Cal 634 criminal misappropriation and cheating—13 C W N 1089 offences under secs 167 and 466 I P C—8 Cal 450 offences under secs 411 and 489 C I P C—29 Cal 387 offences under secs 454 and 325 I P C—*Nga Ta Pu v. K. E.* 2 L B R 19 offences under secs 182 and 500 I P C—37 Cal 604 offences under sec 352 and sec 504 I P Code—*Krishnamurthi v. Narayanaswami* 49 M L J 93. 26 Cr L J 1618 theft in a dwelling house and abetment of criminal breach of trust—5 C W N 294 abetment of falsification of document and fraudulent destruction of document—26 Mad 125 theft and receiving illegal gratification for the restoration of stolen property—14 Bur L R 67 offences under secs 330 and 348 I P C—*A. E. v. Humaramulhu* 25 M L T 379. 20 Cr L J 354 offence of belonging to a wandering gang of dacoits and the offence of committing dacoity—1882 A W N 178 offences under secs 411 and 458 I P C.—1905 P R 51 simple hurt under sec

323 I P C and grievous hurt under section 325 I P C—*Radha Nath v Emperor* 50 Cal 94 embezzlement of money (sec 409 I P C) and falsification of accounts (477A I P C) covering items other than those embezzled—*Emp v Kalka Prasad* 38 All 42 13 A L J 1059

(2) *Offences committed on different occasions* even though the offences be of the same kind (i.e. falling under the same section of the I P C) e.g. two attempts to cheat committed on two different dates—2 C L J 618 or wrongful confinement and torture committed at several distinct times and places—*K E v Kumaramuthu* 25 M L T 379 receiving stolen articles on different occasions though the articles were the proceeds of a single burglary—*Padmanabha v Emp* 2 P L T 47 21 Cr L J 619

(3) *Offences committed against different persons*—11 C W N 54 e.g. misappropriation of three sums of money from three distinct persons—6 C L J 757 or cheating three persons—*Musai Singh v K E* 41 Cal 66 or hurt caused to two persons—*Ram Subhag v K E* 19 C W N 972 wrongful confinement of several persons on several occasions—*K E v Kumaramuthu* 25 M L T 379 20 Cr L J 354 cheating ten different persons on different occasions—*Girja dayal v Emp* 25 O C 151

(4) *Offences in respect of distinct sums of money* e.g. misappropriation of two sums of money collected on different dates—*Asgar Ali v K E* 40 Cal 846 misappropriation by the accused of three sums of money collected in accordance with their duty as tax collectors from three persons—6 C L J 757

746 What are not distinct offences—Offences of the same kind committed on one occasion though consisting of parts are not different offences but are to be treated as constituting one offence e.g. the making of any number of false statements in the same deposition is one aggregate case of perjury and charges need not be multiplied according to the number of false statements—36 Cal 808 Theft of two articles belonging to two different persons committed at one and the same time constitutes only one offence of theft and not two and hence two convictions and sentences are not legal—*Bhura v Emp* 26 Cr L J 1495 (Nag) If a person is found in possession of a number of stolen articles the offence committed by the accused (receiving stolen property) is a single offence and not a number of offences and it makes no difference whether the articles belong to a single owner or to different owners But if there were evidence that the accused received the articles at different times or from different thieves the case would be different—*Emp v Sreo Charan* 45 All 485 (486) The mere fact that property stolen on two different occasions is found at one and the same time in the possession of an accused is not of itself sufficient to prove that the accused has committed two different offences under sec 411 I P C (retaining stolen property), as it is quite possible that the

property though stolen on two different occasions may have been received from the same thief at the same time—*Q E v Makhan* 15 All 317 So also the mere fact that the goods stolen from two different persons are found in the possession of the accused will not be sufficient to try the accused on two separate charges under sec 411 I P Code (receiving stolen property) and to sentence him for each of the charges unless there is proof that he received them at different times or from different thieves All the goods in the possession of the accused may have been stolen by the same thief and may have been delivered to the accused by him at the same time though stolen on different occasions If the accused received all these goods at the same time that would constitute only one offence—*Ishan Muchi v Q E* 15 Cal 511 In the absence of proof that a person accused of receiving stolen property received the stolen goods on different occasions it is not permissible to charge try and convict him in respect of each of them—1 L B R 39 Where several items of stolen property were found in the possession of the accused on the same date *held* that the accused committed only one offence and in the absence of evidence that the different articles were received at different times he could not be charged separately for each item of stolen property consequently the trial of the accused in respect of some of the stolen articles barred a second trial in respect of the remaining articles—*Ganesh Shaha v Emp* 50 Cal 594 *King Emp v Bishun Singh* 3 Pat 503 (519) 5 P L T 319 25 Cr L J 738 Receiving on one occasion various items of stolen property the result of various thefts is only one offence—*K E v Irapa* 3 Bom L R 187 So also the stealing of several bullocks from the same man at the same time is but one offence and there need not be as many charges as the number of bullocks stolen—1891 A W N 154 So also misappropriation of several books of account in respect of the same estate though on different occasions is but one offence the several books of account forming one set of books—*Promothanath v A E* 17 C W N 479 14 Cr L J 219 So also misappropriation of several sums of money on several occasions in regard to one individual is one offence—14 Cal 128 Receiving a bribe partly on one day and partly on another is one offence—5 C W N 322 Theft of a box and a bicycle from one person committed at the same time is one offence—*Byoy v Saish* 21 Cr L J 682 (Cal)

747 *Separate charge*—For every distinct offence there shall be a separate charge Even though the offences have been committed in the same transaction there should be a distinct charge for each distinct offence though they can be tried together under sec 235—10 C W N 53 76 All 195 See also the cases cited under heading *what are distinct offences* above In almost all these cases it has been held that the framing of one charge in respect of several distinct offences is not merely an irregularity but an illegality and the conviction on such a charge must be set aside But

in 11 C W N 54 41 Cal 66 and 19 C W N 972 it was held that the error in framing one charge was an error in form rather than of substance and did not amount to an illegality but a mere irregularity curable by sec 537 In 25 M L T 379 the Judges differed in opinion on this point

Alternative charges for contradictory statements —Where a person charged in the alternative with having made two contradictory statements one to a public servant and another contradicting the first on oath before a Magistrate and was convicted in the alternative either under sec 182 or under sec 193 I P C the Magistrate being unable to find which of them was false it was held that the charge was not made in accordance with this section there were two distinct offences of which two separate charges were necessary—*Q E v Ramji* 10 Bom 124 See also *Ratanlal* 503 But now see section 236 and illustration (b) to that section

748 *Joint trial illegal* —The accused was charged and tried at one trial for several distinct offences extending over a period of one year and the Full Bench held that this was an *irregularity* curable by sec 537 But the Privy Council has laid down that the disobedience of an express provision of law is not a mere irregularity curable by sec 537 but an *illegality* and that such illegality cannot be made good even if there is enough left upon the indictment upon which a conviction might have been supported—*Subrahmanya Aiyar's case* 25 Mad 61 (P C) This decision overrules 28 Cal 7 12 Mad 273 27 Cal 839 and 11 Mad 441 in which it was held that such a joint trial was a mere irregularity which could be cured by sec 537

Persons charged with offences committed in the course of *separate* transactions are entitled to separate trials A joint trial is illegal and must be set aside—*Paw Tha v K E* 3 L B R 280 *Shankar v A E* 11 A L J 188 26 Mad 125 The joint trial of several persons charged with rioting together with other persons charged with criminal trespass is absolutely illegal—14 Cal 395

Where the Magistrate heard the prosecution against several persons (charged with distinct offences) together and afterwards called upon them to plead separately in defence it was held that such a trial was in substance a joint trial of all the prisoners and therefore illegal and a retrial was ordered—*Paw Tha v K E* 3 L B R 280 5 Cr L J 417 So also where the Magistrate framed distinct charges and numbered them as distinct cases but when the witnesses came to be cross-examined he lost sight of the necessity of keeping the two trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both the charges it was held that the joint trial offended against the provisions of this section and the illegality could not be cured by sec 537—*Public Prosecutor v Mahabhal* 39 Mad 527 29 M L J 101 16 Cr L J 593

"Except.....Sections 234" etc.—The broad rule enunciated in sec 233 (viz that for every distinct offence there should be a separate charge and every charge should be tried separately) is made subject to four exceptions. But a Court cannot and ought not to treat a case as an exception to the general rule, unless it is satisfied that in the case before it the charge should be within one of the four exceptions, and it would be safer if the Magistrate or the Sessions Judge recorded in his charge sheet or judgment his reasons for treating the case as falling under one of the exceptions—*Shankar v K E*, 11 A L J 188, 14 Cr L J 116

749. Counter cases—It is illegal to try two counter cases between the same parties at one and the same trial, and a conviction at such a trial must be set aside, even though the cross cases were so tried together with the consent of the parties—*Manisa v Emp*, 13 Bur L T 245, 22 Cr L J 707. But a simultaneous trial of two counter cases is not the same thing as a joint trial, and is not prohibited by this section or by section 239. In certain cases and under certain circumstances a simultaneous trial may be irregular and improper, but that will not entitle the accused to have the whole trial set aside unless it is clearly shown that the procedure adopted has prejudiced him in his defence—*Dhako v Emp*, 1 P L T 498, 21 Cr L J 739. The proper course is to try the one case after the other. But both the cases must be tried by one and the same Magistrate. The simultaneous trial of two counter cases in two different Courts over one and the same occurrence is undesirable and unsatisfactory—*Sheikh Samir v Beni Madhab*, 37 C L J 410, *Judhisthir v Sheik Samir*, 27 C W N 700.

234 (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with and tried at one trial for any number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or any special or local law.

Provided that, for the purpose of this section an offence punishable under Section 379 of the Indian Penal Code shall be deemed to be an offence of the same kind as an offence punishable Section 380 of the said Code, and that an offence punishable

any section of the Indian Penal Code or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence when such an attempt is an offence

Change —The italicised words have been added by sec 62 of the Criminal Procedure Code Amendment Act XVIII of 1923. The reasons are stated below

750 Object of section —Secs 234 235 etc are exceptions to the broad and general rule enunciated in sec 233. The object of these exceptions is to avoid the necessity of the same witnesses giving the same evidence two or three times over in different trials and to join in one trial those offences with regard to which the evidence would overlap. But even when several criminal acts can be included in the same transaction (sec 235) no joinder of trials should be permitted which will result in bewildering the accused in his defence. *Crown v Gulam* 1 S L R 73. The reason of the provision (i.e. the provision contained in sec 234) is obviously in order that the jury may not be prejudiced by the multitude of charges and the inconvenience of the hearing together of a large number of instances of culpability and the consequent embarrassment both to Judges and accused —*Subrahmanya Ayyar v K E* 25 Mad 61 (P C)

751 Scope of section —This section says that the trial must be limited to three offences. It does not say that the trial must be limited to three charges. The same offence may be charged under different sections of the I P C and any number of such charges can be tried in one and the same trial. *Emp v Tribhuvan* 33 Bom 77

Again this section simply limits the number of offences that can be tried in one trial. But this does not mean that the prisoner cannot be tried separately in one day for more than three distinct offences of the same kind committed during the year. 3 Cal 540. So where the prosecution chooses under sec 222 (2) and the proviso thereto to prosecute for some out of the different amounts misappropriated during the year they are not estopped by sec 403 from instituting any further prosecution in respect of any fresh items misappropriated during the same period —*Emp v Kashinath* 12 Bom L R 226. *Nagendra Nath v Emp* 50 Cal 632 27 C W N 578 38 C L J 286

Moreover this section refers to trial and not to commitment. Where the Magistrate committed the accused to the Sessions on six charges of criminal breach of trust and three of falsification of accounts all the offences having been committed within a year it was held that the order of committal was not illegal but merely irregular and the irregularity could be cured by the Sessions Judge trying the charges separately —*Arishna Murthi v Emp* (1911) 2 M W N 179 17 Cr L J 369

This section contemplates a joint trial for offences committed within one year if the offences extend over a period exceeding one year the joinder of charges is illegal—1905 P R 14

This section applies where a person is accused of more offences than one it does not apply where a person is charged for one offence only e.g. an offence under sec 401 I P C (belonging to a gang of persons associated for the purpose of habitually committing theft) and the trial is not therefore illegal if the period over which the association extends exceeds one year—*Kasem Ali v Emp* 47 Cal 154 31 C I J 19 21 Cr L J 386

And lastly this section refers to offences and not to transactions It does not provide that all offences committed in a year in three different transactions may be tried in one trial—*Gehimal v Crown* 10 S L R 192 18 Cr L J 664 30 Mad 328 The operation of the two sections 234 and 235 cannot be combined and therefore a joint trial in respect of two sets of separate and independent transactions in which different offences have been committed is not permissible—*Faujdar v K E* 24 A L J 39 27 Cr L J 143 A I R 1926 All 261

752 Offences committed by several persons —This section does not apply where several persons committing offences of the same kind are jointly charged to such a case sec 239 clause (c) will apply The present section applies to the trial of one accused only—33 Cal 292 *Tulsi v Crown* 1917 P R 17 18 Cr L J 282 *Saved Lal v Emp* 20 Cr L J 7 (Nag) *Nga San v Emp* 21 Cr L J 794 (Bur) *Ram Prasad v K E* 19 A L J 796 22 Cr L J 657 In 3 P L J 224 however it has been held that the word person is to have its ordinary and natural meaning as defined by the General Clauses Act and is not to be restricted to the singular number Such a laboured interpretation would no longer be necessary because clause (c) of section 239 now expressly makes provision for the joint trial of several persons committing offences of the same kind within the period of one year

753 Offences of the same kind —See subsection (2) for the definition of this expression Where a person is found in possession of several items of stolen property he has committed offences of the same kind under sec 411 I P C and they do not cease to be so merely because the stolen articles are of very diverse character (e.g. stamps carpets buckets padlocks)—*K E v Bishun Singh* 3 Pat 503 (519) 5 P L T 319 25 Cr L J 738

The following are not offences of the same kind —Adultery and bigamy—*Ratanlal* 4 Falsification of accounts and criminal breach of trust—*Kasi Viswanathan v Emp* 30 Mad 328 Murder and hurt—*Shankar v K E* 11 A L J 188 Forgery and giving false evidence—*Gehimal v Crown* 10 S L R 192 For other examples see Note 745 in sec 233 under heading Distinct offences

754 Not exceeding three —An accused can only be charged and tried at one trial for any number of offences of the same kind not exceeding three committed within the space of a year Every act of falsification of a book of account would amount to an offence under this section and not more than three of such offences can be tried together—*6 Cal 560 Emp v Salimullah* 32 All 57 *Raman Behari v Emp* 41 Cal 722 *In re Chakraborty* 44 M L J 67 24 Cr L J 462 *Fitzmurray v Emp* A I R 1926 Lah 193 One charge under sec 124A I P C in respect of one article in a newspaper one charge under sec 124A I P C in respect of the same article and a third charge under sec 124A I P C in respect of another article can be tried together—*In re Bal Gangadhar Tilak* 33 Bom 221

Where an accused was charged at one trial with criminal breach of trust with respect to seventeen sums of money and also under sec 477A in respect of distinct offences in excess of three it was held that the course adopted was illegal—*Emp v Nathulal* 4 Bom L R 433 The joinder of charges of three offences under section 411 I P C and three offences under sec 414 I P C is bad—*Chellu Katwar v Emp* 49 Cal 555 Three offences of forgery under sec 477A and three offences of criminal breach of trust under sec 408 I P C committed in the course of similar but separate transactions cannot all be lumped together in one charge and jointly tried—*Sleeo Saran Lal v K E* 32 All 219 Three distinct offences of criminal breach of trust and three distinct offences of falsification of accounts though in respect of the same items cannot be tried together—*Emp v Manant* 49 Bom 892 27 Bom L R 1343 *Kasi Viswanathan v Emp* 30 Mad 328 Such a joint trial cannot be justified even under sec 235 because there are three defalcations committed on different occasions and the false entries connected with one defalcation cannot be said to form part of the same transaction with the other defalcations and falsifications—*Emp v Manant (supra)* Three charges of criminal breach of trust in respect of three items of money and a charge of falsification of accounts in order to conceal the defalcations cannot be legally tried at one and the same trial—*Emp v Shujauddin* 44 All 540 (following 32 All 219) Three charges of criminal misappropriation (sec 409 I P C) and a charge under sec 210 I P C cannot be tried together—*K E v Rayendra* 22 C W D 596 19 Cr L J 868 Where the accused was tried under secs 211 409 and 466 I P C on eight counts the trial was held to be illegal—*Atadh Behari v Emp* 20 Cr L J 784 (All)

Illegality cannot be cured by striking off a charge —A trial of the accused for four offences is altogether illegal and the illegality cannot be cured by the Judge striking out one of the charges after the trial has closed—29 Mad 569 *Chellu v Emp* 49 Cal 555 *Fitzmurray v Emp* A I R 1926 Lah 193 Although the Judge has power under sec 227 to alter a charge

before judgment is pronounced, still he cannot cure an illegality—*Ibid*. But the Judge can strike off a charge *before the trial begins*, as was done in the case of *Dal Gangadhar Tilak*, 33 Bom 221, where in the trial before the High Court Sessions, four charges were at first framed against the accused, but the Advocate General withdrew one of the charges, and then the trial proceeded on three charges

755. Offences against several persons —There was a conflict of opinion as to whether this section applied where the offences were committed against several persons. In the following cases it was held that the words 'offences of the same kind' were not limited to offences against the same person, an accused could be charged with and tried at the same trial for offences of the same kind though committed against different persons—*Chhatra-dhari v Emp*, 19 C W N 557 43 Cal 13, *Babu Lal v K E*, 2 P. L. J 209, 9 Cal 371, *In re Raja Rao*, 20 M L T 234 17 Cr L J 479, 38 All 457, 38 All 458 (Note), 13 C W N 507, *Ratanlal* 331, *Krishna-yya v Emp*, 20 Cr L J 71 (Nag) *Nga Po v K E*, 11 L B R 45 But the contrary view was taken in some other cases. Thus, it was held in a Madras case that the offences of extorting bribes from three different persons could not be charged and tried together—2 Weir 299. So also in a Calcutta case the joint trial of three complaints by three complainants alleging against the accused three offences of the same kind was held to be illegal—11 C W N 1128

In order to remove this conflict of opinion, the words 'whether in respect of the same person or not' have been added in subsection (1) 'We have inserted words in section 234 (1) which will at all events make it clear that an accused person may be charged at one trial with three offences of the same kind though committed against different persons. The addition will, we think, cover the difficulty which has been referred to in most cases' —*Report of the Select Committee of 1916*

Proviso —'We have also added a proviso to section 234 (2), which, we think, is required. Sections 379 and 380 Indian Penal Code, refer to theft and theft in a building which should clearly be treated as offences of the same kind and we think that it should also be provided specifically that an attempt to commit an offence where such an attempt is penalized by any law, is of the same kind as the actual offence' —*Report of the Select Committee of 1916*

This proviso overrules 20 C W N 672 and 20 Cr L J 751 (Nag) where it was held that theft in a building (sec 380 I P C) and theft of paddy in a field (sec 379 I P C) were not offences of the same kind.

235 (1) If, in one series of acts so connected together as
Trial for more than one offence. to form the same transaction, more offences
than one are committed by the same per-

son he may be charged with and tried at one trial for every such offence

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished the person accused of them may be charged with and tried at one trial for each of such offences

(3) If several acts of which one or more than one would by itself or themselves constitute an offence constitute when combined a different offence the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined and for any offence constituted by any one or more of such acts

(4) Nothing contained in this section shall affect the Indian Penal Code Section 71

Illustrations

to sub section (1)—

(a) A rescues B a person in lawful custody and in so doing causes grievous hurt to C a constable in whose custody B was A may be charged with and convicted of offences under Sections 225 and 333 of the Indian Penal Code

(b) A commits house breaking by day with intent to commit adultery and commits in the house so entered adultery with B's wife A may be separately charged with and convicted of offences under Sections 454 and 497 of the Indian Penal Code

(c) A entices B the wife of C away from C with intent to commit adultery with B and then commits adultery with her A may be separately charged with and convicted of offences under Sections 498 and 497 of the Indian Penal Code

(d) A has in his possession several seals knowing them to

be counterfeit and intending to use them for the purpose of committing several forgeries punishable under Section 466 of the Indian Penal Code A may be separately charged with and convicted of, the possession of each seal under Section 473 of the Penal Code

(e) With intent to cause injury to B, A institutes a criminal proceeding against him, knowing that there is no just or lawful ground for such proceeding, and also falsely accuses B of having committed an offence, knowing that there is no just or lawful ground for such charge A may be separately charged with and convicted of, two offences under section 211 of the Indian Penal Code

(f) A, with intent to cause injury to B, falsely accuses him of having committed an offence knowing that there is no just or lawful ground for such charge On the trial A gives false evidence against B, intending thereby to cause B to be convicted of a capital offence A may be separately charged with, and convicted of, offences under sections 211 and 194 of the Indian Penal Code

(g) A with six others commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot A may be separately charged with and convicted of, offences under sections 147, 325 and 152 of the Indian Penal Code

(h) A threatens B C and D at the same time with injury to their persons with intent to cause alarm to them A may be separately charged with and convicted of each of the three offences under section 506 of the Indian Penal Code

The separate charges referred to in Illustrations (a) to (h) respectively may be tried at the same time

'o sub section (2)—

(i) A wrongfully strikes B with a cane A may be separately charged with and convicted of, offences under sections 352 and 323 of the Indian Penal Code

(j) Several stolen sacks of corn are made over to A and

who know they are stolen property, for the purpose of concealing them A and B thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain pit A and B may be separately charged with, and convicted of, offences under sections 411 and 414 of the Indian Penal Code

(k) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure A may be separately charged with, and convicted of, offences under sections 317 and 301 of the Indian Penal Code

(l) A dishonestly uses a forged document as genuine evidence, in order to convict B, a public servant, of an offence under section 167 of the Indian Penal Code A may be separately charged with, and convicted of, offences under sections 471 (read with 466) and 196 of the same Code
to sub section (3)—

(m) A commits robbery on B, and in doing so voluntarily causes hurt to him A may be separately charged with, and convicted of, offences under sections 323, 392 and 394 of the Indian Penal Code

Scope —This section must not be taken as controlled by the words 'not exceeding three' occurring in sec 234 there is nothing in this section to warrant the rule that not more than three offences can be combined even if those offences have been committed in the same transaction—*Sanuman v Emp* 22 Cr L J 641 19 A L J 39. If the offences are committed in the course of the same transaction a charge is not illegal by reason of containing more than three offences spread over a period longer than a year—*In re Gam Wallu* 48 M L J 308 A. I R 1925 Mad 690

This section permits a joinder of charges in respect of offences arising out of the same transaction If two distinct offences are lumped together in one charge instead of framing two charges it is a mere irregularity curable by sec 537—*Abdul Rahman v A E* 4 Bur L J 213. *Ram Subhag v A E* 19 C. W N 972 16 Cr L J 641

756 Same transaction —The expression 'same transaction' used in secs. 235 and 239 is an expression which from its very nature is incapable of exact definition and must have been advisedly used because it had this quality—*Crown v Gulam* 1 S L R 73. 'We think it would be dangerous, if not impossible to attempt any definition of the phrase in the course

of the same transaction * An exhaustive definition is not feasible and if the phraseology is altered, the Courts would be deprived of the guidance which they now have from a long series of rulings on the point. It is not found that there has been any pronounced conflict of opinion, the reason being that the Courts, instead of attempting to lay down general principles as a rule discuss each case on its merits"—*Report of the Joint Committee* (1922)

The question whether the acts are so connected together as to form part of the same transaction is a question of fact—1910 M. W. N. 236 and the arena of facts covered by the expression 'same transaction' varies with the circumstances of each case—*Crown v. Ghulam*, 1 S. L. R. 73. *Fahim v. Emp.*, 18 S. L. R. 199. No comprehensive formula of application can be stated to determine whether two or more acts form part of the same transaction, but circumstances which must be taken into consideration of the question in an individual case can be indicated—proximity of time, unity or proximity of place, continuity of action, community of purpose or design—*Amrita Lal v. K. E.* 42 Cal. 1004. *Madhab Laxman*, 43 Bom. 147. 20 Bom. L. R. 607. *Fahim v. Emp.*, 50 Cal. 1004 (at p. 1008), *Banga Chandra v. Arora*, 527, *Crown v. Ghulam*, 1 S. L. R. 73. Those criminal acts which are regarded as subsidiary to an offence are regarded as part of the 'same transaction' as the offence. If a series of acts are committed together by proximity of time, community of action, continuity of action and purpose and such subsidiary acts are committed in such series of acts—*Crown v. Ghulam*, 1 S. L. R. 73. L. J. 191. The most essential tests are continuity of action and community of purpose—33 Mad. 502. *Virupana v. Emp.*, 22 B. L. R. 101. *v. K. E.*, 19 C. W. N. 672. 30 Bom. 49. *Pahlad v. Emp.*, 19 B. L. R. 101. *midhi v. K. E.*, 5 P. L. J. 11. *In re Lockley*, 43 B. L. R. 101. A substantial test for determining whether several acts form part of the same transaction is whether they are related together in point of purpose, as to whether they are principal and subsidiary acts, as to whether they are committed in such series of acts—*Crown v. Ghulam*, 1 S. L. R. 73. *Emp. v. Sherufalls*, 27 Bom. 135. *Sanuman v. Emp.*, 22 Cr. L. J. 641, 1918 M. W. N. 525. *Gurazam v. Emp.*, 19 Cr. L. J. 34 (Bur). *Woodward v. Emp.*, 12 B. L. R. 101.

When a proposal for a boycott is made by a group of persons, and shortly afterwards the secretary of the group takes joint action to boycott the person directed, the inference is that they are

purpose, or in other words that they are taking part in a conspiracy Acts done in pursuance of such a conspiracy must be deemed to be parts of the same transaction—*K E v Maung Aung* 1 Rang 604 2 Bur L J 224

Mere proximity of time between two acts does not necessarily constitute them as parts of the same transaction—1 L B R 361 *Nga Tha v Emp* 5 Bur L T 10r 13 Cr I J 485 The test to be applied to find out whether a series of acts form part of the same transaction is not so much the proximity of time as the continuity of purpose or progressive action towards a single object—*Legal Remembrancer v Monmohan* 19 C W N 672 *Kushai v Emp* 50 Cal 1004 *Pahlad v Emp* 1 Lah 562 21 Cr L J 626 2 N I R 147 *Gumant v Emp* 13 N L R 35 *In re Gam Mallu* 48 M L J 308 26 Cr L J 1513 *Palit Paban v Emp*, 26 Cr L J 369 (Cal) and a mere interval of time between the commission of one offence and another does not necessarily import want of continuity though the length of the interval may be an important element in determining the question of the connection between the two—27 Bom 135 *Pahlad v Emp* 1 Lah 52 *Kushai v Emp* 50 Cal 1004 *Virupana v Emp* 28 M L J 307 A series of acts separated by intervals are not excluded from the same transaction if the accused started together for the same goal—30 Bom 40 *Emp v Ganesh Narain* 14 Bom I R 972 13 Cr L J 833

Where two acts were committed on different dates and there was no connection between the two so as to make them the same transaction a joint trial is illegal—*Slaf v Emp* 21 A I J 859

757 Instances of same transaction —(1) Theft of a cart from one house, and theft of two bullocks from another house in order to remove the cart—2 N L R 147

(2) Cheating by false personation forging a letter to support the false personation and further cheating on the strength of that forged letter—11 C W N 715

(3) Receiving stolen property and assisting to conceal that property—28 All 313

(4) Criminal breach of trust and giving false evidence to screen the breach of trust—U B R (1897 1901) 31.

(5) Theft at the same time of two bullocks belonging to two owners tied at the yoke of a cart—Ratanlal 927

(6) Rioting, and causing hurt in the riot—7 All 29

(7) Conspiracy to wage war and concealing the existence of such conspiracy from the authorities—*Barindra v Emp*, 37 Cal 467 14 C W N 1114

(8) Dacoity in one place and murder of a person in another place who had found out the dacoits—4 Bom L R 789

(9) Extortion and false personation of a public servant in order to commit that extortion—*ro Alt* 58

(10) Wrongful confinement of several persons on two occasions for the same purpose viz for extortion of money—*Dj Supdt and Legal Remembrancer v Kailash* 42 Cal 760 19 C W N 181

(11) Forgery abetment of forgery and use of the forged document in a Civil Court—*Emp v Jiram* 40 Bom 97 17 Bom L R 881 16 Cr L J 761

(12) Causing grievous hurt to a person (for extorting confession) who died of the injuries and making false entries in the official records attributing another cause for the death of that person—*Emp v Balwant* 14 Bom L R 41 13 Cr I J 137

(13) Conspiracy to commit an offence and the commission of that offence in pursuance of the conspiracy—*Amrita Lal v Emp* 42 Cal 957 19 C W N 676 *Legal Remembrancer v Monmohan* 19 C W N 672 16 Cr L J 3 *Abdul Rahman v K E* 4 Bur L J 213

(14) Criminal misappropriation and falsification of accounts in order to screen the misappropriation—*Emp v Jiban Arishan* 40 Cal 318 Thus where a police officer who took charge of certain ornaments of a deceased lady misappropriated those ornaments and altered the entries in the police diary regarding the ornaments and substituted some fresh pages to show that the ornaments were never placed in his charge held that he could be tried for offences under secs 218 409 and 477A 1 P C as they were committed in the same transaction—*Dilas Clarend v Emp* 17 C W N 626

(15) Rioting causing hurt to one person in the riot and causing hurt to another person in the same riot—*Katwari v Emp* 39 All 623 15 A L J 594 18 Cr I J 788

(16) Criminal breach of trust and falsification of accounts made to conceal the breach of trust—*Emp v Jagatram* 19 Cr L J 987 (Punjab)

(17) Illegal possession of opium and illegal possession of cocaine for the purpose of carrying on business of selling contraband—*Emp v Naga Lu* 12 Cr L J 34 (Bur)

(18) A charge of receiving stolen property can be joined with a charge of cheating if a common purpose ran through these acts—*In re Lockely* 43 Mad 411 38 M I J 209

(19) Possession of stencil plates for the purpose of counterfeiting trade-marks (sec 485 1 P C) selling goods to which a counterfeit trade mark was affixed (sec 486 1 P C) and possession of such goods for the purpose of selling them (sec 486 1 P C.)—*Emp v Sherifalli* 27 Bom 135

758 Acts not forming same transaction —(1) Kidnapping a boy and after a day or two assaulting the boy's mother who came to demand of the boy—26 Mad 454

(2) Misappropriation of money payable to a Railway Company for goods to be taken delivery of and on a different day inducing the Railway Company to deliver the goods—13 C W N 1089

(3) Criminal trespass into the house of the complainant and assault on the complainant on a subsequent day while he was going to inform the Police of the criminal trespass—*Nga Tha v Emp* 5 Bur L T 101 13 Cr L J 485 see also *Virupana v Emp* 28 M L J 397 16 Cr L J 323

(4) Mischief and insult caused on two different days—3 L B R 113

(5) Murder and causing evidence of murder to disappear—2 Weir 301

(6) Dishonest receipt of each stolen article on each occasion is a separate offence and such receipts of more than three of such articles (see 234) cannot be tried together unless the dishonest receipts were so connected as to form one transaction—9 C W N 1027 See Note 746 under sec 233

(7) Criminal misappropriation and falsification of accounts relating to another distinct act of misappropriation—*Emp v Jagatram* 19 Cr L J 987 (Lah)

(8) Four distinct offences committed at different times at different places and against different persons—18 Cr L J 739 (Pat)

(9) Forgery and giving false evidence in respect of service of summons and false evidence in respect of service of another summons on a different occasion—*Gehimal v Crown* 10 S L R 192 18 Cr L J 664

(10) Five murders committed in one day three in one village in the forenoon and two in another village in the afternoon are not so connected together as to represent a series of acts forming the same transaction and cannot be tried together—*A E v Fauja* 17 A L J 614 20 Cr L J 353

(11) Preparation of false balance sheet by a Company for the year 1912 and preparation of another false balance sheet for the year 1913 are quite distinct and separate acts and according to no possible meaning of the word transaction can it be said that the two acts form parts of the same transaction—*Emp v Ram Narayan* 21 Bom L R 732 20 Cr L J 657

759 Separate trial not illegal —This is an enabling section and not imperative. Though it provides for a joint trial of offences committed in the same transaction yet a separate trial for each of the offences is not illegal—8 Cal 481. Thus where the accused has committed house breaking and theft he need not simultaneously be charged with both but he may be tried for and convicted of the two offences separately—*Ratanlal* 307. And a conviction or acquittal in respect of one of the offences is no bar to the trial of another—1906 A W N 32 *Emp v Kashinath*

12 Bom L R 226 11 Cr L J 337 Where it is likely that the joinder of charges will result in bewildering the accused such joinder should not be permitted even though the offences were committed in the same transaction—*Crown v Gulam* 1 S L R 73 *Ahmuddi v A E* 52 Cal 253 40 C I J 541 Thus in a recent Calcutta case where several offences were committed in the same transaction and a joint trial of several charges was held in the lower court the High Court to be on the safe side upheld the conviction and sentence on only one of the charges setting aside the conviction on the other charges—*Radha Nath v Emp* 50 Cal 94

760 Offences requiring sanction.—If during the course of the same transaction several offences are committed some requiring sanction and others not the accused can be tried for the offences not requiring sanction when no sanction has been given for the offences which require sanction—31 Mad 43

760A Subsection (2) —A person who has dishonestly received stolen property (sec 411 I P C) can be charged and convicted of voluntarily concealing or disposing of that property (sec 414 I P C)—*Emp v Abdul Ghan* 49 Bom 878 27 Bom L R 1373 A I R 1926 Bom 71

761 Section to be read subject to sec 71 I P C.—(For the text of section 71 I P C see notes under sec 35 ante) Although in cases falling under section 235 a joint trial of several offences may be held still in awarding punishment Courts are to be guided by the provisions contained in sec 71 I P C Therefore where an offence comes within two sections of the I P C the accused may be charged with and tried at one trial for two offences (subsection 2) but the punishment cannot be cumulative—*Ratanlal* 506 11 B H C R 13 So also where several acts each of which would by itself constitute an offence constitute when combined a different offence the person accused of them may be charged with and tried at one trial for the comprehensive offence or for any one of the offences

But it should be noted that sec 71 I P C refers only to cases falling under subsections (2) and (3) of this section and does not provide for cases under subsection (1) Therefore where offences are committed in the course of the same transaction but do not fall under subsection (2) or (3) the Court is not precluded from passing sentence on every such offence—*Ratanlal* 369 10 All 58 12 Mad 36 7 All 414 11 Cal 349 11 Cal 495 but the principle of sec 71 I P C is to be followed and the whole punishment should not be more severe than the punishment for the gravest offence provided—2 All 101 6 Cal 718 2 All 644 Where two offences are so compounded together that one substantive offence can be said to have been committed there should be only one sentence viz for the

offence proved *e.g.* in cases of abduction of a child with intention to steal from its person and theft—7 M H C R 375 house breaking by night in order to commit theft and theft—1 Bom 214 23 Bom 706 Ratanlal 79 2 All 644 rioting and causing grievous hurt (constructively)—10 W R 63 17 Bom 260 riot and murder—Ratanlal 493 riding a horse furiously and causing hurt to a bystander—Ratanlal 159 house trespass with intent to commit assault and grievous hurt 2 W R 29 In all these cases the whole punishment will be the same as that provided for the graver offence

236 If a single act or series of acts is of such a nature that it is doubtful which of several offences *Where it is doubtful what offence has been committed* the facts which can be proved will constitute the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences

Illustrations

(a) A is accused of an act which may amount to theft or receiving stolen property or criminal breach of trust or cheating. He may be charged with theft receiving stolen property, criminal breach of trust and cheating or he may be charged with having committed theft or receiving stolen property or criminal breach of trust or cheating

(b) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence although it cannot be proved which of these contradictory statements was false

762 Application of section—This section contemplates a state of facts which constitute a single offence but where it is doubtful whether the act or acts involved may amount to one or other of several cognate offences—*Q E v Croft* 23 Cal 174 (177) *Garesh v Emp*, 5 S L R 16 (per Pratt J C) Where it is not at all doubtful which of several offences the facts found would constitute, (*e.g.* where the facts as disclosed in the proceedings clearly amounted to the commission of acts which would const

titute offences under the Excise Act and also offences under the Merchandise Marks Act) this section does not apply—*Ib d Akram Ali v Emp* 18 C. L. J. 574. Moreover this section does not relate to distinct acts but to a single act or series of acts where the facts being ascertained it is doubtful which of several sections is applicable—*Sher Shah v Emp* 1887 P. R. 43.

Again this section refers to *cognate* offences such as theft and criminal breach of trust and does not relate to offences of so distinct a character as murder and theft—*Emp v Narottam* 1888 A. W. N. 85. So also an alternative charge should not be framed in respect of such distinct offences as offences under secs. 182 and 211 I. P. C.—1910 P. R. 20.

An alternative charge cannot be framed in respect of distinct offences nor even in respect of cognate offences when the difference is one of degree as to the intention imputed to the accused or as to some circumstances of aggravation. The criminal intention imputed to the accused must be specifically determined and not allowed to remain a subject of doubt in an alternative charge—*Ganesh v Emp* 5 S. I. R. 16 12 Cr. L. J. 224.

An alternative charge under this section can be framed only in those cases in which the prosecution cannot establish exclusively any one offence but are able on the facts to exclude the innocence of the accused and to show that the accused must have committed one of two or more offences—*Emp v Ganesh* 5 S. L. R. 16 12 Cr. J. J. 224. This section applies where the law applicable to a certain set of facts is doubtful by reason of the nature of the single act or series of acts done and in which it is charged or found proved that the act or series of acts constitute one or more or some one of several offences the doubt being on a matter of law only—*Akhan Mahamad v. Emp* 1887 P. R. 11. This section relates not to distinct acts but to a single act or series of acts where the facts being ascertained it is doubtful which of several sections is applicable—*Sher Shah v Emp* 1887 P. R. 43 and not where the facts proved raise a doubt as to whether the accused is guilty of any of the charges at all—12 C. W. N. 530. The Code only contemplates an alternative finding when the facts are ascertained and it would follow beyond doubt that the facts proved constitute one of two offences under one section of the Penal Code or when the evidence proves the commission of an offence falling within one of two sections of the Penal Code and it is doubtful which of such sections is applicable—Ratanlal 20. Sections 236 and 237 are merely provisions against the defeat of justice on technical grounds. Where an offence is proved by the evidence but its legal definition is doubtful or has been incorrectly given in the charge then sec. 236 or sec. 237 may be resorted to. They really deal with tances which the language of sec. 233 might fail to cover—*Mahadeo v Emp*, 9 N. L. R. 26 14 Cr. L. J. 135.

Therefore this section does not apply where the doubt in the mind of the Judge was not whether on the facts proved the accused's act fell within the purview of sec 302 or sec 201 I P C but whether there was sufficient proof that the accused had in fact committed the murder of the deceased or had merely caused evidence of murder to disappear such a doubt being a doubt as to facts—*Pirtapa v Crown* 1913 P R 11 14 Cr L J 664 So also the section is inapplicable where the doubt exists as to whether the accused had committed murder or culpable homicide not amounting to murder such a doubt being based on facts only—*Khan Walid v Emp* 1887 P R 11 So also where the accused was charged under two heads of charge with committing dacoity in each of two adjoining houses and it was doubtful as to which house he entered an alternative charge that the accused committed dacoity either in A's house or in B's house is illegal—*Ratanlal* 20

This section only authorises a charge in the alternative when it is doubtful which of the several offences the facts which can be proved will constitute and not where there may be a doubt as to the facts which constitute one of the elements of the offence—*Ilafader v Q E* 71 Cal 955 *Naya nulla v Emp* 26 Cr L J 594 (Cal) *Ganesh v Emp* 5 S L R 16 (per Pratt J C)

Where the offences are of a cognate nature e.g. theft and receiving stolen property charges may be framed alternatively—1889 P R 76 So also a charge of murder may be joined in the alternative with a charge of causing evidence of murder to disappear—*Emp v Hanmappa* 25 Bom L R 231 25 Cr L J 1349 *Asdal v Emp* 18 S L R 185 26 Cr L J 909 *Crown v Bawa Maghindas* 4 S L R 474 11 Cr L J 731 On charges under sec 489A (counterfeiting a currency note) and sec 410 (cheating) the High Court directed the conviction to be in the alternative—*Hira v Emp* 15 A L J 587 18 Cr L J 790

Where it is doubtful as to whether the offence was under a certain section of the Penal Code or under a section of any other law (e.g. Post Office Act) the charge should be cumulative. An alternative charge cannot be framed in respect of an offence under the Penal Code and an offence under a special law—*Ganesh v Emp* 5 S L R. 16 But see *Man hari v A L* 45 Cal 717 and *Tulsi Telint v Emp* 50 Cal 564 24 Cr L J 372 where it has been held that a charge under sec 380 I P C may be framed alternatively with a charge under sec 54A of the Calcutta Police Act. The Patna High Court also holds that a charge under sec 16 of the Motor Vehicles Act may be framed alternatively with a charge under sec 338 I P C—*Maksuddan v Emp* 2 P L T 31

If charges are framed cumulatively and such framing of charge is illegal the illegality cannot be cured by saying that if the charges had been

framed alternatively, it would have been valid. Thus a joinder of charges of three offences under section 411 I P C with a charge of three offences under sec 414 I P C is illegal because sec 234 does not allow a joinder of charges of more than three offences but this illegality cannot be corrected by the argument that if the charges had been framed in the alternative under sec 236 there would have been no defect in the trial—*Chetto v Emp* 49 Cal 555 24 Cr L J 86

763 Contradictory statements—Illustration (b) shows that contradictory statements constitute the offence of giving false evidence although it cannot be proved which of the two statements is false

An alternative charge in respect of two contradictory statements can be framed only when the prosecution is unable to prove which of the two statements is false—1890 P R 27 2 Weir 300 Otherwise two separate charges ought to be framed, one relating to each statement and such evidence as is procurable should be adduced to prove the falsity of one or other of the two statements—Weir 299

To attract the applicability of this section and justify a charge in the alternative in respect of contradictory statements it is essential to remember that it is only when the statements constitute a series of acts that an alternative charge can be framed under this section. Thus there is a common relation between a police investigation an inquiry by the Magistrate preliminary to commitment and a final trial in the Sessions Court the words series of acts would be applicable to the statements made at these different stages and an alternative charge can be framed in respect of the statements—*Salah Shah v Crown* 16 S L R 285 25 Cr L J 1195 A 1 R 1924 Sind 1 *Patraji v Emp* 12 O L J 644 2 O W N 637 26 Cr L J 1457

764 Sentence—When the conviction is in the alternative the Court should pass the maximum sentence provided for the lesser of the two alternative charges—*Hira v Emp* 15 A L J 587 18 Cr L J 790 *Sobha Singh v A C* 1903 P L R 63

237 (1) If, in the case mentioned in section 236, the accused

is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it

(2) (Omitted)

Illustration

A is charged with theft, it appears that he committed offence of criminal breach of trust or that of receiving stolen goods. He may be convicted of criminal breach of trust or receiving stolen goods (as the case may be), though he was charged with such offence.

Change.—Subsection (2) has been omitted from this section but been re-enacted as subsection (2A) of section 238, as it should be appropriately placed under that section.

765 Scope of section.—Section 237 has to be read with section 236. It applies to cases where sec 236 applies. If the facts of the case do not fall under sec 236 sec 237 has got no application—*Genu Manji K E*, 18 C W N 1276. *Akram Ali v Emp*, 18 C L J 574. *Ranath v Emp*, 24 A L J 168. 27 Cr L J 152. It is an enabling section which empowers the Court to convict the accused of offences which no charge has been framed but for which a charge could have been framed under sec 236—*Dhuanath v Emp*, 4 P L W 40 Cr L J 202.

766 Conviction for different offence.—A person charged and tried under sec 411 I P C (receiving stolen property) may be convicted of offence under sec 379 I P C (theft)—1888 A W N 116. Similarly a person charged with theft may be convicted of receiving stolen property—17 M L J 219. A person charged with criminal breach of trust may be convicted of attempting to cheat—12 B H C R 1. A person charged under sec 380 I P C may be convicted under sec 54A of the Calcutta Police Act although he was not charged with the latter offence—*Talant v Emp*, 50 Cal 564.

But the two offences (i.e. the offence charged and the offence of which the accused is convicted) must be *cognate* offences. Secs 236 and 237 refer to cognate offences such as theft and criminal breach of trust and do not relate to offences of so distinct a nature as murder and theft—1881 A W N 95. *Wallis v Crown*, 4 Lah 373. 25 Cr L J 385. Thus a person charged with rape cannot be convicted of kidnapping since the two offences involve different elements and different questions of fact—8 Bom L J 120. Persons charged with dacoity cannot be convicted of receiving stolen property—*Ratanlal* 31. A person charged with dacoity and not crime may be convicted of house trespass—23 W R 59. But a person charged with murder may be convicted of causing evidence of murder to disappear without any charge in respect of the latter offence because the accused might have been charged with the two offences in the alternative, under sec 236—*Begu v Emp*, 6 Lah 26 (P C). 41 C I J 437. 27 Bom

L R 707 33 A L J 636 48 M L J 613 26 Cr L J 1059 *Rannun*
 v *A F* 12 La 81 A I R 196 Lah 88

A person who is charged under secs 149 and 35 I P C with having constructively committed the offence of causing grievous hurt by being a member of an unlawful assembly cannot be convicted under sec 35 I P C of causing grievous hurt with his own hands—*Panchu Das v Emp* 34 Cal 698 A L v *Madan Mandal* 41 Cal 66 *Rea uddi v Emp* 16 C. W 1077 But the Madras High Court is of opinion that if a person is being charged with being a member of an unlawful assembly one of the members of which caused grievous hurt in pursuance of the common object there is no necessary implication that that particular member (who caused the grievous hurt) is not himself. Consequently if he is charged under secs 36 and 149 I P C with causing grievous hurt by implication by reason of his being a member of an unlawful assembly and it is found that he himself caused the grievous hurt he may be convicted under sec 326 I P C alone of the substantive offence of causing grievous hurt himself—*Theethumalai v K L* 47 Mad 746 (F B) 47 M L J 221 35 M L T 21

Alteration of charge necessary—When a person is charged with one offence and is convicted of a different offence the Court should alter the charge under sec 227 of this Code before conviction. Sec 237 does not imply that a person charged under one section of the I P C may be convicted under another section without altering the charge—1888 A W N 116 When the charge is altered the altered charge must be read and explained to the accused as provided in clause (2) of sec 227—*Dhun Singh v Emp* 23 A L J 436 *Raghunath v Emp* 24 A L J 168 24 Cr L J 15

767 *Power of Appellate Court*—An appellate Court has power to convict the accused for an offence though he was not charged and tried for that offence in the original Court—26 Cal 863 *Kalicharan v Emp* 41 Cal 537 18 C W N 309 And the Appellate Court can do so not only under this section but also under sec 423 (b) (2)—*Arishnan v Emp* (1916) 2 M W N 67 17 Cr L J 384

238 (1) When a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete minor offence and such combination is proved but the remaining particulars are not proved he may be convicted of the minor offence though he was not charged with it

When offence proved
 included in offence
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sisting of several particulars a combina-
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bination is proved but the remaining particulars are not proved
 he may be convicted of the minor offence though he was not
 charged with it

(2) When a person is charged with an offence, and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it

(2A) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged

(3) Nothing in this section shall be deemed to authorize a conviction of any offence referred to in Section 198 or Section 199 when no complaint has been made as required by that section

Illustrations

(a) A is charged under Section 407 of the Indian Penal Code with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under Section 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under Section 406

(b) A is charged, under Section 325 of the Indian Penal Code with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under Section 335 of the Code

Change —By section 64 of the Criminal Procedure Code Amendment Act (XVIII of 1923) sub section (2) of section 237 has been transferred to the present section and re enacted as sub section (2A) it being more appropriate under this section than under section 237

768 Principle of section —Where an offence consists of several particulars a combination of some only of which constitutes a complete minor offence the graver charge gives notice to the accused of all the circumstances going to constitute the minor offence of which he may be convicted. The latter is arrived at by mere subtraction from the former. But when the circumstances constituting the major charge do not necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also the principle no longer applies because notice of the former does not necessarily involve notice of all that constitutes the latter.—11 B H C R 240

Though a Magistrate has power under this section to convict the accused of a different offence from what he was originally accused of still this must

be done only in cases where the accused is not in any way prejudiced by the conviction on the new charge. The accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him and unless he has this knowledge he must be seriously prejudiced in his defence—*Balkesar v Imp* 3 P f T 3 2 23 Cr L J 114. But where the accused is charged under sec 457 I P C for criminal trespass with intent to commit theft it is open to the Magistrate to convict him under sec 456 I P C for criminal trespass with intent to carry on an intrigue with a woman and the accused is not in any way prejudiced by such conviction because to sustain a conviction under sec 456 I P C it is not necessary to specify the criminal intention it is sufficient if a guilty intention is proved such as is contemplated in sec 441 I P C—*Karali Prasad v Imp* 44 Cal 358 20 C W N 1075 17 Cr L J 424.

But the Patna High Court holds in a similar case that on a charge of criminal trespass with intent to commit theft the accused cannot be convicted of criminal trespass with intent to commit adultery because he will be prejudiced by such a conviction—*Balkeshwar v L* 3 P L T 3 2 13 Cr f J 114.

Minor offence —Minor offence is not defined anywhere in the Code and should be understood in its ordinary and not in any technical sense—22 Cal 1006. It means an offence deserving a lesser degree of punishment.

This section enables a Court to convict a person of a minor offence although he was charged with a major offence but it does not enable a Court to do the contrary i e to convict on a major offence when the accused was charged with a minor one—1 Bom L R 513.

769 Cases under this section —An offence under section 365 I P C can be said to be a minor offence as compared with secs 366 and 376 I P C and a person charged under the latter sections can be convicted of the offence under the former section (365 I P C) even though he was not charged with it—2 Cal 1006. A person charged with dacoity may be convicted of theft though he was charged with dacoity and not with theft—17 Bom 369. A person charged with an offence under sec 457 can be convicted of an offence under sec 414 I P C since the latter offence is included in the former—*Ratanat* 93.

Where the graver offence of rioting was not proved the Magistrate was competent to try the accused for the lesser offence of assault—7 Mad 454. Where the accused is charged with offences under secs 304 and 325 f P C he may be convicted under sec 323 I P C—34 Cal 375. An offence under sec 211 I P C includes an offence under sec 187 I P C and therefore it is competent for the Magistrate to convict under sec

though the accused may be charged under sec 11 I P C—*Crown v Anubomali* 8 S L R 179 16 Cr L J 104 A person charged under section 457 I P C for criminal trespass with intent to commit theft can be convicted of an offence under sec 456 I P C for criminal trespass with intent to carry on intrigue with a woman—*Karali v Emp*, 44 Cal 358 20 C W N 1075 Where the common object of an unlawful assembly is to commit criminal trespass a person charged under section 147 I P C for being a member of an unlawful assembly can be convicted under sec 447 I P C (criminal trespass) because the latter offence is a minor one and included in the former—*Ariff v Emp*, 18 C. W N 992 Where the charge is under sec 430 I P Code (mischief by cutting the embankment of a reservoir) the conviction can be under sec 426 I P C (mischief)—*Banamali v A L* 6 P L T 39 26 Cr L J 682

In the trial of an accused by a Sessions Judge with the aid of assessors for an offence so triable it is competent to the Judge to convict the accused of a minor offence though that offence is triable only by a jury—*Emp v Chargauda* 45 Bom Cr 19 Similarly an accused charged under sec 412 I P C (triable by jury) can be convicted under sec 411 I P C (triable with the aid of assessors) though not separately charged with the latter offence—*Emp v Gulabchand* 27 Bom L R 1416

770 Cases not under this section—A charge under sec 376 I P C cannot be altered into a conviction under sec 366 I P C because the two sections involve different elements and different questions of fact and the latter cannot be said to be minor to or included in the former—*Emp v S Kharam* 8 Bom L R 120 *G G Sircar v Emp* 3 Rang 68 4 Bur L 1 29 Similarly where the accused was charged with murder but the evidence disclosed an offence of kidnapping from lawful guardianship a conviction for the latter offence could not be sustained since it was neither minor to nor included in the former offence—*Weir* 30 An offence under sec 207 I P C is not a minor offence included in the offence under sec 201 I P C and therefore a conviction for the former offence cannot be had where the charge was under the latter section only—*Imp v Rina* 5 S I R 123 13 Cr L J 18 A person charged with dacoity and not convicted for house trespass the latter offence not being a part of the former—23 W R 59 A person charged with dacoity or house breaking by night cannot be convicted of dishonestly receiving stolen property because none of the particulars which go to make up the offence of dacoity or house breaking constitute by themselves the offence of receiving stolen property and hence the latter offence cannot be considered as a minor offence included in the dacoity or house-breaking—*Achpal v Emp* 26 Cr L J 1361 A I R 19 6 Lah 13 A person charged with robbery cannot be convicted of house-breaking by night and theft in a dwelling house because all the particulars constituting the latter offences

are not included in the definition of robbery with which the accused was charged—*Ratanlal* 211 A person charged with murder cannot be convicted of robbery—*Hall v Crown* 1 Lah 373 25 Cr L J 385

Rioting and hurt etc—Where the accused were charged with rioting they could not be convicted of criminal trespass and hurt because none of the latter offences was a necessary ingredient of the offence of rioting and it was not proved that the common object of rioting was criminal trespass or hurt—18 Cr L J 860 (Mad) Where the accused is charged with being a member of an unlawful assembly and with committing grievous hurt by implication (secs 141 and 35 I P C) he cannot be convicted of the substantive offence of causing grievous hurt under sec 325 by his individual act because under no reasonable construction of this section can the substantive offence of causing grievous hurt individually be regarded as minor to or included in the charge under secs 325 and 149 I P C of causing grievous hurt by implication—*Panchu v Emp* 34 Cal 698 *Emp v Madan Mandal* 41 Cal 66 34 Cal 35 *Rasul v A E* 16 C W N 1077 *Contra*—*Theethumalai v A L* 47 Mad 746 (T B) cited in Note 766 ante

771 Subsection (2A)—*Attempt*—Under this subsection when an accused is charged with an offence he may be convicted of having attempted to commit that offence although the attempt was not separately charged—1 P L J 391 *Bilnghurst v Blackburn* 27 C W N 821 *In re Doraiswami* 48 Mad 774 48 M L J 190 26 Cr L J 755

Abetment—There is a conflict of opinion as to whether a person charged with a substantive offence can be convicted of abetment of that offence In 33 Mad 261 *Sitorani v Emp* 21 C L J 44 (Pat) *Darbari v Emp* 22 Cr L J 311 *Muthu Karakku v Emp* (192) M W N 182 23 Cr L J 206, *Emp v Raghya* 26 Bom L R 323 25 Cr L J 2135 and 11 B H C R 240 it has been held that it is improper for a Court to find a man guilty of the abetment of an offence on a charge of the substantive offence only because when a man is accused of a substantive offence he may not be conscious that he will have to meet an imputation of collateral circumstances constituting an abetment of it which may be quite distinct from the circumstances constituting the substantive offence itself A charge for the substantive offence as such gives no intimation of a trial to be held for the abetment But in *Yedithi v Emp* 23 M L J 77-13 Cr L J 453 and *Kehr Singh v Crown* 191 P W R 11 22 Cr L J 161 it is laid down that if on the facts proved two charges can be framed viz the commission of the principal offence and the abetment thereof the accused can be convicted of the offence of abetment though it was not separately charged against him

An accused may be convicted of a substantive offence though he was charged only with abetment of that offence see 1912 P W R 17

77 Subsection (3)—*When minor offence requires complaint*—See subsection (3) A person charged with one offence cannot be convicted of a minor offence if the latter offence requires a complaint by a particular person mentioned in secs 198 and 199. Thus the offence of adultery requires complaint by the husband and therefore a person charged with rape cannot be convicted of adultery in the absence of a complaint by the husband. Even the husband's giving evidence in the case will not amount to a complaint—3 All 233. See Note 634 under sec 199 as to what constitutes a complaint by the husband.

773 Power of Appellate Court and High Court—The powers under this section may be exercised by Appellate Courts. An Appellate Court can alter a conviction for a major offence into a conviction for a minor offence—*Hanuman v Emp* 20 A L J 213 23 Cr L J 198.

Where the jury acquitted the prisoners of certain offences and found some other facts upon which the jury could have convicted them of some other offence but did not convict, the High Court has power to convict the prisoners of the latter offence—3 Cal 189.

239 When more persons

What persons than one are
may be charged jointly accused of the
same offence or

of different offences committed in the same transaction or when one person is accused of committing any offence and another of abetment of, or attempt to commit, such offence, they may be charged and tried together or separately as the Court thinks fit, and the provisions contained in the former part of this Chapter shall apply to all such charges

239 The following

persons may
What persons be charged and
may be charged jointly, tried together,

namely—

(a) persons accused of the same offence committed in the course of the same transaction,

(b) persons accused of an offence and persons accused of abetment of or an attempt to commit such offence,

(c) persons accused of more than one offence of the same kind within the meaning of S 234 committed by them jointly within the period of twelve months,

(d) persons accused of different offences committed in the course of the same transaction,

(e) persons accused of an offence which includes theft extortion or criminal misappropriation and persons accused of receiving or retaining or assisting in the disposal or concealment of property possession of which is alleged to have been transferred by any such offence committed by the first named persons or of abettors of or attempting to commit any such last named offence

(f) persons accused of offences under Ss 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence and

(g) persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin or of abettors of or attempting to commit any such offence

and the provisions contained in the former part of this Chapter shall so far as may be apply to all such charges

Illustrations

1. (a) A and B are accused of the same murder A and B may be charged and tried together for the murder

(b) A and B are accused of robbery, in the course of which A commits a murder with which B has nothing to do. A and B may be tried together on a charge charging both of them with the robbery, and A alone with the murder.

(c) A and B are both charged with a theft and B is charged with two other thefts committed by him in the course of the same transaction. A and B may be both tried together on a charge charging both with the one theft, and B alone with the two other thefts.

Change—This section has been redrafted by sec 65 of the Criminal Procedure Code Amendment Act XVIII of 1923.

The actual change brought about by this amendment is the addition of clauses (c) (e) (f) and (g). It is provided that when two or more persons are accused of offences of the same kind committed by them jointly during the space of one year they may be tried for the same at one trial. *Secondly*, it is directed that when one person is accused of any offence which includes theft etc. and another of receiving or retaining or disposing of the stolen property, they may be tried jointly. *Thirdly*, provision is made for the joint trial of one person accused of counterfeiting coin and another of fraudulently possessing or uttering it. —*Statement of Objects and Reasons* (1914). *Fourthly*, another clause i.e. clause (f) has been added by the Select Committee of 1916 allowing the joint trial of persons accused of offences under secs 411 and 414 of the Indian Penal Code.

774 Scope and Application—This section lays down certain general principles for the combination of charges in a joint trial of several persons. The object of these principles is to avoid the likelihood of bewildering the accused in their defence by having to meet many disconnected charges and of endangering the prospect of a fair trial by the production of a mass of evidence directed to many matters and tending by its mere accumulation to induce an undue suspicion against the accused persons.—*Sarun v Emp* 19 A L J 39, 2 Cr L J 641.

This is the last exception to sec 233 which lays down the general principle that every offence must be charged and tried separately. This is the only section which authorises a joint trial of several persons under circumstances specified in this section. Except in cases falling under this section a joint trial of several accused renders the trial invalid—4 N L R 71 and a misjoinder thus taking place is not a mere irregularity which can be cured by the provisions of sec 537.—*Lachku v Emp* 1 O L J 141, 15 Cr L J 420 or by any waiver or consent of parties or their pleaders—6 Cal 96.

This section applies to *trials* and not to *inquiries*. The sections of the Cr P C relating to joinder of charges viz 233 to 239 refer to trial of the accused and cannot be extended to preliminary inquiries held by Magistrates prior to commitment to the Sessions—*Mad* 59. Therefore in a joint commitment of several accused it is not necessary that the conditions of this section should be fulfilled—*Nelluri Chetti v Rex* 42 *Mad* 511 36 *M I J* 296. o *Cr I J* 379.

But this section is applicable to inquiries under Chapter VIII. The main principles applicable to a criminal trial regarding joinder of charges and the joint trial of accused persons are also applicable to inquiries under Chapter VIII—*3 C W N* 180 14 *Cal* 358 *Q F v Abdul Kadir* 9 *All* 45 *Q L v Vatha* 1 *All* 11 *Q I v Gunda Ratanlal* 585 *Q F v Bapu Ratanlal* 556.

Again this section does not apply to trials of cross cases. The trial of the accused in the two cross cases ought to be separate. But a simultaneous trial is not altogether invalid but somewhat irregular—*C S v* 344 13 *C L R* 275. See Note 749 under section 233.

775 Clause (a)—Persons accused of the same offence.—The words same offence imply that both the accused should have acted in concert or association and therefore where the allegation was that each of them committed the crime this section does not apply and the accused must be tried separately according to sec 233—*Emp* 6 *Bur L* 1 191 7 *L B R* 68 14 *Cr I J* 563. It has been shown that part of the stolen property was found in the possession of one person and another part was found in the possession of another; would probably be illegal to try the two men together if the two men were acting in concert and were in joint possession of the property their joint trial would not be illegal—*Jafar v* 27 *P L J* 64 17 *Cr L J* 234 *Musai Khamat v Emp* 27 *Cr L J* 757. Two persons found in possession of stolen property cannot be tried together on a charge under sec 401 if there was no connecting link between the two. It is only a suggestion that either or both of them were the thieves. The only connecting link between them was that the property stolen from the same complainant—*Emp* 563 *A I R* 1922 *All* 459. Unless the persons are joint persons cannot be tried jointly under sec 401 if the stolen property merely because the goods were stolen from the same complainant—*Emp v Balgovind* 17 *C L J* 477 (*All*) 815 23 *Cr L J* 409.

Same offence.—These words signify one and the same act of crime and not different acts constituting the same crime.

name or punishable under the same section. When A and B give false evidence in the same judicial proceeding even though they depose in the same day regarding the same matter and in almost the same words they do not commit the same offence but different offences which cannot be tried together unless they were committed by them in the same transaction—*Gurwant v Emp* 13 A L R 35 16 Cr L J 339 *Imp v Hys Ali* 5 S L R 129 13 Cr L J 23. See also 2 Weir 271 L B R (1872 189) 129 2 Weir 304. So also where two persons were charged with criminal misappropriation with respect to a certain sum of money held that there was a misjoinder of charges because it is impossible to hold that two persons can be guilty of misappropriation of the same parcel of money. The charges against them must be of misappropriation of one case and abetment in the other. It is also open to the Court to frame the charges against each of them in the alternative of misappropriation or of abetment—*Girwar v K E* 16 C W N 600 13 Cr L J 506.

776 Clause (b)—Abetment.—A person charged with a substantive offence can be tried jointly with a person charged with abetment thereof. Thus where a person who had a license for the sale of opium allowed another who had no such license to sell it they could be jointly tried the offence of the former being an abetment of the offence of the latter—1906 P L R 113. A licensed vendor is punishable under sec 50 of the Bengal Excise Act for the acts of the servant in such a case the master is said to be an abettor of the servant by implication and both may be tried together—*Priya Nath v A E* 15 C L J 69 13 Cr L J 225. When a person is charged with kidnapping and three others with having abetted that offence at different places all the four persons can be tried jointly at the place where the principal offence was committed—18 All 350.

If A induces B to cheat and B attempts to cheat in consequence A and B may clearly be tried together for abetment of and attempt at cheating—*Kal Das v Imp* 38 Cal 453 11 C W N 463 12 Cr L J 106.

777 Clause (c)—Offences of the same kind.—Section 234 applies only to the case of one accused committing several offences of the same kind within a year. But where several persons committed several offences of the same kind there was no provision under the old law for the joint trial of those persons and consequently separate trial was necessary—10 C W N 32. Thus it was held that where three dacoities were committed by several dacoits on three different dates and at separate places the dacoits must be separately charged and tried for each dacoity as the offences were not committed in the same transaction—*Ran Prosad v A E* 19 A L J 796 22 Cr L J 657. So again three acts of robbery

committed by several persons on the same night in three distinct places were to be tried separately—6 W R 83 Where several persons looted the linseed crop of the complainant on one day and his tobacco crop on another day the offences must be tried separately as they were not parts of the same transaction—33 Cal 292 These cases are now overruled by this clause Under the present law the offences can be tried together, provided that each offence is committed by the accused persons *jointly* and it is not necessary that all the sets of offences must be committed in the same transaction If the offences are not *joint* this section cannot apply thus where three persons were found to be in possession of stolen articles but none of the articles were in their *joint possession* they could not be tried jointly even though the articles were the proceeds of one burglary—*Jivan v Emp* 19 A L J 815 *Moosan v Emp*, 20 A L J 563 Where rape was committed on a woman on a field by two accused persons and subsequently the woman was taken either by force or by fraud by one of the accused alone to different places, and where he alone committed rape on her *held* that a joint charge against both the accused of having committed rape at different places is improper—*Keramal v A E* 42 C L J 524 27 Cr L J 263 A I R 1926 Cal 310

The joint trial of two persons for passing counterfeit coins on three different occasions to three persons on the same date is valid under this subsection—*In re Kovaganti* 44 M. L J 130 23 Cr L J 719 A I R 1923 Mad 181.

778 Clause (d)—Distinct offences committed in the same transaction.—For the meaning of the words same transaction see notes under section 235 If more persons than one are accused of different offences committed in a series of acts so connected as to form one transaction they may be tried together Whether or not the series of acts be so closely connected as to form the same transaction necessarily rests with the Court to decide The limits are wide but no joinder of charges or trials should be permitted which will result in bewildering any of the accused in his defence or in causing undue prejudice against him—*Crown v Gulam*, 1 S L R 73

To enable the Court to try at one trial several persons for several distinct offences the offences must form part of the same transaction—*Po Mya v Emp*, 7 L B R 272 16 Cr L J 44 this section does not apply to charges against several persons accused of several offences unless the acts constituting these offences form the same transaction—33 Cal. 299 9 C W N 1027 *Gunawant v Emp*, 13 N L R 35 [16 Cr L J 339 20 Cr L J 7 *Karam Singh v Crown* 1911 P L R 122 *Nur Khan v Emp*, 7 Lah L J 64 26 Cr L J 1167

The expression same transaction would imply oneness of purpose. If, in the course of some quarrel arising accidentally among persons who have collected to witness a festival there happens to be a fight and if some persons inflict injury on others without any common object they would be committing different offences of hurt. And if they do not act with any common intention it cannot be said that they have caused hurt in the course of the same transaction although all the persons committing the offences are there at one and the same place and at the same time. In such a case the joint trial of these persons would be improper—*Tufail Ahmed v Emp.* 23 A L J 5 26 Cr L J 734 A I R 1925 All 301. Two festivals fell on the same day and on the same evening. An arrangement was agreed upon to the effect that the firing of fire-works should be stopped till the procession of *dulendi* passed off. But this arrangement was not adhered to by some people and they fired off fireworks at random and thereby caused damage and injury to the person and property of the public. Held that these persons could not be tried together because the offences were not committed in the same transaction there being no oneness of purpose among the accused—*Ibid*.

It is also necessary that the accused must be associated together in the perpetration of the acts forming the same transaction from start to finish—29 Bom 449 30 Bom 49 50 Cal 1004 (at p 1009) 1917 P R 17. But it is not necessary that all the persons must be charged with all the offences. See illustrations (b) and (c). In such cases it is immaterial whether all the members of the party took an active part in each offence—*Ram Prasad v Emp.* 20 A L J 926. If the accused started together for the same goal this suffices to justify the joint trial even if incidentally some of them have done an act for which the others may not be responsible—30 Bom 49 *Kushal v Emp.* 50 Cal 1004 (1010) *Kalidas v Emp.* 38 Cal 453, *Tepanisidhi v K E* 1 P L T 180 5 P L J 11 6 M L T 17 *Prag v K E* 11 O L J 693 25 Cr L J 1169. Thus six persons were accused of waging war under sec 121 I P Code. The sixth accused joined the gang after the 1st and the 2nd accused had been arrested. But the gang to which the accused belonged continued under the leadership of the same man and was actuated by the same purpose. Held that the joint trial of the 6th accused with the 1st and 2nd accused was legal—*In re Gam Mallu* 48 M L J 308 26 Cr L J 1513 A I R 1925 Mad 690. If the accused started together for the same goal and in the process committed a series of acts they could be jointly tried for those offences although the acts were separated by intervals of time—*Ashulosh v Purna Chandra* 50 Cal 159 (164). The foundation for the procedure laid down in this section is the association of two persons concurring from start to finish to attain the same end. Community of purpose or design and continuity of action are the essential elements

of the connection necessary to link together different acts into one and the same transaction. In such cases the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as necessary thereto—*Tepanidhi v K E* 5 P L J 11 1 P L T 180 1 P L T 364 Where the accusation against all the accused persons is that they carried out a single scheme by successive acts done at intervals and there was a complete unity of project and the whole series of acts were so linked together by one motive and design as to constitute one transaction a joint trial is not only valid but is demanded in the interest of public time and convenience—*Kushal Mallik v Emp* 50 Cal 1004 *Emp v Ganesh* 14 Bom L R 972 Thus where a girl is abducted on a certain night and thereafter various people conceal her the offence being a continuing offence all persons can be tried together—50 Cal 1004 25 Cr L J 1082

Charge need not specify same transaction —It suffices for the purpose of a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction within the meaning of this section. It is not necessary that the charge should contain a statement as to the transaction being one and the same. It is the tenor of the accusation and not the wording of the charge that must be considered as the test—30 Bom 40

Examples of offences committed in the same transaction —

(1) Criminal breach of trust by one person and receipt by another of the stolen property (the proceeds of the breach of trust) knowing it to be so—6 Bom L R 317 In such a case it is not necessary that the offence of receiving should take place simultaneously with the offence of criminal breach of trust—*Ibid*

(2) Where one set of accused were members of an unlawful assembly with the common object of setting fire to municipal buildings and another accused was a member of that assembly with the object of forcibly closing a college it was held that the proceedings of the mob consisting of several transactions from first to last showed such a continuity of purpose and action as to form one transaction and all the rioters could be tried at one trial—*In re Loganatha gar* 6 M L T 17 11 Cr L J 30

(3) The offence of keeping a gaming house and the offence of playing therein arise out of facts so inseparably connected together as to form one transaction and therefore the keeper and the players are clearly within the purview of this section as persons accused of different offences committed in the same transaction and can be tried jointly—*Sheikh Moti v Emp* 9 N L R 68 14 Cr L J 493, *Bhana v Crown* 1919 P R 6 20 Cr L J 219 *Khiluda Ram v Crown* 3 Lah 359 23 Cr L J 621, 20 Cr L J 768 (Pat) *Ganesh Lal v Emp* 20 A L J 967 *Contra*—

1914 P R 35 and 1910 P W R 5 where it has been held that the two offences cannot be said to be parts of the same transaction

(4) If several accused carry out a systematic scheme of criminal breach of trust, by successive acts done at intervals, each accused alternately taking the benefits, the unity of the project constitutes the acts as parts of one transaction, and all the accused can therefore be jointly tried—30 Bom 49

(5) Charges of murder against three accused, and an alternative charge against one of them for murder or causing disappearance of evidence of murder can be jointly tried—*Crown v Gulam*, 1 S L R 73, *Emp v Hanappa*, 25 Bom L R 231 A I R 1923 Bom 262 *Contra*—8 All 252

(6) Where several persons were members of a secret society and conspired to wage war to deprive the King of the sovereignty of British India and collected arms and ammunitions for that purpose and actually waged war, it was held that the joint trial of all the accused for offences under sections 121, 121A, 122, 123 I P C was legal—*Barindra v Emp*, 37 Cal 467, and so long as the conspiracy continues the transaction which began with the forming of the common intention continues—*Harash Nath v Emp*, 19 C W N 706 16 Cr L J 9

(7) Where illegal gratification is paid to a person through another the joint trial of both persons for offences under secs 161 and 162 I P C is valid—7 Bom L R 637

(8) Where several persons were entrusted with a sum of money and those persons in collusion committed criminal breach of trust or dishonestly misappropriated the amount, they could be jointly tried—*In re Appadurai*, 17 Cr L J 30 (Mad)

(9) Cheating by A in respect of a certain sum collected from several persons on a certain date, and cheating by B in respect of another sum collected from some other persons at the same time, at the same place and in pursuance of the same conspiracy, are parts of the same transaction, and A and B may be tried together—*Kailash v K E*, 46 Cal 712 29 C L J, 31 So also conspiracy and acts of cheating in pursuance of that conspiracy can be tried together—*Abdul Salim v K E*, 49 Cal 573 26 C W N 680 35 C L J 279

(10) Where a gang of dacoits assembled on a highway for robbing passers by, and in the course of the dacoity several offences were committed by them, held that all these offences were committed in the course of the same transaction It is immaterial whether all the members of the gang took an active part in each offence—*Ram Prosad v Emp*, 20 A L J 926

(11) The offence of dacoity, the offence of dishonest possession of stolen property knowing it to have been stolen in the commission of a dacoity, and dishonest reception of such property, knowing it to be stolen,

from a known dacoit can be tried together as all the offences can be said to have been committed in the same transaction—*Emp v Durga Prasad* 45 All 3 30 A L J 981 24 Cr L J 149 It will now fall under clause (c)

(12) The offence of fabricating false evidence in order to procure the conviction of an innocent person the offence of instituting a false prosecution against that person and the offence of giving false evidence in that prosecution in order to secure his conviction—all these offences can be tried together as there was one sustained and continuous plot for procuring conviction of an innocent person—*Emp v Ganesh* 14 Bom L R 972 13 Cr L J 833

779 Offences not in the same transaction —(1) In case of rioting the two opposite factions cannot be said to commit the offence of rioting in the same transaction the action of each side forming a separate transaction the two parties must be tried separately—6 Cal 96 20 Cal 537 *Ala Dja v K L* 1906 P R 5 1881 A W N 28 1883 P R 15 *Contra*—*Emp v Mangal* 18 A L J 744

(2) Murder and robbery on one occasion and another act of robbery committed a few hours after in another place though close to the scene of the former offences do not form parts of the same transaction—14 All 502 So also murder by four men and grievous hurt by three of them caused upon a person who tried to prevent them from carrying off the dead body some time after the murder are not offences committed in the same transaction—*Nawab Singh v Crown* 1906 P R 10 4 Cr L J 285 1907 P L R 117

(3) Dacoities committed on *different dates* do not form part of the same transaction—1882 A W N 180 8 M L T 286 So also offences under secs 147 and 325 I P C committed on one date and offences under secs 147 323 and 342 I P C committed on another date cannot be tried together as they were committed in different transactions—*Pulloo Lal v Emp* 21 A L J 820 25 Cr L J 446

(4) Where a person obtained a promissory note by cheating and on a subsequent date he went with another person and both cashed the note the two persons cannot be charged and tried together for both the offences since the occurrence of each date formed a distinct transaction by itself—31 Cal 1053

(5) A charge of theft against one person and a charge against another person for rescuing the former from lawful custody cannot be tried together—13 C W N 804 11 Mad 441 Similarly one person committing an offence punishable under the Railways Act and other persons rescuing the former from the custody of the Police while he was arrested cannot be tried jointly—29 Cal 385

(6) The offences of rioting and murder committed by five persons,

and the offence of concealing the dead body (of a person killed in the riot) committed by the 5th accused, cannot be tried jointly. The offence of the 5th accused (concealing the dead body) should be tried separately—*Su vendra v Emp*, 40 C L J 559 A I R 1925 Cal 413 26 Cr L J 467

(7) A charge against five men of having committed a riot, and a charge against four of them of having committed criminal trespass on a different occasion cannot be tried together in the same trial—14 Cal 395

(8) A person charged under sects 414 and 411 I P C cannot be tried jointly with four others charged under section 454 I P C—*Sahab Singh v Emp*, 1105 P R 38 1905 P L R 115

(9) Two persons fabricating a *kabuliyat*, and two other persons fabricating another *kabuliyat*, the two sets of persons not having any community of interest, cannot be tried together—*Kazi Safiuddin v Fazl Sheikh*, 21 C W N 756 18 Cr L J 833

(10) Two acts of abduction separate and distinct though of the same genus, committed by two sets of persons at different dates cannot be tried together—1 C L J 475

(11) Where several dacoities were committed by several persons, but the persons implicated in one dacoity were not the same as those implicated in the other or others the dacoities were not committed in the same transaction and could not be tried jointly—*Ram Sahai v Emp*, 19 A L J 610 22 Cr L J 397

(12) The author of a defamatory article who is charged under sec 500 I P C and the printer of the article, who is charged under sec 501 I P C cannot be tried together when there is no evidence of conspiracy between them—*Asulosh v Purna Chandra* 50 Cal 159 36 C L J 287 24 Cr L J 206 (*Bhawal Defamation Case*)

(13) Murder by one person and intentional omission by another person who discovered the murder to give information in respect of the murder, cannot be said to be offences committed in the same transaction—*Ratan Singh v Emp*, 19 A L J 915 23 Cr L J 8

(14) The offence of receiving stolen property (sec 413 I P C) and the offence of belonging to a gang of thieves (sec 401 I P C) relate to different transactions and cannot be tried together—*Chhajju v Emp*, 26 Cr L J 1097 (Lah)

780 Clause (e) —Under the old law it was held that where A and B were charged with house breaking by night with intent to commit theft and C with having received some of the stolen articles on a certain day, and D with having received some other stolen articles on another day, the joint trial of these persons would be illegal—1882 A W N 215 This ruling is now superseded by clause (e) of this section

Where one person has committed *theft* and another person *received the stolen property* knowing it to be stolen, they can be tried jointly—6 C L

R 245 *Emp v Bhima* 14 A L J 344 38 All 311 6 Bom L R 361
Anwar v Emp 10 A L J 96 44 All 276 1 C W N 35 28 Cal 10
Nga Po v Emp 4 Bur L T 263 13 Cr L J 59 and it is not necessary
 that the receiving should take place simultaneously with the theft—
 44 All 276 Even an appreciable interval of time between the two acts
 which are otherwise connected does not always prevent them from being
 parts of the same series of connected events and from being tried together
 —14 Bur L R 38 2 L B R 19 In 29 Bom 449 and *Ramratan v Emp*,
 21 C W N 1111 19 Cr L J 17 however it is held that theft and receipt
 of stolen goods cannot be said to be acts committed in the same transaction
 because the thief and the receiver of goods are not associated in the series
 of acts which form the same transaction from the very start the one offence
 takes place after the other is completed In another Calcutta case also it
 was held that unless the theft and subsequent receipt were committed in
 pursuance of the same conspiracy the two offences could not be said to
 be parts of the same transaction and the offenders could not be tried to-
 gether—*Ohl Bhusan v Emp* 46 Cal 741 23 C W N 463 29 C L J
 71 Under the present clause however it is not necessary that the two
 offences must be committed in the same transaction or in pursuance of the
 same conspiracy all that is now required is that one offender should commit
 theft and the other offender should receive the stolen property

Dacoity and receiving the property stolen in the dacoity may be tried
 together under this clause—*Durga Prosad v Emp* 45 All 23 20 A L J
 981

The offence of belonging to a gang of thieves (sec 401 I P C) is not an
 offence which includes theft within the meaning of this clause because
 the former offence is committed as soon as a gang of persons associated
 for the purpose of habitually committing theft is formed and before any
 theft is actually committed by them Therefore an offence of belonging
 to a gang of thieves and an offence of receiving stolen property cannot be
 tried together under this clause—*Clayton v Emp* 6 Cr L J 1097 (Lah)

781 Clause (f) —The object of this clause and the meaning of the
 words possession of which has been transferred by one offence have
 been thus explained by Mr Tonkinson during the debate in the Legisla-
 tive Assembly Take a concrete example A is a cattle thief two
 cattle are stolen B is the dishonest receiver to whom A has passed on
 one of the cattle C is the dishonest butcher who knows the cattle to have
 been stolen and assists in their concealment by slaughtering the other
 Well if A is present A B and C can all be tried together under clause
 (e) If A has disappeared then this is not possible and the provisions
 of clause (f) are required The possession of these cattle has been
 transferred by one offence the original offence of theft One person has

committed an offence under sec 411 I P C and another person has committed an offence under section 414 I P C The two cattle were stolen at the same time, that is one offence—*Legislative Assembly Debates*, 6th February 1923 page 1992 By this clause, the ruling in 28 Cal 104 is rendered obsolete

The only offences mentioned in this clause are offences under secs 411 and 414 I P C and the provisions of this clause cannot be extended by analogy to a trial of persons accused of offences other than those specifically mentioned herein Therefore, the joint trial of two accused both charged under sec 412 I P C, is illegal—*Behari v K L*, 12 O L J 339 26 Cr L J 1291 A I R 1925 Oudh 452

782 Clause (g) —A person who passes counterfeit coins and another who is in possession of them can be tried jointly—31 Cal 1007

783 Separate trial —A joint trial is not compulsory under this section the Magistrate has a discretion to proceed jointly or separately against the accused persons—*Govinda v Emp*, 16 N L R 9 21 Cr L J 769 Though the offences are committed in the same transaction, still it is a question for the Court in the exercise of its discretion to say whether the accused should be tried together or separately—*Emp v Charu Chandra* 38 C L J 309 25 Cr L J 294 This section gives a judicial discretion to the Court to try the accused persons jointly or separately and the manner in which the discretion should be exercised must depend upon the facts of each case—*Dwarkanah v K E* 19 C W N 121 16 Cr L J 348 Although a joint trial is allowed under the circumstances specified in this section still it is the duty of the Magistrate to see that the accused are not prejudiced thereby No joinder of charges should be allowed if it bewilders any of the accused in his defence or unduly prejudices him—*Crown v Gulam* 1 S L R 73 5 Mad 20 *Alimuddi v K E* 52 Cal 253 29 C W N 173 Thus, a number of murders and an offence of arson were committed Though all the accused were present there was evidence against some of them only as regards those offences There was evidence against all the accused together only of conspiracy to commit murder All the accused were charged with conspiracy, murder and arson and the jury returned a verdict of guilty against all the accused on all the charges Held that the jury were embarrassed and the accused were prejudiced in their defence—*Alimuddi v K E*, (supra) If the accused appear to have acted independently and have separate defences the joint trial is illegal—2 Weir 303

A separate trial is the rule, and joint trial is the exception, and it is for the prosecution to justify a joint trial—*Emp v Durga Prasad*, 45 All 223 (224) 20 A L J 981

783A Applicability of sec 234 to sec 239 —In Burma and Oudh it

has been held that the words the former part of this chapter occurring at the end of this section mean the part prior to the part headed joinder of charges i. e. the part under the heading form of charge, therefore sec 234 will not control the provisions of sec 239—*Bishamb'ar v K L*, 2 O W N 760 26 Cr L J 1602 *Po Vs A Emp* 7 L B R 272 16 Cr L J 44 But in 11 A L J 188 it has been held that the words mean that secs 234 and 235 shall also apply to this section Sec 239 is governed by secs 234 and 235 see notes under sec 234

784 Misjoinder not cured by acquittal—Where several persons were charged with and tried at one trial for dacoity and one of these persons was also tried for an offence under sec 40 Arms Act for being in possession of arms and ammunitions at a time subsequent to the dacoity and after the transaction in which the dacoity was committed it was held that the trial was illegal and the fact that the Sessions Court acquitted him of the offence under the Arms Act observing that the accused could not be legally convicted at the same trial of the offence under the Arms Act, could not cure the illegality—*Jaising v Crown* 1917 P R 44 19 Cr L J 100

240 When a charge containing more heads than one is framed against the same person and when a conviction has been had on one or more of them the complainant or the officer conducting the prosecution, may, with the consent of the Court withdraw the remaining charge or charges or the Court of its own accord may stay the inquiry into or trial of such charge or charges Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn

785 Scope of section—This section applies where the accused is charged with several distinct offences and not where formal charges are drawn up against him—1889 P R 4 Where the offence is one but the charges are several because the offence falls under several sections of the I P C or because there is doubt as to which offence was committed this section does not apply and the conviction of the accused on one of the charges necessarily makes the other charges nugatory

It however the accused has committed several offences and several charges are therefore drawn up the conviction on one of the charges d

not make the other charges nugatory, but it is open to a Court to convict the accused on the other charges or to withdraw the charges under this section—1889 P R 24 This is an enabling section and gives the Court discretion either to convict or acquit the accused on the remaining charges, and does not make it obligatory on the prosecution, on a conviction on one charge, to withdraw the other charges

If the evidence is sufficient to sustain a conviction on all the charges, and the Court considers a certain term of imprisonment adequate to meet all the offences, it is not a proper course for the Court to convict on one charge and drop the others, but it should convict on all the charges and pass concurrent sentences—*Reg v Ram Chandra, Ratanlal* 19, Q E v *Nadhariya, Ratanlal* 288

Again, this section applies only to charges framed in the same case, and the prosecution cannot, on conviction of the accused in one case, withdraw a charge against the accused in another case—Q E v *Sadia Ratanlal* 362 Q E v *Govinda, Ratanlal* 977

Charge when can be withdrawn—A charge can be withdrawn at any time before it is tried If however evidence on the charge is recorded and the pleaders heard, it cannot be withdrawn and it is the duty of the Judge to sum up the whole of the evidence and to require the jury to return a verdict on the charge *A fortiori*, a charge cannot be withdrawn after a jury has returned a verdict convicting the accused on that charge—Q E v *Nadhariya, Ratanlal* 288

High Court's power to direct withdrawal—Where the accused was charged with 10 offences of criminal breach of trust, in respect of 10 small sums, and the Sessions Judge convicted the accused on three only of the charges, the High Court on appeal approved of the Sessions Judge's action, and also directed that no further proceedings against the accused in respect of the other offences should be taken—9 C L J 257

CHAPTER XX

OF THE TRIAL OF SUMMONS-CASES BY MAGISTRATES

786. This chapter deals only with the trial of summons cases, a warrant case cannot be tried under this chapter. If however a warrant case is joined with a summons-case, e g. where two charges arising out of the same transaction are made against an accused person, one of which is a summons case and the other a warrant case, the procedure should be as in a warrant case—11 Cal 91. 39 Mad. 503; 41 Mad 727. But in such a case if the warrant case is not proved, the Magistrate may proceed with the summons case according to the procedure laid down in this chapter and not under chapter XXI—7 Mad. 454.

Procedure in summons-cases.

241 The following procedure shall be observed by Magistrates in the trial of summons cases

242 When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he shall not be convicted, but it should not be necessary to frame a formal charge.

787 Particulars to be stated to accused —It is necessary that the accused should have a clear statement made to him (a) that he is about to be put on his trial, and (b) as to the offence or facts constituting the offence of the commission of which he is accused. If these particulars are not made known to him, the conviction will be set aside—3 C L R 87. Where the Magistrate did not explain to the accused the particulars of the offence of which he was accused but merely told him that he was accused of an offence under sec 19 of the Burma Village Act the trial was illegal—*K L v Nga Sein* (1922) 4 U B R 127.

788 Charge —Although it is not necessary to frame a formal charge in a summons case still the provisions of section 233 as to joinder of charges apply to summons cases as well because a charge is an essential element in any trial—3 L B R 52. See also 41 Cal 694 cited under sec 233.

When a summons case is tried jointly with a warrant case the procedure of a warrant case has to be followed and a charge has to be drawn up not only for the warrant case but for the summons case also. Where

243 If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him and, if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly.

789 Charge —The word *may* has been substituted for the word *shall*, by sec 66 of the Criminal Procedure Code Amendment Act XVIII of 1923. Under the old law the Magistrate was bound to convict the accused if the latter pleaded guilty and there was nothing to show that the plea was not unreserved or voluntary—3 S L R 213. If the accused

guilty the Magistrate was bound to convict him and pass a sentence though a nominal one he had no power to discharge the accused on the ground that his criminal intention was wanting—U B R (1905) Cr P C 37

This power is now given to the Magistrate by the present amendment. This amendment gives the Magistrate a discretion which he does not now possess as to convicting an accused who pleads guilty in a summons case and the Court is thus able to refuse to accept a plea of guilty which it believes to be untrue.—*Statement of Objects and Reasons* (1914) By making this amendment the Legislature has reverted to the ordering of the 1872 Code

790 Admission of accused.—Where in a prosecution for obstructing the road with a bullock cart the accused on being questioned whether he drove the cart on the particular road without permission answered that he drove the cart without permission on account of ignorance and begged to be excused held that this did not amount to an admission that he had committed the offence and a conviction based thereon was wrong—*Emp v Gulam Ra* a 25 Cr L J 707 (Lah) So also it is an incorrect procedure to convict an accused on an admission made by his counsel without examining the accused or recording any evidence—*Municipal Board v Tulsi Ram* 1 O W N 495 26 Cr L J 179

The Legislature requires that the admission shall be recorded as nearly as possible in the words used by the accused because the right of appeal depends upon whether he really pleaded guilty or not—1889 A W N 81 When an accused person makes an exculpatory statement before the framing of a charge the Magistrate should take down the plea in the form of question and answer and in the exact words used by the accused in answer to the charge—5 Bom L R 999

The admission of the accused should be recorded at once at the time of the trial and not afterwards from the rough notes nor from the Magistrate's memory—15 Mad 83

Where a written defence is tendered in a case under this chapter it is not incumbent on the Magistrate to take down the defence of the accused by personally examining him—16 W R 53

If a warrant case is tried under the summons case procedure the Magistrate cannot convict the accused on his own admission without recording evidence and without framing a formal charge—*Nabab v R E* 27 C W N 93 Even if the case is tried summarily he must frame a charge if he passes an appealable sentence—*Ibid*

244 (1) If the Magistrate does not convict the accused under the preceding section, or if the accused does not make such admission the Magistrate shall proceed to hear the complainant

Procedure when no such admission is made

(if any) and take all such evidence as may be produced in support of the prosecution and also to hear the accused and take all such evidence as he produces in his defence

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court

<p>(2) The Magistrate may, if he thinks fit on the application of the complainant or accused issue process to compel the attendance of any witness or the production of any document or other thing</p>	<p>(2) The Magistrate may, if he thinks fit on the application of the complainant or accused issue a summons to any witness directing him to attend or to produce any document or other thing</p>
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(3) The Magistrate may before summoning any witness on such application require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court

Change —This section has been amended by section 67 of the Criminal Procedure Code Amendment Act XVIII of 1923

The italicised words at the beginning of the section have been added as consequential to the amendment made in sec 243. The proviso has been introduced to provide for the case where a complaint has been made by a Court and we have made a similar amendment in section 252. —*Report of the Joint Committee (1922)* In sub section (2) the word summons has been substituted for process for reasons see Note 792 below

791 **Magistrate's duty to examine complainant witnesses etc** — The Magistrate is not at liberty to stop a case whenever he likes. If the accused does not make the admission under sec 243 the Magistrate is bound to hear the complainant and his witnesses and he is not competent to acquit the accused without examining them—Ratanlal 539 2 B L R S N 15 18 All 221 6 W R 75 It is not sufficient to examine the complainant alone if the complainant has any witnesses they must also be examined—5 Mad 160 and the Magistrate is not entitled to acquit the accused on a consideration of the complainant's statement alone—20 Mad 388

Again it is *prima facie* the duty of the prosecution to call the witnesses who prove their connection with the transaction in question and who from the connection must be able to give important information—8 Cal 121 10 Cal 1070 All persons said to have witnessed the offence should be

produced before the Magistrate—1916 P R 12 If such witnesses are not called an adverse inference against the prosecution may be drawn—8 Cal 121

Moreover the Magistrate is bound to examine the accused and his witnesses—6 W R 75 He is bound to examine *all* the witnesses that are produced by the accused and has no discretion in this matter—13 W R 63 The Magistrate has no power to arbitrarily limit the number of witnesses to be examined though he has undoubted jurisdiction to curtail the number of *unnecessary* witnesses on the ground that their examination will delay and probably defeat the ends of justice—*Biswanath v Shivanand* 2 P L T 330 It is also the duty of the Magistrate to enquire of the accused as to whether he has any witness to produce Where no such enquiry is made the conviction is liable to be set aside—1884 P R 7 If the accused does not produce any witness no unfavourable inference will be drawn against him—8 Cal 121 But see 21 C W N 1152 (cited under see 290)

The Magistrate must base his decision on the evidence produced on either side in Court he cannot rely on statements made to him out of Court—14 Bom 572

Cross examination —In summons cases the accused has no right to postpone the cross examination of any prosecution witness as in the case of trial of a warrant case But if the cross examination was postponed in accordance with the direction of the Magistrate he is bound to give further opportunity to the accused to cross examine the witness Otherwise the evidence of such witness will not be legally admissible—*Parmeshwar v Emp* 3 P L T 347

792 *Issue of summons* —If the complainant or the accused thinks that any witness is not likely to appear without summons he should apply beforehand to the Magistrate for summons to enforce his attendance—14 W R 76 When such application is made the Magistrate must either grant or refuse the application he cannot simply file it—6 C W N 548

The Magistrate has a discretion as to whether he will issue summons or not—14 W R 76 21 Cr L J 385 (All) Where a complainant mentioned the name of several witnesses but could only produce two of them the Magistrate could decide the case on the evidence of the two witnesses alone 15 W R 87 and was not bound to issue summons to the other witnesses—4 M H C R App 29

But where a summons had already been issued to a witness and he did not appear in obedience to the summons it was held under the old law that the Magistrate was bound to issue further process against that witness and had no discretion to refuse to issue further process—*Daulat v Brinda* 30 Cal 121 The party at whose instance the process was originally issued had a *right* to call upon the Court to compel the attendance of

his witness—6 C W N 548 But by virtue of the present amendment of sub-section (2) this section read with section 90 will give a *discretion* to the Magistrate to issue further process (warrant) or not This amendment has been made on the recommendation of the *Select Committee of 1916* who observed The difficulty intended to be dealt with by this clause rests upon the words process to compel the attendance as seems clear from the Calcutta decisions We think that the only alteration really required is to substitute for the words referred to above the simpler expression a summons to any witness directing him to attend etc This we think will make section 90 clearly applicable which is in our opinion all that is required

If a witness summoned by the Magistrate does not care to appear the Magistrate is not bound to re-issue the summons but it is in his discretion to issue fresh summons if he likes—*Seltanuthu v Chinnappan* 27 Cr L J 76 A I R 1926 Mad 361

793 Sub section (3)—Payment of process fee —If the complainant fails to deposit fees for summoning witnesses the Magistrate must deal with the case on such evidence as he may have before him but should not dismiss the complaint—3 Mad 160

If the accused fails to deposit process fees the Magistrate may refuse to issue process but this order of refusal must be sparingly passed and such order would be improper in a case where the accused is unable or unwilling to deposit the money and the result is that he is convicted without his witnesses being heard especially if the case is one in which a severe sentence is passed—1898 P R 7

245 (1) If the Magistrate upon taking the evidence referred to in Section 244 and such further evidence (if any) as he may of his own motion, cause to be produced and (if he thinks fit) examining the accused finds the accused not guilty he shall record an order of acquittal

<p>(2) If he finds the accused Sentence guilty he shall pass sentence upon him according to law</p>	<p>(2) Where the Magistrate does not proceed in accordance with the provisions of Section 349 or Section 562 he shall if he finds the accused guilty, pass sentence upon him ac- cording to law</p>
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Change —Subsection (2) has been amended by sec 68 of the Crimi

nal Procedure Code Amendment Act XVIII of 1923 This amendment is merely one of drafting

794 **Acquittal—Discharge** —A Magistrate who does not find the accused guilty, must record an order of acquittal No order of *discharge* can be passed under this section—1900 P R 19 Even if he styles his order as an order of discharge, the discharge will amount to an acquittal for no other order is contemplated in summons cases That being so the Sessions Judge has no power to take action under sec 437 (now 436) against a person alleged to be discharged—8 M L T 78

If on the contrary, the Magistrate tried a warrant case as a summons case without framing a charge and passed an order of acquittal the so called acquittal would operate as a discharge under sec 253 of the Code—1886 A W N 260 If, however, the Magistrate framed a charge in a summons case, the acquittal should be under sec 258 and not under this section—22 W R 12

Compensation to accused —When the Magistrate acquits an accused under this section on the ground that the complaint was vexatious he can under sec 250 direct the complainant to pay compensation to the accused—10 Bom 199 5 Mad 381 Even if the Magistrate tries a warrant case as a summons case and acquits the accused, he can award compensation

'Shall pass sentence —If the Magistrate convicts the accused, he is bound to pass some sentence at least a nominal one—4 M H C R App 66, 2 Bom L R 611 U B R (1905) Cr P C 37

246 A Magistrate may, under Section 243 or 245, convict the accused of any offence triable under this Chapter which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons

Finding not limited by complaint or summons.

795 **Scope of section** —This section enables the Magistrate to proceed in regard to any other offence *prima facie* established by the evidence for the prosecution It is not necessary that the case started by the complainant must be the one which the Court should find proved, before it arrives at a conclusion of the guilt of the accused The Court is not bound by all the statements of the complainant Its duty is to find out the truth in the midst of the conflicting evidence—*Emp v Somnath*, 14 Bom L R 135 But it is not necessary, when the Magistrate thinks that other offences have been committed, to reopen the trial or to follow the procedure of secs 243 and 244 Such a procedure would involve the rehearing of all the evidence in the same trial and is clearly opposed to the intention of the Legislature—36 Cal 869

This section does not mean that the accused in a summons case can be convicted of an offence alleged to have been committed on a date to which no reference has been made in the complaint or summons—*Sarkar v. Haurah Municipality* 22 Cr L J 559 (Cal)

247 If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day

Provided that where the complainant is a public servant and his personal attendance is not required the Magistrate may dispense with his attendance and proceed with the case

795A Scope —This section does not apply to cases instituted under section 195 and the Magistrate cannot dismiss the complaint for default of the complainant to appear—*Ratanlal* 137 See prov 10

This section does not apply unless the case is instituted upon a complaint Under sec 47 of the U P Act II of 1916 it is the Magistrate who takes cognizance of the offence upon information received So the case is not one instituted on a complaint and sec 247 of this Code has no application In spite of non appearance of the complainant the proceedings must continue—*Basanti v. Masud Ali* A I R 1924 All 528 26 Cr L J 170

796 Does not appear —The appearance of the complainant s Vakil is not appearance of the complainant within the meaning of this section unless the Court has dispensed with his personal attendance and has specially allowed him to appear by a pleader—2 Weir 309

If the complainant does not appear the Court is not bound to wait for the complainant till the Court closes for the day—7 Mad 356 The Magistrate is empowered to dismiss the complaint if the complainant does not appear when the case is called on for hearing even though he appears soon after—7 Mad 213

Although a Magistrate has power to dismiss the complaint for default of the complainant s appearance he should exercise his power with a reasonable discretion He should not dismiss the complaint where the non appearance of the complainant was due to circumstances beyond his control e g a heavy flood which cut off all communications—24 W R 64 5 W R 51 or when the case was transferred from one Magistrate to other, and the complainant was present in the Court premises but not

had notice of the transfer did not appear before the particular Magistrate who had charge of the case, but appeared in the previous Court—13 C L R 303, 47 Cal 147, 24 C L J 444, or where the complainant had been kept out of the way by the action of the accused in getting a constable to arrest him on a false charge—38 Mad 1028, or where the case was called on for hearing on a date not fixed for hearing and the complainant was necessarily absent—42 Cal 365, or where the complainant was dead and another person wished to be brought on the record—*Madhu Chowdhury v Turab*, 18 C W N 1211, 1 P L J 262, (*contra*—*Purna Chandra v Dengar*, 19 C W N 334) or where the complainant was in jail and could not therefore appear—*Ratanlal* 59

Non appearance on adjourned hearing —A Magistrate can dismiss a complaint and acquit the accused, not only where the complainant does not appear on the first day of hearing but also where he fails to appear on the date of adjourned hearing—2 Weir 308, 22 W R 40, *Ramjiwan v Abilakh*, 18 C W N 584 But this power to dismiss a complaint must be exercised with discretion Where the complainant has done all that is necessary for him to do to establish his case, a complaint ought not to be dismissed for his non appearance on an adjourned date, unless his attendance is in the opinion of the Magistrate specially required on that day—2 Weir 306, 46 Cal 867

Again, a Magistrate cannot dismiss a complaint for non appearance of the complainant on the adjourned date if the order of adjournment was not made in the presence and hearing of parties—8 M H C R App 5 or where the Magistrate did not specify the place where the case was to be taken up but ordered the parties to appear either at Aligarh or at Talibnagar—1882 A W N 229

Non appearance on date of judgment —This section applies to a case of absence of the complainant on the date fixed for his appearance or on the date of adjourned hearing, and does not apply to a case where the complainant is absent on the date fixed for delivery of the judgment. If on such a date the complainant is absent (and the attendance of the complainant on that date was not specially directed by the Magistrate) an order of acquittal of the accused on the ground of absence of the complainant is erroneous—46 Cal 867, *Emp v Jangusinh*, 19 N L R 49

797. *Order of acquittal* —In a summons case, if the complainant is absent on the day of hearing, the proper order to be passed by the Magistrate under sec 247 is one of acquittal and not one 'striking off' the complaint—10 Bom L R 628

The accused is entitled to acquittal if the complainant is absent, and unless the Court thinks proper to adjourn the hearing of the case to some other day In other words, the right to an order of acquittal accrues to the

accused upon two conditions, and is dependant *firstly* on the absence of the complainant, and *secondly* on the Court not adjourning the case. But if on the date of hearing the case is not taken up at all, it cannot be said that the second condition is fulfilled, and the accused is not entitled to acquittal owing to the absence of the complainant on that date—*Rash Behary v. Corporation of Calcutta*, 26 Cr L J 1050 A I R 1926 Cal 102

Warrant case—If a warrant case is tried by the Magistrate as a summons case, the procedure is bad, and he cannot pass an order under this section dismissing the complaint for non appearance of the complainant—4 C W N 26

Where two charges, one on a summons case and another on a warrant case, are jointly tried in one trial and the complainant is absent on the adjourned hearing, the Magistrate ought to make an order of discharge under sec 259 and not one of acquittal under this section—41 Mad 727 11 Cal 91.

If a summons case is tried under the warrant case procedure, and eventually the Magistrate acquits the accused under sec 247 on account of the absence of the complainant on an adjourned date of hearing *held* that the acquittal is legal and proper. Section 247 lays down a general principle that a person charged with a summons case offence is entitled to an acquittal if the complainant is absent, and there is no reason why this right should be denied to him simply because the Magistrate has adopted a different procedure for the trial of the case—*Venkatarama v Sundaram*, 44 M L J 119

Further inquiry—Since an order under this section is one of acquittal and not one of discharge, no further inquiry can be directed under sec 436—*Hindra v Bhagwanra*, 25 Cr L J 359 (Oudh)

Absence of accused—This section has nothing to do with the presence or absence of the accused. If the complainant is absent, the case must be dismissed and the accused acquitted, whether the latter is present or absent—17 C W N clix. If the complainant is absent, the accused must be acquitted and it is immaterial that the summons to the accused had not been served and that the accused was not present when he was summoned—*Kiran Sarkar v Emp*, 5 P L T 15 24 Cr L J 815 (Calcutta 2111 307). If there are several accused and one is present and the others absent, the order acquitting the accused who is present will put an end to the case also against the other accused who are not before the Court—4 C. W. N. 346

Appeal to District Magistrate—If an order of dismissal is passed under this section, the District Magistrate has no power to set aside the order of acquittal on appeal, because under sec. 417 an appeal against an

of acquittal shall be directed by the Government and presented to the High Court—7 Mad 213 38 C L J 196

798 Revival of complaint—retrial —The Code contains no provision empowering a Magistrate to revive a case after an order of dismissal—4 C W N 26 The dismissal of a complaint under this section amounts to an acquittal and bars a subsequent trial on the same facts (section 403) even if good cause is shown for non appearance of the complainant—45 All 58 26 M L J 160 *In re Guggilappu* 34 Mad 253 12 Cr L J 41 9 M L T 93 4 C W N 346 1885 A W N 43 *Ram Mahala v Emp* 2 P L T 170 *Airan Sarkar v Emp* 5 P L T 15 38 C L J 196 Even the District Magistrate has no power to order the entertainment of a complaint which was dismissed for default of appearance—2 Weir 308 He cannot order the entertainment of a fresh complaint for a different offence on the same facts—*Fasar v K E* 37 C L J 253 25 Cr L J 149 But

the proceedings are so irregular as not to amount to a trial the dismissal will not amount to an acquittal and the complaint may be revived—2 Weir 307 *Ratanlal* 59 In 2 P L T 170 it has been held that even if the order of acquittal is passed under a misapprehension still the Magistrate cannot take cognizance of a fresh complaint if the order is wrong, the complainant can take proper steps by way of revision but he cannot file a fresh complaint

In a Madras case it has been pointed out that the accused who is acquitted under this section owing to the absence of the complainant on the date fixed for hearing is acquitted without trial on the merits he cannot be said to have been tried within the meaning of sec 403 and therefore an acquittal under this section is not a bar to a second complaint of the offence on the same facts—40 Mad 977 (Note) dissenting from 34 Mad 253 But the other High Courts are of opinion that an acquittal under section 247 acts as a bar to further proceedings in the same way as an acquittal after trial on the merits—See 45 All 58 4 C W N 346 *In re Guggilappu Paddy* 34 Mad 253 and the cases cited above

Fresh process for other offences including the previous one —Where a Magistrate issued process against and summoned the accused persons for one of several offences alleged against them and acquitted them under this section for default of complainant's appearance no fresh process could in view of sec 403 (1) be issued against them in respect of all the offences alleged against them on the previous occasion including the one in respect of which they were summoned and acquitted—2 C L J 622

799 Order of adjournment —On default of the complainant's appearance the Magistrate has a discretion either to dismiss the complaint and acquit the accused or to adjourn the hearing or he can even proceed to examine the witnesses in the absence of the complainant Such a

procedure is not illegal if the accused is not prejudiced—*Sa afdi v A.* L 24 C W N 199

The Magistrate cannot adjourn the hearing unless there are sufficient and proper grounds for doing so. The fact that the accused has been guilty of contempt of the processes of the Court is no good reason for proceeding with the case—17 C W N clxx. But a Magistrate can adjourn the hearing for the purpose of allowing the accused time to secure the attendance of his witnesses—16 W R 21

800 Death of complainant.—It is open to doubt whether this section applies where the non appearance of the complainant is due to his death. But if on the day fixed for hearing the son of the deceased complainant appears and asks the Magistrate to proceed with the case the Magistrate ought to proceed and should not acquit the accused under this section—1 P L J 262 18 C W N 1211. But see 19 C W N 334

801 Revision.—The High Court does not ordinarily interfere in revision against an order of acquittal since the Local Government can appeal but this rule does not apply to an acquittal under sec 247 especially where the acquittal is the result of an improper clutching at jurisdiction—*Ram Nidh v Ram Saran* 26 O C 283

Where an order is passed by the Magistrate acquitting an accused under sec 247 the order can only be set aside by the High Court. The Magistrate or his successor has no power to revive the proceedings by setting aside the order—*Nityananda v Rakhahari* 38 C L J 196

248 If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused

802 Scope of Section.—This section applies only to summons cases. A withdrawal of complaint is permissible only in summons cases—21 Cal 103 5 Mad 378 Ratanlal 461. If the offence charged is a warrant case the Magistrate must proceed with the inquiry or trial in spite of the withdrawal of the complaint if he finds the elements of the offence set forth in the complaint—13 Bom 600 37 Bom 369 3 C W N 548 6 Mad 316

Again this section is limited in its operation to cases instituted upon complaints in the strict sense. If A gave information to the Police and the Magistrate took cognizance of the case upon the Police report there was no complaint within the meaning of sec 4 (1) and A could not be permitted to withdraw—23 Mad 626

This section contemplates a withdrawal of the complaint as a whole. Where a complaint against several accused persons is withdrawn as against one of them, this amounts to a withdrawal of the whole complaint in respect of all the accused—*Shyam Behari v Sagar Singh*, 1 P L T. 32. The withdrawal of the case absolves not only the accused present but also all the accused—2 P L T 584. Contra—*Rohit Singh v Makdum*, 9 O L J 54. 23 Cr L J 271 and *Anantia v Crown*, 5 Lah 239 (*per* Le Rossignol J) where it is held that the withdrawal against some does not amount to a withdrawal against all. It should be noted that this latter view is in consonance with the provisions of sec 345 (as now amended) under which the composition of an offence with one of the accused does not amount to a composition with all the accused.

803 Withdrawal of complaint — *Withdrawal and Compromise.*—There is a well marked distinction between a withdrawal of a case under this section and a compromise under sec 345. Compromise contemplates an arrangement between two parties, withdrawal has no such meaning. A case is said to be compromised if it is withdrawn *with the consent* of the accused, whereas a case is withdrawn under this section *without* the consent of the accused. Therefore when a petition is filed by the complainant praying for striking off the case, the Magistrate should satisfy himself under what section the petition is made. If the case is not being compromised but is being withdrawn without the consent of the accused, the petition is not a petition under sec 345 but under this section, and the Magistrate may in spite of the petition, proceed with the trial and convict the accused—*Bayan Ali v K E*, 20 C W N 1209. See also notes under sec 345.

Who can withdraw —Only the complainant can withdraw the case. In cases of contempt of the lawful authority of a public servant, the complainant is the public servant whose authority has been resisted, and not the person injured by such resistance and the former alone can withdraw—2 Bom 653. Where a Municipal Secretary instituted a complaint, the Municipal Council was not competent to withdraw—27 M L J 617.

When to withdraw —The complainant can withdraw at any time 'before a final order is passed'. But these words do not refer to a time so early as when no process has been issued to the accused. An order of acquittal passed on an application for withdrawal preferred before issue of process is unmeaning and of no avail—*In re Muthusamoopan*, 36 Mad 315. 14 Cr L J 55.

Magistrate alone can permit withdrawal —This section does not empower a Police officer to entertain an application for withdrawal of a complaint. The permission for withdrawal of a complaint is a judicial act, and the Magistrate alone can do it—*Ratanlal* 91.

May permit —It is discretionary with the Magistrate to permit the complainant to withdraw. The Magistrate can in spite of the application for withdrawal proceed with the trial and convict the accused—20 C W N 1209 (Pat)

Revival of withdrawn complaint —Where a Deputy Magistrate allowed a complaint to be withdrawn and discharged the accused the District Magistrate could not revive the case against the accused—25 W R 64

But where the complaint was withdrawn because there was no sanction (the case being one in which a sanction was necessary) and the accused was discharged the complainant was competent to lodge a fresh complaint after obtaining the necessary sanction—22 Bom 711

249 In any case instituted otherwise than upon complaint,

Power to stop pro-ceeding when no com-plaint a Presidency Magistrate, a Magistrate of the first class or with the previous sanction of the District Magistrate, any other Magistrate, may, for reasons to be recorded by him stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction and may thereupon release the accused

804 Where upon a report of the Police that one J had given false information to the Police against certain persons a Magistrate ordered the prosecution of J under sec 182 I P C but subsequently upon receipt of another report in another case that the information given by J was true he ordered the summons issued for the attendance of J to be cancelled it was held that the Magistrate had full power to cancel the summons under this section—*Nathu v Erip* 1 P L T 28

An order under this section neither amounts to an acquittal nor to a discharge. Since it does not amount to an acquittal (see Explanation to sec 403) it does not bar further proceedings in accordance with law—*Achru v Crown* 1913 P R 9. And since it does not amount to an order of dismissal of complaint no order can be passed under sec 437 (now 436) directing further inquiry—*Ibid*

Proviso to Accusations in Summons and Warrant Cases

250	(1) If, in any case	250	(1) If, in any case
Frivolous or vexatious accusations	instituted by complaint as defined in this Code, or upon information given	False, frivolous or vexatious accusations	instituted upon complaint * * * or information given to a

to a police officer or to a Magistrate, a person is accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits the accused and is satisfied that the accusation against him was frivolous or vexatious, the Magistrate may, in his discretion, by his order of discharge or acquittal, direct the person upon whose complaint or information the accusation was made to pay to the accused or each of the accused where there are more than one, such compensation, not exceeding fifty rupees, as the Magistrate thinks fit.

Provided that before making any such direction the Magistrate shall—

- (a) record and consider any objection which the complainant or informant may urge against the making of the direction and
- (b) If the Magistrate directs any compensation to be paid, state in writing, in his order of discharge or acquit-

officer or to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or, if such person is not present, direct the issue of a summons to him to appear and show cause as aforesaid.

- (2) The Magistrate shall record and consider any cause which such complainant or informant may show and if he is satisfied that the accusation was false and either frivolous or vexatious may, for reasons to be recorded direct that compensation to such amount not exceeding one hundred rupees or, if the Magis-

tal his reasons for awarding the compensation

(2) Compensation of which a Magistrate has ordered payment under subsection (1) shall be recoverable as if it were a fine

Provided that, if it cannot be recovered the imprisonment to be awarded shall be simple, and for such term not exceeding thirty days, as the Magistrate directs

(2B) When any person is imprisoned under sub section (2A), the provisions of Sections 68 and 69 of the Indian Penal Code shall, so far as may be, apply

(2C) No person who has been directed to pay compensation under this section shall by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him

Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter

(3) A complainant or informant who has been ordered under sub section (2) by a Magistrate of the second or third class to pay compensation or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees may appeal from the order in so far as the order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate

(4) Where an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub section (3), the compensation shall be

him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided, and where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any compensation paid or recovered under this section

(5) (Omitted).

Change —The whole section has been redrafted by sec 69 of the Criminal Procedure Code Amendment Act, XVIII of 1923. The principal changes introduced are the following —

(1) The words 'frivolous or vexatious' occurring in the old section have been substituted by the words "false and either frivolous or vexatious"

(2) Under the old law the complainant was *forthwith ordered to pay the compensation* under the present law the Magistrate will *forthwith call upon him to show cause*. "The procedure in awarding compensation has been more clearly laid down by directing that a Magistrate in his order of discharge or acquittal may call upon the complainant to *show cause* why he should not pay compensation, and that he shall then consider and record any cause shown and pass such orders as he sees fit * * * As the section is worded under the old law, the order to pay compensation is part of the order of discharge or acquittal, and the record and consideration of objections is to precede such order. The procedure now proposed is more logical"—*Statement of Objects and Reasons* (1914). Moreover, the old law did not provide for the case where the complainant was *absent* at the time the judgment was delivered now, power has been given in such a case to summon him to appear and show cause—*Report of the Joint Committee* (1922)

(3) The limit of compensation has been increased from Rs 50 to Rs 100, unless the Magistrate is a Magistrate of the third class. "We think that this increase is amply justified by the present day conditions. We do not think that this increase will, having regard to the provisions of section 404, make orders under section 250 appealable where they are not so at present"—*Report of the Select Committee* of 1916.

(4) Under the old law the Magistrate could order imprisonment only *after* failure to recover compensation but he could not award imprisonment in default in the very order directing compensation under the new sub-section (2A) the Magistrate has now been empowered to award such imprisonment in the order itself

(5) Subsection (2) of the old section which provided that compensation should be recoverable as if it were a fine has been omitted as it is provided for in sec 547 The proviso to sub section (2) of the old section has now been re enacted as sub section (2A) with some alterations Sub section (2B) is new

(6) Sub-section (2C) is new and the proviso to this sub section is the same as the old sub-section (5)

(7) An appeal shall now lie from the order of a first class Magistrate if he awards compensation exceeding fifty rupees See sub section (3), Under the old law no appeal lay from the order of a 1st class Magistrate

(8) Sub-section (4) has been amended to specify the time for payment of compensation where the original case is non appealable The amendment which we propose at the end of sub section (4) is to provide for cases in which though there cannot be an appeal the acquittal or discharge of the person to whom compensation has been awarded may be set aside in revision The period of one month which we have allowed should be ample to admit of an application being made to the superior Court —
Report of the Select Committee of 1916

805 Instituted upon complaint etc —The operation of this section is restricted to cases instituted by complaint as defined in the Code or upon information given to a Police Officer or to a Magistrate It is clear that it will not apply to a case instituted on a *police report* or on information given by a Police Officer—21 Cal 979 It is inapplicable to the case of a complaint lodged by a Police Officer as such—5 C W N 370 21 Cal 979 1879 P R 16 7 C W N 206 *Q E v Sakar Jan* 22 Bom 934

A case instituted by the Police on a complaint to them or upon evidence obtained in an inquiry conducted by them is not instituted upon complaint within the meaning of this section—6 All 96 *Saryug v King Emp* 1 P L J 106 But if the case is originally based on information given to a Police Officer this section applies although the case was ultimately instituted upon a Police report—14 C W N 326 See also *Jairaj v Bans* 23 A L J 1034 27 Cr L J 35

and the Magistrate can award compensation if the complaint is *alleged*—
King Emp v Sada 26 Bom 150 But the law has now been changed
See Note 16 under sect 254 (h)

Complaint under Cattle Trespass Act—This section applies to a case in which a false and frivolous complaint has been made under the Cattle Trespass Act. Under section 1 (9) of the 1898 Code, the word 'offence' includes an act in respect of which a complaint may be made under Sec 20 of the Cattle Trespass Act. If such complaint is false and frivolous or vexatious, compensation may be awarded—29 Mad 517. The rulings in 18 All 353, 13 Cal 304, 22 Cal 139, 23 Cal 248, 9 Mad 102, and 9 Mad 374 decided under the Code of 1882, are no longer good law.

Complaint to a Village Magistrate—A complaint of a non bailable offence to a village headman who is bound to report the substance of the information to the Police under sec 45 (c) is an 'information to a Police Officer' within the meaning of this section and if on such information the Police charges the accused and the Magistrate finds the charge to be false and vexatious he can order compensation under this section—*Nachimuthu v Muthurami* 39 Mad 1006, 27 M L J 37, 15 Cr L J 431, *Kalyaperumal v Batagi* 45 M L J 255, *Thanskadarath v Amman* 4 L W 73, 17 Cr L J 503, *Nadiabba v Rajachetty*, 32 M L J 78, 18 Cr L J 11 (Contra—*In re Arulanandham*, 22 M L J 138, 13 Cr L J 29). If however the information preferred to the village Magistrate is one which he is not bound to report to the Police, the preferring of such information does not amount to information to the Police within the meaning of this section and no compensation is awardable if the information proves to be false—*A. E. v Thammana*, 25 Mad 667.

Case instituted under sec 476—Where a case is instituted under sec 476 at the instance of a person it cannot be said to have been instituted either upon complaint of that person or upon information given to a Police Officer or to a Magistrate—14 Bom L R 1166.

Information given through another—Where a person gave information to another to the effect that a certain constable had committed extortion, intending that a complaint should be made on his behalf to a Magistrate, and the complaint was subsequently dismissed as frivolous, it was held that such person was liable to give compensation to the accused, and the fact that he utilised another in giving the information was immaterial—40 All 79. But in 12 S L R 76 it is held that this section does not warrant an order to pay compensation against a person who only instigates the giving of false information but who does not himself make the complaint or give the information to the Police.

806 'Accused of an offence'—An institution of proceedings under Chapter VIII is not an accusation of an offence, and this section does not apply if the accusation proves to be false—25 Bom 48, 15 All 365, *Bindha chah v Lal Behari*, 36 All 382, *Ram Sukh v Mahadeo*, 7 A L J 743, 1896 P R 4, 1902 P R 33, *Mannu Khan v Chandhi*, 20 A L J 624, 21 A L J 207, *Ram Badan v Janhi*, 45 All 363.

Similarly an application for maintenance under sec 488 is not a complaint of an offence (the refusal to maintain wife not being an offence) and no compensation can be awarded if the application proves to be false—6 M L T 261

The use of a house as a brothel is not an offence under sec 41 Bombay District Police Act and a complaint as to such use of a house is not a complaint of an offence. No compensation can therefore be awarded if the complaint is frivolous or vexatious—*Imp v Hari* 6 S I R 254 14 Cr L J 320

An order for compensation cannot be made in regard to a complaint under sec of the Workman's Breach of Contract Act (VIII of 1850) because neglect or refusal to perform work is not an offence—4 C W N 253 Ratanlal 17 4 Mad 234 See also 41 All 322

Section 3 of the Bombay Public Conveyance Act provides a summary remedy for the recovery of the legal fare of a public conveyance and a complaint under that section is not a complaint in respect of an offence within the meaning of this section. A Magistrate has therefore no power to make an order awarding compensation under this section in respect of such a complaint if it is false—44 Bom 463

807 Triable by a Magistrate.—This section applies only where the offence is triable by a Magistrate and not where the offence is triable exclusively by the Court of Session but is actually tried by a Magistrate—Weir 315 1902 P R 26 *Emp v Chhaba* 19 Bom L R 60 1 Bur L J 38 *Sarupsonar v Ram Sundar* 20 A L J 433 Even if the Magistrate tries an offence triable by the Court of Session by virtue of his powers specially conferred upon him under sec 30 and discharges the accused on account of the charge being vexatious he cannot award compensation to the accused—1902 P R 26 2 Weir 315 Ratanlal 1961 *Crown v Hanir Chand* 1902 P R 14 *Het Ram v Ganga* 16 A L J 486 40 All 615 *Shankar v Crown* 1919 P R 15 *Ud Harat v Blola* 1919 P R 1 But where the facts in a case showed that the offence was triable by a Court of Session only but the Magistrate regarding it as falling under a different head of offences triable by him tried the case and in dismissing the same awarded compensation to the accused held that the procedure was not illegal—45 Ma 29 *Hemandas v Ahir* 16 S L R 205 26 Cr L J 265 But when a complaint has been filed against an accused person for offences some of which are triable exclusively by the Magistrate and some by the Court of Session and the accused after trial is discharged in respect of all the offences an order for compensation against the complainant can not be passed—*Harishar v Vaktand Ali* 23 A L J 1056 48 All 166 27 Cr L J 6 A I R 1926 All 159 See also *Het Ram v Ganga* 40 All 615 where one offence was triable exclusively by the Sessions Court and two other offences by the Magistrate

Summary cases.—Compensation may be awarded even if the case is triable summarily—11 Mad 142

808 Who can award compensation.—An order of compensation can be made only by the Magistrate by whom the case is heard. Where part of the evidence was heard by one Magistrate and then the case was made over to another Magistrate under section 346, and the latter Magistrate heard the rest of the evidence and decided the case, *held* that the latter Magistrate was competent to order compensation—19 A L J 651. But a Magistrate who has heard nothing of the case except the complainant's plea against the order cannot make an order under this section—1892 A. W N 58

'The Magistrate by whom the case is heard' does not include an Appellate Court. Such a Court in setting aside a conviction cannot order the complainant to pay compensation—39 Cal 157 (overruling 14 C W N 212); 3 Bom L R 841, 7 Bom L R 998, *Chedi v. Ram Lal*, 21 A L J 834

809. "Discharges or acquits the accused":—The word 'heard' shows that the case must proceed as far as hearing. If a complaint is summarily dismissed under sec 203, without issue of process to the accused, such a dismissal is not an order of discharge or acquittal within the meaning of this section—29 All 137, 1897 P R 14, even though the accused was present at the enquiry under sec 202, without issue of process, compensation cannot be awarded where the case is dismissed under sec 203—*Harphul v Manku*, 1906 P R 3

An order for compensation may be passed where the accused is acquitted under sec 245—6 Cal 581, 5 Mad 381, 10 Bom 199; or under sec 247—1888 P. R 14, 1884 A W N 115; 1891 A W N, 120; or under sec 248—1883 P R 24. But compensation cannot be awarded when the case is compounded (sec 345) because there is neither a discharge nor an acquittal. Even though the accused is acquitted after composition such an acquittal is not one contemplated by this section—*Ratanlal* 957; 10 Bom L R 1056, *Ratanlal* 700, 7 C P L R 2; 1888 P. R 19; 1910 P. R. 30

In order that compensation may be granted, it is necessary that there must be a complete discharge or acquittal. If the accused is charged with more offences than one, he must be discharged or acquitted of *all the offences*, a discharge or acquittal in respect of one of the offences is a partial discharge and cannot entitle the accused to compensation—24 Cal 53; 40 All. 610; *Emp v Nadar*, 12 S L R 87. If there are several accused, and some only of them are acquitted or discharged, the complainant may be ordered to pay compensation only to those who have been discharged or acquitted, but not to the others—5 Mad 381, 1877 P. R. 15

Moreover, the provisions of this section as to compensation can only apply to cases where the order of discharge or acquittal is legal—*Q E v Maung Tun* 1 L B R 44

810 False and frivolous or vexatious—Under the old law if the charge was frivolous or vexatious this was sufficient to entitle the accused to compensation and if over and above the charge was false as well, the accused was equally entitled to the compensation—*Densmadhab v Kumud* 30 Cal 123 2 Weir 313 5 Bom L R 128 *Adikhan v Alagan* 21 Mad 237 26 All 512 *In re Gopal* 37 Bom 376 15 Bom L R 49 14 Cr L J 75 1903 P L R 156 1914 U B R 3rd Qr 31 Under the present law the charge must be false besides being frivolous or vexatious The rulings in *Ram Singh v Mathura* 34 All 354 and 4 Bom L R 645 (where it was held that this section did not apply if the charge was false) are now over ruled

In a Burma case it was erroneously held that it was sufficient to make the complainant liable to pay compensation if the charge was false even though it was neither frivolous nor vexatious—19 Cr L J 172 (Bur) This is incorrect We do not think that the procedure of sec 250 should be used in every false case unless the case is also either frivolous or vexatious In more serious cases it is desirable that the Magistrate should act under section 476 with a view to the institution of a prosecution —*Report of the Joint Committee* (1922)

The mere fact that a complaint is frivolous or vexatious does not necessarily mean that it must be false Compensation can be awarded only if the complaint is false and also frivolous or vexatious—*Assanmal v Dilbar*, 26 Cr L J 1295 (Sind) A I R 1926 Sind 19

The word vexatious indicates an accusation merely for the purpose of annoyance—30 Cal 123 6 C W N 799 An accusation cannot be said to be vexatious unless the main intention of the complainant be to cause annoyance to the person accused—11 S L R 55 The idea conveyed by the word vexatious is that the object of the person making the accusation should be primarily to harass the persons accused—*Bahaji v Mukund Singh* 21 Cr L J 226 (Nag) *Bhan v Syed Chand* 26 Cr L J 1033 (Nag) If a prosecution is found to be maliciously brought on account of enmity, it is necessarily a vexatious one—*Kashi Prosad v Emp*, 24 A L J 161 27 Cr L J 300, *Sheikh Faiz v Crown*, 14 S L R 168

The word frivolous means 'silly, or 'without due foundation'—21 Cr L J 41 (Nag) Whether the charge is frivolous or vexatious is a question of fact to be decided by the Magistrate investigating the complaint—2 Weir 319 But the knowledge and intention of the complainant must be looked into Compensation should not be granted to the accused where the complainant did not know that the complaint was false and if

is clear that the intention of the complainant was not to vex or harass the accused—*Crown v Kourold* 11 S I R 55

Where the complainant believed his case to be true at first but subsequently after enquiries found that his belief had been proved to be untrue it would be his duty frankly to tell the Court that he had made a mistake and if he omits to do so it would show unwarrantable malice on his part and he would be liable to pay compensation—*Shah Daood v Md Ibrahim* 11 Bur L T 201 19 Cr L J 172

811 By his order —The order calling upon the complainant to show cause must be made in the same order by which the Magistrate acquits or discharges the accused. Thus where the accused was discharged and in the order of discharge a conditional order for compensation was passed subject to the complainant showing cause and the order of compensation was made absolute on the very day or on a subsequent day to which the case was adjourned for the complainant to show cause it was held that both the orders were passed in one proceeding and were not illegal—36 Aⁿ 132 *Jairaj v Bansil*, 23 A L J 1054 27 Cr I J 35 *Lalit Mohan v Kunja Behari* 18 C W N 702 7 S L R 123 1905 A W N 214 (1916) 2 M W N 159 *Emp v Sandagar* 1917 P R 31 *In re Nagindas* 22 Bom L R 184 8 Bom L R 847 What is intended by the Legislature is that the order of discharge and the order directing compensation must be made in one continuous proceeding and not in two separate proceedings. Therefore where the Magistrate at the time of discharging the accused made no order as to compensation but on a subsequent day ordered that the complainant should pay compensation the order was illegal because it was not passed in the same proceeding in which the accused was discharged—*In re Sadur Husain* 25 All 315 *Ram Singh v Mathura* 34 All 354 1905 P R 57 38 Cal 302 *Narheyial v Rambalu* 10 B L R 8 *Imamdin v Emp* 1913 P L R 99

Where there were two accused and one of them was discharged and the case against the other was adjourned to a later date when he was acquitted and on the latter date the Magistrate required the complainant to show cause and then ordered him to pay compensation to each of the accused held that the procedure followed was illegal. When the order of discharge was made against the first accused the case against him was at an end and in so far as payment of compensation to him was concerned the order to show cause should have been made along with the order of discharge. The defect was not curable under sec 537—*Suresh v Abdul Jabbar* 29 C W N 127 26 Cr L J 449 But where several charges are brought against the same accused and he is at first discharged on one charge and is subsequently acquitted in respect of the other charges it is not illegal to pass an order of compensation at the time of the acquittal

in respect of the latter charges. In fact in such a case it is better for the Magistrate to take action under sec 250 not at an intermediate stage of the trial but at the end—*Raishankar v Sa anlal* 28 Bom L R 89 27 Cr L J 448

Notice to show cause —Under the old law there was a difference of opinion as to whether the Magistrate should issue a formal notice to the complainant to show cause why he should not be ordered to pay compensation. In some cases it was held that since the proviso laid down that before making any direction for payment of compensation the Magistrate shall record and consider any objection which the complainant or informant may urge against the making of the direction it necessarily implied that the Magistrate should give the complainant an opportunity to show cause and raise any objection which he might urge—*Q E v Manik Rataolal* 725 *In re Mahadev* 24 Bom L R 805 3 Bom L R 777 1 P L T 558 44 Mad 51 18 C W N 70 9 A L J 170. But it was held in a recent Allahabad case that the proviso only related to objections voluntarily urged that this section was not intended to multiply the proceeding but to be applied in a summary manner and that in a small matter of the kind contemplated by this section it would be an unnecessary and burdensome procedure to issue a formal notice—*Emp v Panckam* 45 All 474. Under the present amendment the Magistrate must call upon the complainant to show cause if the complainant is present the Magistrate must call upon him directly if he is not present the Magistrate must direct the issue of a summons to show cause.

It is imperative on the Magistrate to give the complainant an opportunity to show cause and he cannot make the order absolute owing to the absence of the complainant—1891 A W N 63 *Subans v Mahabir* 18 C W N 1277 9 A L J 170. Under the present law if the complainant is absent summons to show cause must be issued to him. If this is not done the order of compensation must be set aside and the Magistrate should be directed to summon the complainant and give him an opportunity of showing cause before passing the order—*Halka v Ranjit* 24 A L J 170 27 Cr L J 128.

812 Who can be ordered to pay compensation —Public officers are not exempted from the liability to pay compensation for frivolous and vexatious complaints—2 Weir 317. Where a Municipal peon under sanction of the Municipality charged a certain person of an offence which was found to be false the order of the Magistrate directing the peon to pay compensation to the accused was held to be legal—*Ratanlal* 30.

Where certain persons gave information as witnesses of an offence to a constable and upon the constable's information to the Sub-Ins a case was instituted which was afterwards found to be false, held

those persons could not be ordered to pay compensation because they were not the persons upon whose information the accusation was made within the meaning of this section—*Wali Mahomed v Crown* 13 S L R 166 21 Cr L J 49 This section is a penal one and should be construed strictly There is no authority for introducing into it words which would extend the liability to pay compensation to individuals other than the actual complainant or person who gives the information on which the case is instituted—*Ibid* This section does not warrant an order to pay compensation against a person who only instigates the giving of false information but who does not himself make the complaint or give the information to the Police Officer—*Emp v Summar* 12 S L R 76 But see 40 All 79 cited 12 Note 803 *ante*

Where a process-server of a Civil Court reported to the Court that he was obstructed by the accused in executing a writ of attachment and a report was thereupon made by the Court to a Magistrate and the Magistrate found the case to be false and directed the process-server to pay compensation to the accused it was held that the order of the Magistrate was wrong because the process peon was not a complainant within the meaning of this section It was the Civil Court which actually made the complaint—1 Bom 175 26 All 183 See also 14 Bom L R 1166

A person preferring a complaint on behalf of another is not liable to pay compensation A master preferring a complaint on behalf of his servant 1869 P R 24 or a servant preferring a complaint on behalf of his master 1869 P R 61 cannot be ordered to pay compensation A guardian or next friend of a minor complainant is not liable to pay compensation—1912 P W R 1

Where a written complaint prepared by the Police Officer was sent through a constable to the Magistrate the constable who was merely a bearer of the complaint and acting under the order of his superior officer could not be ordered to pay compensation—21 M L J 844

The word person includes also a juristic person according to sec 3 (59) of the General Clauses Act it includes any company or association or body of individuals whether incorporated or not Therefore a Municipal Committee can be ordered to pay compensation—*Municipal Committee v Rattan Chand* 24 Cr L J 463 (Lah)

813 To whom compensation can be awarded—Compensation is awardable only to the person who has suffered from the accusation and not to his relatives—1866 P R 89 1866 P R 97 1868 P R 24

Where there are several accused and one of the accused is discharged on the ground that the complaint against him is vexatious he can be awarded compensation but not the others—1877 P R 15 5 Mad 381

814 Sub-Section (2)—Record of objections reasons, etc —The Magis

trate before passing an order for compensation must comply with the provisions of sub section (2) of this section he cannot pass an order for compensation, without recording and considering any objection which the complainant may urge—*Ratanlal* 725 2 Weir 310 24 Bom L R 805, 3 Bom L R 777 1906 U B R (Cr P C) 51 1 P L T 558 *Emp v Chunn*, 24 O C 261 3 P L T 203 8 S L R 25 if he omits to record the objections it is more than an irregularity and cannot be cured by sec 537—1906 U B R (Cr P C) 51

The Magistrate is bound to *consider* the objections raised by the complainant and to record a judgment with reasons A mere statement that the cause shown is not reasonable is insufficient—3 P L T 203

Moreover a Magistrate should in his order awarding compensation state his *reasons* why he deems the complaint to be vexatious and should also state in his judgment the facts of the case with a criticism of the incidents involved in it—10 C W N 544 When the accused are discharged the recording of the reasons for ordering compensation to be paid is almost a condition precedent to the proper exercise of that power the recording of reasons is in addition to the finding by the Magistrate that the accusation was either frivolous or vexatious The policy of the Legislature in requiring that in such a case reasons should be recorded is obviously to afford an opportunity to an appellate or revising tribunal to consider the sufficiency of the reasons so recorded In the absence of such a recording of reasons there is no proper compliance with the provisions of this section and the order is wrong—*Thadiappan v Veeraperumal* 21 L W 646 26 Cr L J 1501

The complainant may show cause with reference to the evidence already recorded but he cannot adduce *further evidence* This section does not require that separate proceedings should be held and fresh evidence taken—1898 A W N 198 But where the Magistrate had discharged the accused in the main case after hearing only some of the witnesses produced by the complainant, the Magistrate before awarding compensation ought to hear the remaining witnesses of the complainant—44 Mad 51, *Sya Kyaw v K E* 3 Bur L J 26 25 Cr L J 1280 Though compensation can be awarded in exceptional cases before all the evidence for the complainant has been recorded still if there are witnesses present whom the complainant wishes to produce, the Magistrate should examine them before passing his order awarding compensation—*Dena Singh v Emp* 24 Cr L J 251 (Lah)

815 Amount and nature of compensation —The loss sustained the inconvenience undergone by the accused ought to serve as a guide to the Magistrate in awarding compensation—1881 A W N 167 cannot impose more than Rs 50 (now Rs 100)—1919 P R 15

cannot impose it as a fine otherwise than by way of compensation—2 W P H C R 430

The award of compensation is only by way of amends to the accused and is not a thing which can be credited to Government—1866 P R 102 1869 P R 1 It is not a fine but it is in the nature of damages for malicious prosecution (and cannot be credited to Government) though it is recoverable in a summary way as if it were a fine—26 Mad 127

816 Subsection (2A)—Imprisonment in default of compensation — If the compensation be not paid the Magistrate may send the complainant to jail but before the complainant is thrown into prison the Magistrate is bound to issue a warrant for the levy of the compensation by distress and sale of the moveables of the complainant—3 L B R 32 26 Mad 127 Even if the person pleads that he has no moveables a warrant should still be issued—26 Mad 127

Since clause(1) specifically provides for the payment of compensation separately to each accused the term of thirty days simple imprisonment may be awarded in default of each such separate payment ordered—*Emp v Ma Aha* 4 Bur L J 9 3 Rang 93 26 Cr L J 821

The Magistrate has no power to order that the sentence of imprisonment in default of payment of compensation shall take effect after a term of detention in the Civil jail which had been ordered by a Civil Court under the C P Code in another case—*Ibid*

Under the old law an order for imprisonment could be made only on failure to recover the compensation Such an order could not be made *alternatively in the order* for payment of compensation—2 Weir 320 Ra tanlal 611 1903 P R 18 18 All 96 19 All 73 21 Cal 979 1896 P R 13 (1916) 2 M W N 159 21 Cr L J 226 (Kag) 18 Cr L J 1014 (Cal) the order for imprisonment could not be made until some attempt was made to recover the amount in the manner provided for recovery of fine—21 Cal 979 22 Cal 586 28 Cal 251 5 C W N 213 18 All 96 19 All 73 18 C W N 702 1 P L T 558 18 Cr L J 1014 (Cal) Under the new subsection (2A) the order for imprisonment in the alternative can now be made *in the order* awarding compensation

817 Sub section (2c) —This section does not bar civil or criminal proceedings The object of this section is not to punish the complainant but to award by a summary order some compensation to the person against whom a frivolous or vexatious complaint is brought leaving it to him to obtain further redress against the complainant by a regular civil suit or criminal prosecution—30 Cal 123

Proceeding under section 476 —The Joint Committee (1922) observe In more serious cases it is desirable that the Magistrate should proceed under section 476 with a view to the institution of a prosecution

A Magistrate who passes an order of compensation under this section can subsequently make a complaint (under sec 476) to prosecute the complainant for preferring a false charge under sec 211 I P C—21 Mad 237 2 Weir 311 37 Bom 376 15 Bom L R 49 *Allabux v Crown* 10 S L R 166 *Hafiz Khan v Emp* 26 Cr L J 527 (Oudh) 15 W R 9 Similarly where the Magistrate makes a complaint for the prosecution of a complainant under sec 211 I P C for bringing a false charge he is not precluded from passing an order under this section directing the complainant to pay compensation to the accused—1907 P W R 30 1901 P R 18 *Achar v Pirushah* 7 S L R 10 *Contra*—26 Cal 181 22 Cal 586 But of course it is discretionary with the Magistrate to make a complaint under sec 476 for prosecution of the complainant as well as to proceed under this section and the question whether the discretion has been rightly exercised by the Magistrate depends upon the facts of the particular case If the false charge is of such a nature that a prosecution is necessary on the ground of public policy the Magistrate would exercise his discretion wrongly in awarding compensation instead of making a complaint under section 476 But if the charge is such that no prosecution is necessary then the exercise of his discretion in awarding compensation is proper—27 Mad 59 See also 20 Cr L J 226 (Patna) It should be noted that all these cases are cases relating to sanctioning prosecution (now abolished) under sec 195 but the principle of these cases applies also to the preferring of complaints under sec 476

818 Subsection (3)—Appeal—Under the old law no appeal could lie against an order of compensation passed by a 1st class Magistrate—1 Bom L R 350 7 Bom L R 998 under the present law an appeal is allowed from an order of such Magistrate if the compensation awarded exceeds rupees fifty

Whenever a complainant has been ordered to pay compensation exceeding rupees fifty he has a right of appeal whether the amount is awarded to one accused or is ordered to be distributed among a number of accused persons in sums not exceeding fifty rupees—*Augustin v Dunning Demello* 49 Bom 440 26 Cr L J 480 26 Bom L R 1243 This clause does not limit the right of appeal to cases where the compensation awarded to each accused exceeds rupees fifty Where the total amount directed to be paid to several accused persons exceeds Rs 50, a right of appeal exists—*Assanmal v Dilbar* 26 Cr L J 1295 (Sind) A I R 1926 Sind 19 *Sumaria v Emp* 24 A L J 167 27 Cr L J 146 There is nothing in this section to show that an appeal will lie only where the compensation directed to be paid to each individual accused is more than Rs 50 A complainant who has been ordered to pay compensation exceeding Rs 50 has the right of appeal It is the total amount of compensation directed to be paid by the complainant which must form the basis of the

whether an appeal lies or not—*Sobhit v Emp* 26 Cr L J 1504 A I R 1926 Pat 70

Notice to accused —Though there is no express provision that notice should go to the accused still it is desirable that the accused should have notice of the appeal in order that he may have an opportunity of supporting the order passed in his favour—29 Mad 187 38 Mad 1091 *Ram Chand v Jesa Ram* 25 Cr L J 209 (Lah) But absence of notice to the accused will not vitiate the appellate proceedings and will not make the appellate order liable to be set aside—33 Mad 89 41 M L J 172

Notice to Crown —But it is not imperative that notice of the appeal should be given to the Crown under sec 422—29 Mad 187 41 M L J 172

819 *Revision* —The High Court in revision can set aside an order of compensation passed by a Magistrate and can order repayment of the money paid—1903 P R 29 1884 P R 14 1885 P R 12 A superior Criminal Court has jurisdiction under sec 435 to examine an order under sec 250 in the exercise of its ordinary revisional jurisdiction—*Harris v Peal* 17 A L J 896

Death of party —If pending the revision the complainant (i.e. the party who has been ordered to pay compensation) dies the revision petition does not abate but may be continued by his legal representatives—1908 P R 24

Where after the passing of the Magistrate's order the accused died and the complainant applied to the High Court for revision the High Court refused to pass any order because the accused could not be served with notice—*Ratanlal* 634

CHAPTER XXI

OF THE TRIAL OF WARRANT-CASES BY MAGISTRATES

820 *Change of procedure* —If a warrant case is tried as a summons case the procedure is illegal and the conviction is liable to be set aside—29 Mad 372 If in such trial the accused is acquitted under sec 245 the order of acquittal will at best operate as an order of discharge under sec 53—1886 A W N 260 1888 A W N 96

The fact that a summons instead of a warrant has been issued in a warrant case does not justify the procedure to be as in a summons case—10 W R 31

If a trial is commenced as a warrant case it must be ended as a warrant case and not as a summons case a sudden change of procedure in the

midst of a trial is illegal. Therefore where a complaint alleged the commission of certain offences which were triable as warrant cases, and the processes issued to the accused as well as the commencement of the proceeding showed that the accused were being tried for those offences but the Magistrate after taking the evidence of some of the witnesses for the complainant recorded an order that the offences as disclosed were triable as summons cases, and then he proceeded with the trial as in a summons case, without framing a charge, *held* that the procedure adopted by the Magistrate was highly illegal and the trial should be set aside—*Ganga Saran v. Emp.*, 19 A L J 6

The question whether a case is triable as a summons case or as a warrant case is to be decided by reference to the *complaint* and the *notices* issued to the accused and also to the *commencement* of the case under certain sections of the Penal Code, and not by reference to the particular sections under which the *conviction* takes place—19 A L J 6

If two charges arising out of the same facts under the same circumstances are framed, one of a summons case and another of a warrant case, the procedure should be as laid down for a warrant case—11 Cal. 91, 39 Mad 503, 41 Mad 727, 1915 M W N 546

251. The following procedure shall
 Procedure in warrant- be observed by Magistrates in the trial of
 cases warrant cases

821. In trying warrant cases, the procedure of this chapter must be strictly followed. The Magistrate cannot follow a procedure which had grown up by usage in the course of years, and which materially differs from that laid down in this chapter, such a procedure is more than an irregularity and is not curable by sec 537—17 Bom L R 490. The Magistrate cannot follow an arbitrary procedure of his own. See 1883 P R 29. A Presidency Magistrate must follow the procedure laid down in this chapter, subject to the special provisions of sec 362 as to the mode of taking down the evidence—Ratanlal 539

252. (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution:

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before him self such of them as he thinks necessary

Change —The proviso has been newly added by sec 70 of the Criminal Procedure Code Amendment Act XVIII of 1923. A similar change has been made in section 244 q v. This amendment follows clause (aa) of section 200.

822 Is brought before the Court —It is immaterial if the accused is brought before the Court by illegal arrest. Where a subject of a Native State committing an offence in British territory fled to his own country and the British Police without the intervention of the State authorities pursued him and arrested him in that State it was held that his illegal arrest would not vitiate his subsequent trial and conviction in British India—1899 P R 6 7 Bur L R 66

Hear the complainant —Hearing a complainant withing the meaning of this section does not involve his *examination on oath* and a trial of a warrant case is not vitiated merely because it did not begin with an examination of the complainant by the Court—42 M L J 108

823 Taking evidence for the prosecution —As soon as the accused is brought before the Magistrate he has a right to have the evidence against him recorded at as early a period as possible and the fact that there is or may be a great body of evidence forthcoming against him is not a good ground for his detention for an inordinate period—6 Mad 63

It is the duty of the prosecution to bring before the Court all the persons who are alleged or are known to have knowledge of the facts or are likely to give important information—10 Cal 1070 8 Cal 121 14 All 521 15 All 6 14 Cal 245. If such witnesses are not called without sufficient cause being shown the Court may properly draw an inference adverse to the prosecution—8 Cal 121

The Magistrate is bound to examine every one of the witnesses called by the complainant—4 Mad 329 1908 P W R 3. He cannot say before hand whether the evidence of a certain witness will be material or not—Ratanlal 21. He cannot refuse to examine any witnesses simply because their evidence will be a mere repetition of what has been already given by the other witnesses—3 Cal 389 2 All 447. But if the Magistrate considers the charge to be groundless he can discharge the accused without examining all the witnesses (sec 253)—(1911) 1 M W N 149 Ratanlal 201

The witnesses must be examined *orally*. Where the witnesses common

to three cases were first examined in-chief in only one case and their deposition was recorded by a typewriter in triplicate one copy being made part of the record in each case *held* that the procedure in the other two cases was illegal—*Ma. kar Ah v. Emp.* 50 Cal 223 (1916)

An accused should be given if he so desires an opportunity to cross examine the prosecution witnesses even though a charge is not framed—8 C W N 838 But the prosecution is not bound to tender the witness for cross-examination the prosecution is not bound to do anything more than make a witness appear in Court so that the accused may call him or not as he likes—14 Cal 245 Moreover the prosecution is not bound to put such of those as he does not examine into the witness box to be cross-examined But he should not refuse to put into the box for cross-examination a truthful witness merely because his evidence may be favourable to the defence—16 All 84

824 Summoning witnesses —The Magistrate has a discretion in summoning witnesses and he is not bound to summon every person named as a witness for the complainant—23 W R 9 The Magistrate can use his discretion in selecting out of the list of witnesses those who seem to be necessary and those who seem to be unnecessary But the power is to be exercised with caution and the Magistrate must see that there be no miscarriage of justice by excluding an important witness—*Sitab Singh v. Dalganjan* 12 A L J 15 14 Cr L J 682 The duty of seeing that all evidence essential to the prosecution case is before the Court is thrown upon the Magistrate himself See Sub sec (2) So it is not open to a Magistrate to acquit on the ground that the prosecution has failed to produce a necessary witness—*Emp v. Maiku Lal* 12 O L J 632 2 O W N 584 26 Cr L J 1266

After the witnesses in support of the prosecution are heard it is the duty of the Magistrate to see that the prosecutor is not allowed to set the Court on to a roving inquiry summoning persons in the hope that something might be elicited which may help his case The prosecutor must come with his case fully prepared and there is no section in the Code which authorises him to file a fresh list of prosecution witnesses—12 A L J 15

Where witnesses do not obey the summons the prosecution has a right to call upon the Court to compel their attendance—6 C W N 548

It is not proper for the Magistrate to issue a warrant in the first instance it is only when the summons is disobeyed that serious measures may be taken—1907 P W R 22

Process fee —There is nothing in this Code which enables a Magistrate to demand from even the complainant the expenses to be incurred by his witnesses though such a power is conferred by sec 244 (3) in a

case—8 N L R 65 The dismissal of a complaint in a warrant case for non payment of process fee is illegal—2 Weir 323

Inspection of documents —The accused is entitled to inspect all the documents produced by the complainant as evidence against the accused and filed as exhibits, and not merely to get certified copies thereof—1 Bom L R 433 But so long as the documents are not filed but merely in the possession of the prosecution the accused has no right to call for their production or to inspect the same, until after a charge has been framed—8 S L R 267 (cited under sec 257)

253 (1) If upon taking all the evidence referred to in Section 252, and making such examination (if any) Discharge of accused of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, if for reasons to be recorded by such Magistrate, he considers the charge to be groundless

825 Procedure —The procedure prescribed by these sections should be strictly followed The Magistrate should first take the evidence of the complainant and his witnesses (sec 252) and if necessary examine the accused (sec 253) and then apply the law to the criminal acts to find whether there is *prima facie* evidence then frame charges (sec 254) and call upon the accused to plead thereto (sec 255) and enter upon his defence (sec 256)—9 W R 15 If the Magistrate after examining the prosecution witnesses (sec 252) examined the accused and the witnesses for the defence (sec 256) without having drawn up a charge and then discharged the accused under sec 253 the procedure was contrary to law and the accused should be treated as acquitted under sec 258—1883 P R 29 In *Orilal v Kalu* 18 Cr L J 1006 (Burma) however where the Magistrate followed the same procedure as in the Punjab case it was held that although the procedure adopted was highly irregular and unwarranted still as the procedure was in substance that laid down in this chapter the omission to frame a charge and record a plea would not invalidate the order of discharge and that sec 535 (1) would cure the irregularity

Taking all the evidence etc —A Magistrate is not competent to discharge an accused person until the evidence of all the witnesses named for the prosecution has been taken—4 Mad 329, 2 C L R 389 22 W R 25, 20 W R 67 *Ratanlal* 21, 1908 P W R 3 Although he has a

discretion to summon or not every person named as a witness by the complainant—23 W R 9 still he is not justified in discharging an accused person without examining all the witnesses who are present in Court—11 C W N 199. If, however, upon examination of some of the witnesses the Magistrate considers the charge to be groundless, he can discharge the accused under subsection (2) without examining the other witnesses—*La anna Chinna v Suresetti*, 9 M L T 302

Where a case was transferred from a Bench of Magistrates, who had already recorded some evidence, to a Deputy Magistrate the latter is bound to examine the evidence already recorded and cannot discharge the accused without considering the evidence—38 Cal 828

826 Discharge—An order of discharge under this section does not amount to an acquittal and the Sessions Judge can under section 437 (now 436) have the accused put upon his trial in spite of the discharge—5 W R 58 4 N W P H C R 23 See sec 436

Orders which amount to discharge—Where a warrant case which can not be compounded, is compounded and the case dismissed such dismissal amounts only to a discharge—1 Bom 64 *Ratanlal* 391 When after the issue of process the Magistrate does not think it proper to proceed any further, the termination of the proceedings amounts to an order of discharge—4 C W N 24. Where no charge was drawn up and the accused was not called upon to plead or enter on his defence the release of the accused did not amount to an acquittal but to a discharge under this section—4 B L R App 1

Order of discharge when improper—A Magistrate ought not to discharge the accused merely because he was illegally arrested e g where the Police arrested him without warrant in a non cognizable case—*Ratanlal* 73 So also, a Magistrate ought not to discharge a person merely because he has no jurisdiction to try the case in such a case he ought to proceed under section 346—2 Weir 323

Before the amendment of 1923 a Magistrate could not discharge or acquit the accused upon withdrawal of complaint in a noncompoundable case Such a procedure was allowed in summons cases and not in warrant cases The Magistrate had to proceed with the inquiry in spite of the withdrawal of complaint—13 Bom 600 37 Bom 369 Similarly, a Magistrate could not dismiss the complaint under this section if the complainant was absent and the offence was a non compoundable one Such a dismissal amounted to an application to a warrant case of the procedure of a summons case—10 Cal 67, 4 C W N 26 *Alexander v Connors*, 20 C W N 698, *Ratanlal* 524 1 C W N 57 But now see sec 259 under heading "Scope of Section"

An order of discharge can be made when, according to the words

this section no case has been made out which if un rebutted would warrant the conviction of the accused but when there is a body of evidence which if believed would justify a conviction it is better to draw up a charge and dispose of the case finally than to discharge the accused—1909 P W R 18

An order of discharge cannot be made after a charge has been framed such an order is erroneous and would amount to an acquittal under section 258—1903 P R 14

827 Fresh proceedings —The dismissal of a complaint or the discharge of an accused person does not bar a fresh complaint being entertained or a fresh inquiry held into the case against the accused (and it is not necessary that the previous order of discharge must be set aside before fresh proceedings can be taken)—Ratanlal 350 28 Cal 211 31 Mad 543 15 Cal 608 (F B)

This power of revival of proceedings is vested in all Magistrates including the Magistrate who discharged the accused But Magistrates are bound to exercise due discretion to take that discharge into account and to avoid any such oppressive proceedings as may either expose them to punishment under section 219 or 220 I P C or to a civil action on the part of the accused—Ratanlal 350 No rehearing should be made of a case which has been disposed of by an order of discharge by a Magistrate of co ordinate jurisdiction except where there has been a manifest error or miscarriage of justice—29 Mad 126 An order of discharge passed under this section cannot be set aside and prosecution started afresh unless there are new materials before the Magistrate which were not before him formerly and unless upon those materials there is a probability of the conviction of the accused persons—23 Cr L J 236 (Pat)

If an order of discharge is passed by a *Presidency* Magistrate the High Court can interfere under sec 439 of this Code (and not merely under sec 15 of the Charter Act) and direct a further inquiry—*Malik Protap v Khan Mahomed* 36 Cal 994 See this case and other cases cited in Note 682 under sec 203

Power of District Magistrate —Where an accused person has been discharged under this section the District Magistrate can himself hold a further inquiry or can direct such inquiry to be held by a Subordinate Magistrate (sec 436)—18 Cr L J 706 (All) 9 All 52 14 Mad 334 32 Mad 220 20 W R 46 20 W R 47

828 Sub section (2) —When a Magistrate is reasonably convinced on what has been already deposed that a criminal charge cannot be sustained he is relieved from the necessity of going on with the trial and can discharge the accused—Ratanlal 201 9 M L T 302 The Magistrate can discharge the accused even before the date fixed for hearing if upon

the materials then before him he is satisfied that the offence could not have been committed—*Hatton v Metcalfe* 25 Cr L J 696 (Pat) The Magistrate can discharge but not *acquit* the accused—6 W R 13

If the evidence recorded does not raise any presumption that the accused has committed any offence but merely leads to a doubt the proper course would be to discharge the accused and not to proceed to frame a charge—1906 P R ~

Recording reasons —The Legislature does not render the writing of reasons necessary when the Magistrate discharges the accused person after he has heard all the evidence for the prosecution It is only when he discharges under sub-section (2) without hearing all the evidence that he is bound to record reasons But even in the former case the Magistrate should record his reasons having regard to the fact that the order is not final—9 Bom L R 250

254 If when such evidence and examination have been taken and made or at any previous stage of the case the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter which such Magistrate is competent to try and which in his opinion could be adequately punished by him he shall frame in writing a charge against the accused

Charge to be framed when offence appears proved

Evidence and examination —It is not necessary for a Magistrate to examine more witnesses than are sufficient to convince him of the truth of the charge and with that view he can put questions to the accused The answers given to such questions will have a great effect upon the question as to the witnesses to be examined for the prosecution And if on questions put to the accused answers which leave no doubt as to the commission of the offence are elicited the Magistrate may frame a charge and call upon the accused to plead—3 M H C R App 2

829 *Charge when to be framed* —It is not necessary that the Magistrate should wait till the whole of the evidence for the prosecution has been taken Cf the words or at any previous stage the moment the stage is reached when there is ground for presuming that the accused person has committed an offence the examination of the accused should be taken up and the charge sheet drawn up and the remaining witnesses for the prosecution should be examined—8 A L J 707 Under the Code of 1882 the Magistrate could not frame a charge till the evidence for the prosecution was completed The words or at any previous stage of the case did not exist in that Code

Charge to be framed when offence appears proved —It is only when the prosecution has proved all the facts necessary to constitute the offence charged against the accused that a charge should be framed. If the evidence recorded does not lead to any presumption that the accused has committed any offence but merely raises a doubt the Magistrate should give the accused the benefit of the doubt and discharge him under sec 53 and should not proceed to frame a charge—1906 P R 2

If other offence is proved —If on the evidence a Magistrate finds that an offence different from the one expressly charged against the accused has been committed he has power to frame a charge with regard to the other offence—5 B H C R 100 and need not dismiss the complaint with leave to the prosecution to institute a fresh and more comprehensive complaint—8 W R 82 Thus where a charge of defamation had been framed against the accused and the complainant in her deposition further charged him with using criminal force and thereupon the Magistrate tried him for both the offences acquitted him of the former offence and convicted him of using criminal force it was held that the procedure was legal—3 Bom L R 675 If when a case is being tried as a warrant case and a charge is drawn up thereof it is intended to proceed against the accused for an offence triable only as a summons case that offence should form part of the charge—29 Cal 481

Which such Magistrate is competent to try and adequately punish —Sec 254 is very restrictive for it provides that the Magistrate shall try an accused person only for an offence which in his opinion can be adequately punished by him. A Magistrate has to exercise his discretion in the matter of every complaint that is brought before him—16 Bom 580 A Magistrate ought not to frame a charge under this section if he is of opinion that he cannot adequately punish the offence—Ratanlal 499 1905 U B R 33 If the Magistrate is of opinion that he cannot adequately punish the accused he can commit the case to the Sessions although the case may be exclusively triable by a Magistrate—Q E v Kayemulla 24 Cal 429 A commitment is bad in law unless the Magistrate is of opinion that the sentence which he can impose will not be adequate to meet the ends of justice—K E v Jagmohan 6 A L J 989 Q E v Keyamulla 24 Cal 429 Emp v Bindeshri 41 All 454 See note 695 under sec 207

Where it was within the competence of the Magistrate to pass an adequate sentence in the case but the Magistrate committed the case to the sessions on the ground that as he was a witness in the identification proceedings in the case he was disqualified from trying it (sec 556) held that the course adopted by the Magistrate was improper he should have moved the District Magistrate to transfer the case to some other Magistrate—Emp v Ram Jatan 21 A L J 420 25 Cr L J 665 A I R 1924 All 185

830 Charge —Contents —A charge under this section should allege all that is necessary to constitute the offence charged and all that is requisite in order that the accused may have notice of the matter with which he is to be charged. It should not allege positively anything of which the allegation in a positive form is not justified by the materials before the Court—1889 P R 26

Effect of framing charge —Proceedings before a Magistrate in a warrant case under this chapter are only an inquiry until a charge is framed and on a charge being framed become a trial—38 Mad 585

When a Magistrate frames a charge under this section he indicates thereby that a *prima facie* case exists against the accused and he cannot acquit the accused or dismiss the case without hearing the prosecution and the defence evidence. He is bound to proceed with the case—7 C W N 521

But the mere fact that a charge has been framed against the accused does not justify the view that the Magistrate is bound to convict the accused. If after carefully considering all the evidence adduced in the case he comes to the conclusion that the guilt of the accused has not been satisfactorily established he is bound to acquit him under sec. 258 although he may have framed a charge against him in the first instance—*Danodhar v. Jujharsingh* 26 Cr L J 1348 (Ag)

Omission to frame charge —It is imperative on the Magistrate to frame a charge and an omission to do so vitiates the trial—*Id. Rafique v. A. E.* 43 C L J 100. The Allahabad High Court holds that an omission to frame a charge according to this section would not invalidate an order of acquittal nor would render the acquittal equivalent to a discharge—3 All 129

255 (1) The charge shall then be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make

(2) If the accused pleads guilty, the Magistrate shall record the plea, and may in his discretion convict him thereon

831 Explained —The charge must be read out and explained to the accused and the record must show that the Magistrate has done so. Where all that is found on the record is only a narrative by the Judge of what occurred and of the statements made by the prisoner it cannot be inferred from the record that the charge has been explained to the accused as required by this section—7 Cal 96. The charge should be so explained to the accused that the Magistrate is sure that the accused has understood the nature of it thoroughly and it is then that his plea should be received—5 Cal 826. If there are any aggravating circumstances of the

offence, those circumstances should be set forth in the charge so that the accused person may know what it is to which he pleads guilty and the full effect of such plea, or in case he pleads not guilty, he may know what material facts he is called upon to rebut—Ratanlal 55

Where the charge was not explained to the accused, the High Court set aside the conviction and ordered a new trial—9 Mad 61

832 Plea —An admission which does not admit all the elements of a charge is not a plea of guilty to a charge. Therefore, where, on a charge of murder, the prisoner pleaded that he struck his wife with a *dao* but he did not intend to kill her it was held that the acknowledgment could not be treated as a plea of guilty, since the intention to murder was denied—25 W R 23

When an accused person does not formally plead guilty, the fact that he throws himself at the mercy of the Court should not prejudice him—12 C W N 140

Plea of Pleader —A pleader cannot be called upon to plead under this section on behalf of his client and it is improper for a Magistrate to act upon such plea though made in the presence and hearing of the accused. It would be more regular in form for a Magistrate to call upon the accused to say with his own lips whether he denies the truth of the complaint—6 Bom L R 861. But when the accused has been permitted under sec 205 to appear by a pleader the latter may perform all acts which devolve upon the accused in the course of the trial and he can plead guilty or not guilty under this section—6 S L R 206

Record of plea —If the plea is not recorded the conviction is liable to be set aside—7 Cal 96. The Court must record the actual words used a narrative of what occurred and of the statements made by the prisoners is not a proper record of the plea—7 Cal 96. If the statement of the accused is in a foreign language the Magistrate need not record it in the language in which it is made, but the record must be in the language in which it is interpreted—5 Cal 826

833 Conviction on plea —If after a charge is framed the accused pleads guilty, the Magistrate can refuse to convict on the plea, and can proceed to take further evidence—*Emp v Rash Behari*, 25 C W N 212. In a warrant case, although an accused can be convicted on his own plea of guilty, still a conviction should not be made unless there is evidence on the record to support the conviction. It is highly improper in a warrant case to convict an accused on his own admission alone without recording any evidence for the prosecution and without framing a formal charge—29 Mad 372

Again, in order that a conviction on a plea of the accused may be sustained, it is necessary that the accused should admit in his plea all the

elements of the offence. If he admits that he killed the deceased but he denies that he had any intention of killing her the Magistrate cannot convict him on such statement. Such a confession does not amount to a plea of guilty—5 W R 23. If the accused pleads guilty to one offence the Judge cannot convict the accused for another offence e.g. if the accused pleads guilty to a charge of murder he cannot be convicted for culpable homicide not amounting to murder—13 W R 55.

If the accused person admits some or all of the facts alleged by the prosecution but pleads not guilty the proper procedure for the Magistrate is to proceed to trial according to law and not to convict him on the admission without taking evidence—9 Bom L R 1346.

255A *In a case when a previous conviction is charged under the provisions of Section 221, subsection (7) and the accused does not admit that he has been previously convicted as alleged in the charge the Magistrate may after he has convicted the said accused under Section 255 subsection (2) or Section 258 take evidence in respect of the alleged previous conviction and shall record a finding thereon*

834 This new section has been added by sect on 71 of the Criminal Procedure Code Amendment Act XVIII of 1923.

We think that this addition is necessary after section 255 to provide for a case where previous conviction is also charged. Definite provision is made for this in the case of trials before a Court of Session (see section 310) but it does not seem to have been provided for by the Code in the case of a Magistrate's trial.—*Report of the Select Committee of 1916*. It was suggested to us that the new section 255A is unnecessary on the ground that though a procedure for the proof of previous convictions is necessary in a Sessions Court to prevent the jury or the assessors from being prejudiced by anything they may hear as to the accused's previous record yet in warrant cases the same considerations do not apply. On the whole however we think the new section may serve a useful purpose and we have retained it.—*Report of the Joint Committee of 1922*.

Prior to the enactment of this section it was held that in a trial before a Magistrate it was not illegal to adduce evidence of a previous conviction before the accused was called upon for his defence if such procedure did not prejudice the accused—*Dehrí Sonar v Emperor* 50 Cal 367. In another case however the trial was set aside because the accused was prejudiced by reason of the Magistrate allowing the proof of previous conviction to go in before the evidence for the defence was gone into—*Golam Hossein v Emperor* 10 C W N cxcv. But these cases are no longer

of any authority because the present section provides that the Magistrate can take evidence of previous conviction only *after he has convicted the accused*

256 (1) If the accused refuses to plead, or does not plead

Defence or claims to be tried he shall be required

to state *at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit forthwith* whether he wishes to cross examine any and if so which of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish the witnesses named by him shall be recalled and after cross examination and re examination (if any) they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken and after cross examination and re examination (if any) they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence.

(2) If the accused puts in any written statement the Magistrate shall file it with the record.

Change —The italicised words in subsection (2) have been added by section 72 of the Cr. P. Code Amendment Act XVIII of 1923. The reasons have been thus stated by the *Select Committee of 1916* — It may happen that up to the time of a charge being framed the accused is not professionally represented and it seems reasonable in such a case that he should be given time until the next hearing to engage a pleader and decide what witnesses he will cross examine.

835 Scope of Section —This section does not apply to proceedings under sec. 110. Though under section 117 the procedure prescribed for warrant cases is as nearly as possible to be followed in cases of security for good behaviour it does not follow that that gives a right to the accused person to further cross examine the prosecution witnesses on entering on his defence when he has once cross examined them—35 Cal. 243 1916 P. R. 1.

This section does not apply to an inquiry into a Sessions case prior to commitment. In such inquiry the accused has no right to cross-examine the prosecution witnesses after the charge is framed—*Baldeo v. King Emperor* 19 O. C. 239. See notes under section 208.

This section applies to *summary trials* (see sec. 262) and therefore in the trial of a warrant case under the summary procedure the accused has

the right to cross-examine the prosecution witnesses after the evidence for the prosecution is closed—*Tithu Sahu v Emp*, 1 P L T 652

836 Cross-examination —Before framing of charge —Although the proper time to recall and cross-examine the witnesses for the prosecution is after the charge is read over to him and before he is called upon to make his defence still this section does not prohibit such cross examination before the charge is framed—21 Cal 642 An opportunity should be given to the accused if he so desires to cross-examine the prosecution witnesses even though the charge is not yet framed—8 C W N 838

The fact that the accused has cross examined the witnesses for the prosecution before the charge is framed does not deprive him of the right given him by this section of recalling and cross examining those witnesses after the charge is framed—27 Cal 370 37 Cal 236 20 Cal 469 21 Cal 642 6 Bur L T 67 2 Bom L R 542 Even when the prosecution witnesses were cross examined by the accused before frame of charge on the understanding that the accused would not require those witnesses to be recalled for further cross examination after the charge still the Magistrate cannot refuse the application of the accused to recall and cross examine those witnesses after the charge is framed—6 C W N 424 *Ram Chandra v K E* 5 Pat 110 A I R 1926 Pat 214

837 Accused's right to cross examine —According to the plain language of this section the accused has a right to have the witnesses for the prosecution recalled and cross examined after frame of charge—7 C L J 240 4 Mad 130 1 P L T 652 24 Cr L J 371 and it is not necessary for the accused to show that he has a reasonable ground for exercising the right of recalling and cross examining the prosecution witnesses He is as a matter of right entitled to cross-examine—21 W R 29 25 W R 32 and the Magistrate is not justified in refusing to recall the prosecution witnesses for cross examination specially when the accused had not cross examined any witnesses before frame of charge—5 P L J 94 Where there are several accused each of the accused should be given an opportunity to cross examine A Magistrate cannot refuse to allow the further cross examination of the witnesses for the prosecution by one of the accused on the ground that they had been cross examined by another—11 C W N 101

The right referred to in this section is absolute and unqualified and is intended to apply only where the witnesses are still before the Court and before they have been discharged from further attendance Under sec 257 however there is a discretion vested in the Court to resubmit the prosecution witnesses already examined and where a witness has been allowed to depart under sec 256 on the representation of the accused that he is not required any further application to re cross examine him must be deemed to fall under sec 257—43 Mad 411

Magistrate's duty to ask — Under this section it is the duty of the Magistrate after a charge has been framed to require the accused to state whether he desires to cross examine the prosecution witnesses already examined—27 Cal 470 Omission on the part of the Magistrate to ask the accused whether he wished to recall any witnesses for cross examination will invalidate the conviction and the case will be retried from the point of framing the charge—*Moola v Crown* 1914 P R 11 16 Cr L J 146 *Mahan Singh v Emp* 24 Cr L J 371 A I R 1924 Lah 215 Omission to so ask the accused and the rejection of the accused's application on the ground that it was too late would prejudice the accused in his trial—190 A W N 5 In *Munian Chetty v Emp* 16 Cr I J 5 (Mad) however it has been held that such omission is a mere irregularity and the conviction is not thereby vitiated

This section lays down that the Magistrate shall record his reasons for requiring the accused to state forthwith whether they wish to cross examine the prosecution witnesses But omission to record the reasons does not render the trial illegal if it has not caused any prejudice to the accused—*Ghasi v K E* 6 Lah 354 27 Cr L J 408

Adjournment — An accused against whom a charge was framed without any previous intimation when required by the Magistrate to state whether he wished to cross examine said that he had no question to put at present but that time should be granted him for engaging a pleader and for cross examining witnesses it was held that the application for adjournment was reasonable under the circumstances and ought to be granted—*Arunugam v Emp* (1911) 2 M W N 192 Where the charges are complicated and the accused are ignorant persons they should not be called upon to cross examine the witnesses immediately after the charge is framed but a reasonable time should be given to them to get proper legal advice and to engage a pleader before they are called upon to cross-examine the prosecution witnesses—*In re Rangasami* 16 Cr L J 786 This is now made clear by the addition of the words at the commencement of the next hearing of the case The provision that the accused should be asked whether they wished to cross-examine the prosecution witnesses on a date subsequent to that upon which they are called upon to plead to the charge is a new proposition deliberately introduced into the Code by the Amendment Act of 1923 and the only possible reason for the change is that the Legislature has intended to give the accused persons against whom charges are framed an interval of time to think out the lines of their defence before they are called upon to inform the Court how they intend to proceed Omission of this new procedure is an irregularity which vitiates the whole trial—*Phuman v Emp* 7 Lah L J 114 26 P L R 460 26 Cr L J 1158 The words inserted by the Amending Act of 1923 indicate the intention of the Legislature that sufficient time should be given to the accused to

consider whether he wishes to cross examine any of the prosecution witnesses after the framing of the charge, and it is only in special cases that the Magistrate can require him to state forthwith if he so wishes—*Ram Chandra v. K. E.*, 5 Pat 110 A. I. R. 1926 Pat 214

If summons-case tried as a warrant case—Where an inquiry commenced as a warrant case and the accused curtailed their cross-examination of prosecution witnesses under the impression that they would have a further opportunity of cross-examining them, but no offence triable as a warrant case having been disclosed, the Magistrate closed the case and convicted the accused as in a summons case it was held that it was the duty of the Magistrate to allow the accused an opportunity of completing the cross-examination before proceeding with the case—*In re Apparu*, 16 Cr. L. J. 250 (Mad.).

Similarly, where a Magistrate, while trying a summons case and a warrant case in one trial under the warrant-case procedure, dismissed the complaint in respect of the warrant case and proceeded with the complaint in respect of the summons case and on being requested by the accused to recall the prosecution witnesses for their further cross examination, refused to do so it was held that the refusal was illegal and the accused must certainly have been prejudiced by the same. The privilege conferred by this section is a substantial one, and when denied it is for the prosecution to shew that there was no prejudice—39 Mad. 503

838 Time of cross-examination—If an accused person desires to recall and cross examine the witnesses for the prosecution, the time at which he should express such desire is when the charge is read over to him—7 Cal. 28 The accused should cross examine the witnesses for the prosecution *before* he enters upon his defence. But of course it is open to the Magistrate to allow cross examination at any subsequent stage, before the case has been closed—37 Cal. 236 The accused may, after the charge has been drawn up and the witnesses for the defence have been examined recall and examine the witnesses for the prosecution—4 Mad. 130 *Sec. sec. 257* But although it is in the discretion of the Magistrate to recall the witnesses at a subsequent stage of the case, the accused has no right to insist upon the witnesses being recalled—7 Cal. 28

'Any remaining witnesses'—The words 'any remaining witnesses' do not refer only to those witnesses who have been named by the complainant under *sec. 252 (2)*, these words are wide enough to include any witness who according to the prosecution is able to support its case though he has not been summoned, provided he is not sprung upon the defence all on a sudden and sufficient opportunity is given to the accused to prepare for the cross examination of such witness—11 Bom. L. R. 1153

839 Discharge of prosecution witnesses—A Magistrate ought of his own motion to discharge the witnesses for the prosecution until

accused person has exercised or waived his right of cross examination—6 N W P H C R 284 25 W R 48 Witnesses for the prosecution should not be discharged until the Court has ascertained whether their cross examination after the charge will be desired—8 N L R 65 Where

re summoned as a matter of right—6 N W P H C R 284, 2 All 253 If the Magistrate did not so inquire and there was no sufficient proof that the accused consented to the discharge, the accused would be entitled to have the witnesses, whom he desires to cross examine, re summoned—6 N W P H C R 284

840 Expenses—This section gives the accused an absolute right to recall witnesses for cross-examination at the expense of the prosecution and it is not open to the Magistrate to order the accused to pay costs for recalling those witnesses—20 Cr L J 112 (Lah), *Ram Chandra v K E*, 3 Pat 110 A I R 1926 Pat 214, *Radhakishan v Ramakrishna*, 7 N L J 57 25 Cr L J 912 1907 P R 12, *Bridhichand v Lakhmichand*, 8 N L R 65 A Magistrate cannot refuse to summon a witness for the prosecution on the ground that fees for his attendance were not paid—4 C W N 351 Where in order to suit the convenience of the Court or for reasons connected with the discharge of other public business the witnesses for the prosecution are allowed to leave before the charge has been framed or before the right conferred by sec 256 has been exercised by the accused they must be required to attend again and ordinarily any expenses incurred on this score should be paid by the Government There is nothing in this chapter which enables the Magistrate to demand even from a complainant the expenses to be incurred by his witnesses—*Bridhichand v Lakhmichand*, 8 N L R 65 If, however, the complaint is a private one (e g for an offence of using false trade mark) and the prosecution is not carried on by or under the orders or with the sanction of the Government and is bailable, and it does not appear that the prosecution is directly in the interests of public justice, then the complainant may be ordered to pay the expenses of the witnesses The question as to whether the complainant or the Government should pay the expenses is to be decided by the Magistrate But in no case can the accused be compelled to pay the expenses of the witnesses for the prosecution whom he wishes to cross examine under section 256 Under this section, the right of the accused to cross examine is absolute—*Radhakishan v Ramakrishna* 7 N L J 57 25 Cr L J 912 A I R 1924 Nag 114

841. Defence—After the cross-examination is over, the accused should be called upon to enter upon his defence It is not a proper or

cedure to call upon the accused to enter upon his defence before he has cross-examined the witnesses for the prosecution—8 N L R 65 So also, the practice of examining the witnesses for the prosecution, after the defence is closed to bolster up the prosecution if it appeared that the evidence was prejudicial, is highly deprecated—*Radhamadhab v Emp*, 15 C. W. N 414

Adjournment for defence—According to the provisions of secs 256 and 257, the accused is entitled as a matter of right to ask for an adjournment, after a charge has been framed against him, to enable him to adduce evidence in support of his defence—1 C W N 313 Where a trial is commenced as a warrant case, it should be concluded by the procedure laid down in this chapter for warrant cases and the Magistrate acts illegally in concluding the trial as a summons case and convicting the accused, without giving him an opportunity to have his witnesses produced by giving him the adjournment asked for—*Munshi Teli v Emp*, 2 P L T 482

842 Subsection (2)—Written Statement—Where certain legal practitioners convicted under sec 17 (1) of the Criminal Law Amendment Act, XIV of 1908, for being members of an Association called the "National Volunteers' Association" which was declared by the Government to be an unlawful association under sec 15 (2) (b) of that Act and were then called upon by the High Court to show cause why they should not be removed or suspended from practice under clause 8 of the Letters Patent whereupon one of them proposed to file a written statement, *held* that the proceedings under clause 8 of the Letters Patent were not of a criminal nature in this sense that the rules of procedure of a criminal trial such as the filing of a written statement under sec 256 (2) of the Criminal Procedure Code were not applicable to them and the respondent's written statement could not therefore be received—*In re Abdul Rashid*, 4 Lah 271

A written statement filed by the accused cannot take the place of the examination of the accused which is imperative under sec 342. See notes under that section under heading 'Written statement'

257 (1) If the accused, after he has entered upon his defence

Process for compelling production of evidence at instance of accused.

applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production

of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of ve

or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing.

Provided that when the accused has cross-examined or had the opportunity of cross examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section unless the Magistrate is satisfied that it is necessary for the purposes of justice.

(2) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purpose of the trial be deposited in Court.

The procedure of this section applies to *summary* trials and the accused is entitled to have processes issued for compelling the attendance of prosecution witnesses for cross examination when he is called upon to enter on his defence, if they have not been cross examined before—22 Cr L J 271.

843 Issue of process.—The language of this section is imperative. A Magistrate has no discretion to refuse to issue process to compel the attendance of any witness unless he considers that the application should be refused on the ground specified in the section—26 Bom 418. The Magistrate must summon every witness named in the list. He cannot arbitrarily limit the number of witnesses to be examined—26 Bom 418. Thus where the accused put in a list of 72 witnesses and the Magistrate ordered him to cite only 12 of them it was held that the Magistrate's order was arbitrary and illegal—31 Mad 131.

Once the Magistrate has issued summons, he is bound to assist the accused in enforcing the attendance of the witnesses. If the witnesses do not obey the summons the Magistrate cannot refuse to issue a second summons—10 Cal 931 1884 P R 28 1922 P L R 5, 1922 P L R 6 6 C W N 348 Ratanlal 594 4 All 53, *Muhammad Din v Emp*, 9 C W N cccxix *Amrit Mondal v mp* 1 P L T 490. It is the duty of the Court to see that the summonses or warrants are duly executed. If the witnesses do not attend the accused can insist upon the Court to issue further process. Where the witnesses cited by the accused failed to attend, and it appeared that the summonses were not duly executed, but the Magistrate proceeded to give judgment remarking that it was the business of the accused to take suitable steps for bringing his witness before the Court, *held* that the conviction of the accused was illegal and must be set aside—*Dijoy v Emp*, 19 A L J 945. When once a Court has issued a summons to a witness under this section and the witness fails to appear, it is not justified in dispensing with the evidence of the witness on the ground that

at the most he would merely support the accused in his statement
Sohara v. Emp, 1922 P. L. R. 5.

844. **Refusal to summon prosecution witnesses**—An absolute right of cross examination of the prosecution witnesses is not conferred by this section. The Magistrate can refuse to allow the accused to recall such witnesses for cross examination, if he considers that it is made for the purpose of vexation or delay or for defeating the ends of justice. But it is upon the party who thinks himself aggrieved to show that the ends of justice have been frustrated in consequence of the refusal to recall the prosecution witnesses for cross examination—20 Cal 469

Where the accused was given an opportunity under section 256 to cross-examine the prosecution witnesses but he refused to do so, leaving no option for the Magistrate but to close the case, and after the case was closed the accused applied to cross examine the prosecution witnesses and it was held that the accused's attitude was deliberately designed to harass the Court, and that the Magistrate would be justified in refusing the application—*Vijaya Rao v. King Emp*, 21 M L J 283 (F B). Where the witnesses for the prosecution were subjected to a very lengthy and strict cross examination before the framing of charge, the Magistrate was right in declining to re-summon those witnesses if he was of opinion that the application to re-summon the witnesses was made for vexation etc.—*Ratanlal* 930, 20 Cal 469, *Ramsakal v. Emp*, 26 Cr L J 1627 (Cal) but unless the Magistrate considers that the application to re-summon the witnesses is made for the purpose of vexation or delay the accused is entitled to have the prosecution witnesses summoned for cross examination—*Monmohan v. Bankim* 51 Cal 1044 (1047) 26 Cr L J 384, and the Magistrate cannot refuse to summon the witnesses merely on the ground that they were fully cross examined before—4 C W N 241, 4 C W N 351

The proviso to subsection (1) is to the effect that when an accused has been cross examined or had the opportunity of cross examining any witness after the charge has been framed, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice. The mere fact that it might have been possible from a cross examination of the prosecution witnesses to have extracted from them something which might have been of advantage to the accused is not a sufficient ground to enable the Magistrate to recall those witnesses, it must appear that there was to be obtained from the witnesses sought to be cross-examined something which would have materially affected the result of the trial—*Ajo Mian v. K E*, 6 P L T. 626 A I R 1925 Pat. 696

The mere fact that the accused's lawyers had previously declined to cross-examine such witnesses or the mere fact that such witnesses

not cross examined before does not compel a Court to summon them for to do so would be to render the proviso meaningless—*Ibid*

After he has entered upon his defence —It is only after the accused has entered upon his defence that the Magistrate can in his discretion refuse the application of the accused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice—27 Cal 370

845 Examination of defence witnesses —A Magistrate cannot refuse to examine a defence witness who is present in Court if he is requested by the accused to do so—4 Bom L R 461 Though it is competent for a Magistrate to decline to summon witnesses for the defence under this section it is not competent for him to refuse to examine the defence witnesses on the ground that their evidence is unnecessary—*Emp v Nanbasappa* 14 Bom L R 360 Where in a trial involving a capital charge the accused is denied his right to have his defence witnesses examined in Court it must be held that it has resulted in a failure of justice and the conviction ought to be set aside and a re trial ordered—*Ayarvali v Emp* 45 M L J 305 If a witness is unable to attend the Court owing to illness and he appears to be an important witness the Magistrate should ascertain whether it will be possible for that witness to attend the Court within a reasonable time and if not then his evidence should be taken on commission—*Jamu Singh v K E* 3 Pat 591 (594) 25 Cr L J 1255 A I R 1925 Pat 55 A Magistrate cannot refuse to summon witnesses cited by the accused on the ground that they are implicated in the charge—15 W R 7 or on the ground that the accused is unable or refuses to pay the costs of the witnesses—24 Cr L J 831 or on the ground that they will not be able to give any reliable evidence one way or the other—(1911) 2 M W N 192 or on the ground that they are living at a great distance—45 M L J 305 The Magistrate cannot refuse process to a defence witness merely because he thinks that no useful purpose will be served by summoning that witness—*Ganpat v Emp* 24 Cr L J 686 (Lah) Where after a case on both sides having been closed the Magistrate summoned a witness to give evidence whereupon the accused prayed to have certain witnesses summoned to rebut the evidence of the Court witness held that the Magistrate was bound to summon such witnesses and could not refuse to do so on the ground that the accused had stated at the close of his case that he did not wish to examine any more witnesses—6 Cal 714

If a Magistrate rejects the application for summoning the witnesses he should specify his reasons for such refusal If he fails to record the reasons the conviction and sentence will be set aside—4 C W N 241 *Manmohan v Baikim* 51 Cal 1044 (1047) 3 All 392 1895 A W N 40 *Debi Singh v Emp* 24 Cr L J 831 *Abdul Jabbar v Emp* 25 Cr L J 310 A I R 1925 Cal 80

It is a sufficient compliance with the requirements of this section if the Magistrate states facts which led him irresistibly to the conclusion that the application was for no other purpose than that of vexation or delay or defeating the ends of justice although he does not say expressly that the application was made for that purpose—11 C W N 789 Where a Magistrate rejects an application after recording on it too late, this is a sufficient compliance with this section—39 Cal 781

846 Cross examination —The accused in a warrant case has got three opportunities of cross-examining the prosecution witnesses one (under sec 254) before the charge is framed secondly under section 255 after the charge is framed and under section 257 the accused is given the third opportunity of cross-examining the prosecution witnesses unless the Magistrate decides that the application for cross examination is vexatious—5 P L J 94 *Lalrai v King Emp* 46 Mad 449 (463)

Where on a refusal by the Magistrate to resubmit the prosecution witnesses for cross-examination the accused cited those witnesses on their own behalf as defence witnesses and then proceeded to cross examine them but were disallowed by the Magistrate it was held that the mere fact that the accused had been compelled to treat the witnesses for the prosecution as their own witnesses did not change their character and that although the accused were compelled to obtain their attendance as witnesses for the defence they were really prosecution witnesses and summoned under sec 257 for the purpose of cross examination and the Magistrate was wrong in refusing to allow their cross examination—*Sheo Prakash v Rawlins* 28 Cal 394 1 C W N 19 *Lenku Reddi v Emp* (1912) M W N 120

Where an accused first obtained process for the attendance of a witness but subsequently declined to examine him whereupon the Court examined him as a Court witness under section 340 it was held that the witness could not be treated as a defence witness and that the accused had the right to cross examine him—29 Cal 387

An accused may be allowed to cross examine the witnesses called by his co-accused when the case of the co-accused is adverse to his case—21 Cal 401

847 Inspection of documents —In a warrant case the accused has no right to call for the production of documents in the possession of the prosecution and to inspect the same until after a charge has been framed and read out to him under secs 254 and 255 This right is given by section 257 after a charge has been framed But the Magistrate should satisfy himself that the documents called for have some bearing on the case and are relevant before granting a summons for their production—*Tahsiram v Pitamberdas*, 8 S L R 267

848 Expenses —It has been held in some cases that the inability or even refusal to pay the expenses would not be an adequate ground for refusing to summon the defence witnesses—*Delu Singh v Emp* 24 Cr L J 831 (Pat) 1898 P R 7 But the Lahore High Court recently holds that if the rule laid down in 1898 P R 7 is to be literally followed then subsection (2) of this section would become an entirely dead letter because one can hardly conceive of a case where an accused person would willingly deposit the expenses of his witnesses if he knew that he had only to express his unwillingness to entitle him to get his witnesses summoned at the expense of the Government Subsection (2) fully empowers a Magistrate to order that the reasonable expenses of a witness shall be deposited by the accused before the witness is summoned But the Magistrate should only summon so many witnesses at one hearing as he thinks he will be able to examine on that hearing to save the expense of parties—*Ganpal v Crown* 24 Cr L J 686 (Lah)

Although the Magistrate can under this section require the accused to deposit in Court the expenses for the attendance of witnesses still if the Magistrate has once allowed witnesses to be summoned without demanding expenses from the accused and if by any chance the witnesses summoned for a particular date have not been examined on that date the Magistrate has no power afterwards to say that on the next date of hearing the witnesses shall not be summoned except on payment of their expenses by the accused—22 Cr L J 711 (Lah)

A Court ordering a party to deposit the travelling allowance of a witness should state the amount of the travelling allowance to be deposited—*Gourishankar v Collector* 6 P L T 215 26 Cr L J 965

258 (1) If in any case under this Chapter in which a charge
 Acquittal has been framed the Magistrate finds the
 accused not guilty, he shall record an order
 of acquittal

(2) Where in any case under this Chapter the Magistrate
 Conviction does not proceed in accordance with the
 provisions of Section 349 or Section 562, he
 shall, if he finds the accused guilty, pass sentence upon him
 according to law

Change —Subsection (2) has been amended by section 73 of the Cr P C Amendment Act XVIII of 1923 Similar amendment has been made in sec 245

849 Acquittal —An order of acquittal can be recorded only after a charge has been drawn up—22 W R 25 But an omission to prepare

a charge does not invalidate an order of acquittal—1881 A W N 142 If however a warrant case is tried as a summons case and no charge is framed the acquittal amounts to a discharge under sec 253—1886 A W N 260

After a charge is framed the Magistrate can pass no other order except that of acquittal or conviction He cannot pass an order of discharge Even if he discharges the accused the discharge would amount to an acquittal—1883 P R 29 38 Mad 585 *Bishambar v Emp* 1 O W N 705 So also an order of dismissal of complaint would amount to an acquittal—5 C. L. R 359

Where a Magistrate passes an order of acquittal under this section the Sessions Judge cannot treat it as an order of discharge and direct a commitment of the accused under sec 436 (now 437)—43 Mad 330

The acquittal must be based on the finding that the accused is not guilty the Magistrate cannot acquit the accused merely because the complainant is absent Where a charge has been framed against the accused and the latter have entered upon their defence and produced some defence witnesses they cannot be acquitted on account of the absence of the complainant—*Ram Baksh v Jaiaram* 27 O C 316 26 Cr L J 264 1 O W N 613 But where after a charge is framed the complainant is absent and it is obvious that the complainant has no desire to proceed with his complaint the Magistrate should acquit the accused and not merely discharge him—*Emp v Godhar* 1 O W N 486 6 Cr L J 400 See also Note 852 under sec 250

850 Conviction —An accused must be convicted on the strength of the case made against him and not in consequence of his inability to put forward proof of his innocence—*Ratanlal* 5 If however a Magistrate feels reasonable doubt as to the guilt of the accused he is bound to acquit him—*Ratanlal* 854

It is not necessary that the conviction or acquittal should be by the same Magistrate who drew up the charge—3 Cal 495

Sentence —See notes under sec 245

259 When the proceedings have been instituted upon complaint and upon any day fixed for the hearing of the case the complainant is absent and the offence may be lawfully compounded or is *not a cognizable offence*, the Magistrate may, in his discretion notwithstanding anything hereinbefore contained at any time before the charge has been framed, discharge the accused

Change —The italicised words have been added by section 74 of the Cr P C Amendment Act, XVIII of 1923

Principle of section —The primary reason of passing the order of discharge is that the absence of the complainant raises a presumption that the complainant does not wish to proceed with the prosecution—12 Cr L J 184 (Sind)

851 Scope of section —It is not in every warrant case that a Magistrate will be competent to pass an order of discharge on account of the absence of the complainant. The warrant case must fall under this section—10 Cal 67 1891 A W N 116, that is, the case must be instituted upon complaint and the offence must be compoundable without the leave of the Court or non cognizable

All warrant cases would be governed by this section and the fact that a summons instead of a warrant has been issued in the first instance, will not exclude that case from the operation of this section and bring it under Chapter XX—10 W R 31

Under the old law if the case was not compoundable, no order of discharge could be passed—37 Bom 369, 13 Bur L T 244; 17 O C 18. Under the present section however, it is not always necessary that the offence must be compoundable. If the offence is a non cognizable one, an order of discharge may be passed

852 Absence of Complainant —If the complainant is absent the Court is not bound to wait till the end of the day, in order to give the absent complainant an opportunity of appearing—7 Mad 356. But a slight delay in attending the Court, especially where on a day the Court sat earlier than usual would not be a proper ground of discharge—Ratanlal 983

The Magistrate can discharge under this section if no charge has been framed. But if a charge has been framed, and the complainant is absent it is not legal to discharge the accused without hearing the evidence for the defence. The Magistrate ought to admit the accused to bail and enforce the attendance of the complainant—Ratanlal 524, Ratanlal 847. Once a charge has been framed, it is the duty of the trial Court to proceed with the trial even in the absence of the complainant, and to convict or acquit the accused on the merits—*Narain v Mewa Singh*, 22 Cr L J 312 (Lah) *Nabi Baksh v Emp*, 25 Cr L J 87 (Lah). Where, after a charge has been framed both parties are absent, the proper procedure for the Magistrate is to get the accused arrested under a warrant, and then decide whether he is guilty or not and not to discharge the accused and then direct the taking of proceedings under sec 514 for forfeiture of his bond—*Emp v Godhan*, 1 O W N 586

In a warrant case after the charge has been framed, the position of the complainant is reduced to that of a witness, and he cannot be asked to

pay the costs of an adjournment necessitated by his absence—*Nabi Baksh v Emp*, 25 Cr L J 87 A I R 1914 Lah 627

853 Discharge —The proper order is one of discharge and not one of acquittal—37 Bom 369 So also an order of striking off the case is not a proper order under this section—*Ramphal v King Emp* 17 O C. 18 If a summons case and a warrant case are tried together the proper order is one of discharge and not one of acquittal—41 Mad 727

The Magistrate has a discretion to discharge the accused But in exercising this discretion in discharging the accused he should see whether there is a *prima facie* case against the accused if there is such a case the Magistrate should convict if he discharges for the sole reason that the complainant is absent his order is illegal—1891 A W N 116 *Harun v Abdul* 12 Cr L J 184 (Sind) If the absence of the complainant is due to his death the Magistrate has a discretion in a proper case to allow the complaint to be continued by a proper and fit complainant instead of discharging the accused—*Mahomed Aram v Emp* 28 Bom L R 288 A I R 1926 Bom 178

854 Fresh complaint —The discharge under this section does not amount to an acquittal and a Magistrate who has passed the order of discharge can re hear the case on fresh complaint—*Chinnathambi v Gnanasamy* 28 Mad 310 29 Mad 126 41 Mad 727 18 M L J 561 28 Cal 632 29 Cal 726 *Balcland v Chandoomal* 8 S L R 196 *Asgar Ali v Akbar Ali* 26 Cr L J 1040 (Nag)

Further inquiry —A District Magistrate is competent under sec 437 (now 436) to revive a case which has been dismissed by himself under this section and make it over to a subordinate Magistrate for trial—28 Cal 102

A District Magistrate can order further inquiry if he thinks that the discharge was improper—*Ratanlal* 988 *Ratanlal* 76 *Ratanlal* 145 12 Cr L J 184 as for instance where the complainant was prevented from appearing owing to circumstances beyond his control (e g by reason of floods) and the Magistrate discharged the accused—12 Cr L J 184 He can order further inquiry even if no additional evidence is disclosed—10 Bom 131 15 Cal 608 9 All 52

CHAPTER XXII.

OF SUMMARY TRIALS.

855 Change of procedure from Chap XX or XXI to Chap XXII — There is no section of the Code which expressly sanctions a change of procedure from a trial under Chap XXI to one under Chap XXII, but there is also no section which expressly prohibits such a change. The change of procedure is certainly not contemplated or sanctioned by the Code, but the High Court will regard it as a mere irregularity, which will not vitiate a trial unless it has occasioned a failure of justice. Thus in a case the Magistrate commenced the trial of the accused under Chap XXI but after framing the charge he continued the trial under Chap XXII. It was held that this change of procedure was a mere irregularity, and where there was no failure of justice, the High Court would not interfere in revision—*Adoo v Crown*, 10 S L R 185

So also, where a complaint was made of an offence not triable summarily, and the Magistrate commenced a regular inquiry, but afterwards finding that the offence committed was triable summarily, tried it summarily, it was held that the Magistrate had acted *bona fide* in the interests of justice, and the High Court refused to interfere—22 Mad 439. But in *Gosta Behari v Baistam*, 26 C W N 831 it was held that such a change of procedure in the midst of the trial was prejudicial to the accused, and that there should be a retrial.

Power to try summarily.

260. (1) Notwithstanding anything contained in this Code,—

- (a) the District Magistrate,
 - (b) any Magistrate of the first class specially empowered in this behalf by the Local Government, and
 - (c) any Bench of Magistrates invested with the powers of a Magistrate of the first class and specially empowered in this behalf by the Local Government,
- may, if he or they think fit, try in a summary way all or any of the following offences:—

- (a) offences not punishable with death, transportation or imprisonment for a term exceeding six months;

- (b) offences relating to weights and measures under Sections 264, 265 and 266 of the Indian Penal Code,
- (c) hurt, under Section 323 of the same Code,
- (d) theft, under sections 379 380 or 381 of the same Code, where the value of the property stolen does not exceed fifty rupees,
- (e) dishonest misappropriation of property under Section 403 of the same Code where the value of the property misappropriated does not exceed fifty rupees,
- (f) receiving or retaining stolen property under Section 411 of the same Code where the value of such property does not exceed fifty rupees
- (g) assisting in the concealment or disposal of stolen property under Section 414 of the same Code where the value of such property does not exceed fifty rupees,
- (h) mischief under Section 427 of the same Code,
- (i) house trespass under Section 448 and offences under Sections 451, 453 454 456 and 457 of the same Code,
- (j) insult with intent to provoke a breach of the peace, under Section 504 and criminal intimidation, under Section 506 of the same Code
- (k) abetment of any of the foregoing offences,
- (l) an attempt to commit any of the foregoing offences when such attempt is an offence,
- (m) offences under Section 20 of the Cattle Trespass Act 1871

Provided that no case in which a Magistrate exercises the special powers conferred by Section 34 shall be tried in a summary way

(2) When in the course of a summary trial it appears to the Magistrate or Bench that the case is one which is of a character which renders it undesirable that it should be tried summarily the Magistrate or Bench shall recall any witnesses who

have been examined and proceed to re hear the case in manner provided by this Code

856 Magistrates empowered —The District Magistrate of Bangalore has no power to try European British subjects summarily under this section as his powers are confined to those conferred on him by the Declarations of the G G in Council and the power to try European British subjects summarily under this section is not included in such powers—39 Mad 942 Under the present law however all such restrictions have been removed

Where an Assistant Commissioner of a district who was before his going to England on furlough authorised to exercise summary powers in a certain local area was on his return from furlough posted to another local area as a first class Magistrate it was held that he had no jurisdiction to exercise summary powers in the latter area—2 Cal 117 But see sec 40 as now amended

Presidency Magistrate —The provisions of this chapter 'do not apply to trials before Presidency Magistrates—Ratanlal 539

Responsibility of Magistrates —The responsibility thrown on Magistrates entrusted with summary powers is very great and the responsibility of those who have to entrust them with such powers is equally great Magistrates who are sufficiently alive to the responsibility entrusted to them will take care that the procedure or the record is not made more summary than what the law has laid down—21 All 189

857 Offences triable summarily —Whether an offence is to be tried summarily or not is to be determined by the facts stated in the complaint as well as the sworn testimony of the complainant—36 Cal 67 27 C W N 148 The Magistrate is competent to dispose of a case summarily where the facts reported disclose an offence triable summarily without reference to the particular charge pressed—6 N W P H C R 254 16 Cal 715 1 Bom L R 683

Where a person is charged with a graver offence the Magistrate ought not to cut down the offence to a less serious one at his own will in order to give himself jurisdiction to try it summarily—24 W R 48 27 Cal 983 29 Cal 409 11 Cal 236 27 C W N 148 1 C L R 434 1888 P R 5 Thus a charge of dacoity cannot be treated as one of unlawful assembly for the purpose of trying it summarily—21 W R 89 see also 23 W R 3 Ratanlal 670 1907 P L R 21 6 Bnr L T 137 24 W R 21 So also no Magistrate is entitled to split up an offence into its component parts for the purpose of giving himself summary jurisdiction thereby depriving the prisoner of his right of appeal—4 Cal 18 Where the value of the property stolen exceeded Rs 50 the Magistrate had no jurisdiction to reduce it to Rs 50 in order to give himself jurisdiction to try it summarily—21 W R 65

Joint charge of summary and non-summary offences—Where an accused person is charged with offences not triable summarily along with offences triable summarily, the Magistrate cannot disregard the former offences, and proceed to try the case summarily—11 Cal 236, 1888 P R. 5 *Contra*—10 All 55 where it has been held that the mere fact of the complainant charging the accused with summary offences along with non summary ones will not oust the summary jurisdiction of the Magistrate

Summary trial of non-summary offences—Effect—Where a Magistrate deliberately disregards the offence complained of which is an offence not triable summarily, and tries it summarily, his proceedings are absolutely void under sec 530 (g) The conviction and sentence will be set aside, and a new trial under the regular procedure directed—27 C W N 148, 5 C W. N 252. *Emp v Ram Narain*, 46 All 446

858 Instances of summary offences—Offences under sec 121, Indian Railways Act—1902 A W N 24 offences under sec 65 (a), Stamp Act, for failure to give a receipt—1 Weir 906 proceedings under sec 84 Bombay Act VI of 1873, for recovery of Municipal Taxes—17 Bom 131 offences under the Companies Act for not filing the balance sheet with the Registrar of Joint Stock Companies—35 All 173 offences under sec 49 Bengal Abkari Act XXI of 1856 the confiscation provided in that section being merely a consequence of the conviction and not part of the punishment—3 Cal 366

Property of value not exceeding fifty rupees—Where a box containing fifty Rupees was stolen and the price of the box was annas eight the theft was of property exceeding Rs 50 in value (i e Rs 50 8 annas) and could not be tried summarily—22 W R 65 Since a tenant is entitled to the exclusive possession of the whole produce until it is divided under sec 71 of the Bengal Tenancy Act, his complaint against the landlord for theft for having cut and carried away paddy worth Rs 88 of which the latter was entitled to one half cannot be summarily tried by a Magistrate as the value of the property in this case must be regarded as Rs 88 and not Rs 44 only—1 P L J 230

859. Offences not triable summarily—Offences which are punishable with imprisonment for more than 6 months e g an offence under sec 66 of the U P Excise Act (IV of 1910) which is punishable with imprisonment for one year—*Bhishha v Emp*, 28 O C 123 26 Cr L J 800, offences under sec 2 of the Workmen's Breach of Contract Act—6 Bom L R 255, 2 L B R 163, 1902 U B R 3rd Quarter (W B C A) 1 4 Mad 234 20 Mad 235. 16 Bom 368, 27 Cal 131, 33 Bom 22 6 S L R 165, 1912 P. R. 5, (*Contra*—11 All 262 and 43 All 281) offences under sec 6 of Act VII of 1851, for illegal demand of toll—22 W R 76, offences under the

Press Act *e g* omission to make a declaration—1889 P R 9 maintenance proceedings under sec 488—20 Cal 351 24 W R 61 offence under sec 60 of the U P Excise Act (IV of 1900) in respect of exciseable articles other than cocaine (punishable with one year's imprisonment)—*Emp v Ram Narain* 46 All 446 offences under sec 9 Opium Act (punishable with one year's imprisonment)—4 Bur L T 271 cattle lifting—6 S L R 101 offences under sec 224 I P C—1894 A. W. N 176 offence under sec 452 I P C—6 Bur L T 137 theft of property valued at more than Rs 50—22 W R 65 14 N L R 190 1 P L J 230 a summary offence combined with a charge of previous conviction—2 Weir 324 1 Bur S R 386. Under clause (1) of this section an offence under sec 457 I P C (house breaking by night in order to commit theft) is triable summarily but if the property stolen is worth more than Rs 50 a summary trial would be improper—*Dipchand v Emp* 14 N L R 190

860 When summary trial undesirable or improper—A summary trial is undesirable in a case where a large number of correspondence has to be gone into and the case is by no means of a simple character—35 All 173 or in a case in which from the nature of the dispute and the plea taken by the accused it is apparent that complicated questions of right and title and production of documentary evidence are involved—*Bhīn Bahadur v Emp* 1 P L T 121 *Parmeshwar v Emp* 3 P L T 347 2 Bur L J 55 6 S L R 120 A summary procedure is also undesirable where the accused is a deaf and dumb person—8 Bom L R 849 It is also improper where the Magistrate takes cognizance of the case from his own knowledge or suspicion and holds the trial on inadequate materials—3 C W N 1000 1905 P L R 31 25 W R 69 It is also undesirable in offences of a very serious nature—6 S L R 101 14 N L R 190 It is improper where the charge is a serious or complicated one and the trial goes on for a considerable time and a local inquiry has to be made or a large number of witnesses and accused persons are examined—*Emp v Rustomji* 23 Bom L R 984 *Ghasia Mal v Crown* 3 Lah L J 316 25 W R 65 *Rakimulla v Emp* 26 Cr L J 1016 (Snd)

A summary trial is also improper in a case where the conviction of the accused may entail further serious consequences (*e g* dismissal from service) Thus where a Police officer of many years standing was charged with criminal intimidation with a view to prevent a person from giving evidence against certain grave offenders and was tried summarily and convicted held that the Magistrate did not exercise a sound discretion in trying the case summarily and depriving the accused of the privilege of an appeal—*Sībramanya Ayyar v Queen* 6 Mad 396 So also where a village Kulkarni is charged with offences under secs 176 and 402 I P C (intentional omission to give information of offences to a public servant) the Magistrate should not try the accused summarily in as much as cases

under sec. 202 are complicated and the conviction of the accused may entail further serious consequences (dismissal from service)—*Q E v Hari Gopal, Ratanlal 778, Q E v Waman, Ratanlal 784*

261. The Local Government may confer, on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class, power to try summarily all or any of the following offences —

Power to invest Bench of Magistrates invested with less power

(a) offences under the Indian Penal Code, Sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426, 447 and 504.

(b) offences against Municipal Acts, and the conservancy clauses of Police Acts which are punishable only with fine or with imprisonment for a term not exceeding one month *with or without fine*

(c) abetment of any of the foregoing offences,

(d) an attempt to commit any of the foregoing offences, when such attempt is an offence

The italicised words at the end of clauses (a) and (b) have been added by section 75 of the Cr P C Amendment Act XVIII of 1923

A Bench of Magistrates cannot try summarily any other offence except those mentioned in sec 260 and this section—21 W R 12 9 Cal 96

262 (1) In trials under this Chapter, the procedure prescribed for summons cases shall be followed in summons cases, and the procedure prescribed for warrant cases shall be followed in warrant cases, except as hereinafter mentioned

Procedure for summons and warrant-cases applicable

(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

Limit of imprisonment

861 Procedure —The scanty procedure laid down in this Chapter should be strictly followed—22 W R 28 15 Mad 83 Magistrates should take care that the procedure and the record are not made more summary than what the law has laid down—21 All 189, *Damodar v Emp* 3 P L. T 499 Thus where the Magistrate without issuing process & a record of the proceedings and without dismounting from the horse

which he was riding, convicted and fined a man summarily for causing obstruction in a public way, it was held that the procedure adopted by the Magistrate was illegal—15 Mad 83

In a summary trial of a warrant case, the Magistrate must adopt the procedure laid down in Chapter XXI (except that he has not to frame a charge and is not bound to record the evidence of the witnesses) Therefore the provision of section 256 which gives the accused an absolute right of cross examination of the prosecution witnesses after they have been examined in chief must apply to a summary trial of warrant cases—1 P L T 652 The accused is entitled to have processes issued for compelling the attendance of the prosecution witnesses for cross examination—22 Cr L J 271 (Cal)

In a summary trial of a warrant case, though a charge need not be framed, the accused person cannot be called dilatory, if he delays to name his witnesses until he has heard the evidence for the prosecution and found that the Magistrate considers the evidence a substantial basis for charging him—Ratanlal 768 In a warrant case tried summarily, the Magistrate ought to grant an adjournment if desired by the accused to enable him to summon the witnesses for the defence under sec 257, unless the Magistrate considers that the application is made for the purpose of vexation or delay—5 L B R 20

In a summons case the Magistrate must not only state the charge to the accused, but explain it to him—1 Bur S R 594, the record must show that this has been done, and the answer of the accused must be recorded as nearly as possible in the words used—Ibid

862 Sentence —In a summary case, a sentence of imprisonment for more than three months cannot be awarded, if an adequate sentence cannot be passed the case should not be tried summarily—4 L B R 338 The limit of three months applies only to a substantive sentence, a Magistrate is therefore competent to award a sentence of imprisonment in default of fine, in addition to the three months imprisonment—6 All 61

Fine of any amount may be imposed there is no limit to the amount of fine awardable in a summary trial—35 All 173

Solitary imprisonment can also be awarded as part of the sentence—6 All 83

A Magistrate is competent to take security bond under sec 106 on conviction in a summary trial—1896 A W N 181.

The High Court in revision can enhance the sentence passed in a summary trial to two years : i.e. the limit to which a Presidency Magistrate or a Magistrate of the first class can pass sentence—Bom H C Cr R 30-7 1883 See subsection (3) of sec 439

Compensation —Compensation may be awarded under sec 250 to the accused in a trial held summarily—11 Mad 142

263 In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter, in such form as the Local Government may direct, the following particulars —

- (a) the serial number,
- (b) the date of the commission of the offence,
- (c) the date of the report or complaint
- (d) the name of the complainant (if any),
- (e) the name, parentage and residence of the accused,
- (f) the offence complained of and the offence (if any) proved, and in cases coming under clause (d), clause (e), clause (f) or clause (g) of sub-section (1) of Section 260 the value of the property in respect of which the offence has been committed
- (g) the plea of the accused and his examination (if any),
- (h) the finding, and, in the case of a conviction, a brief statement of the reasons therefor,
- (i) the sentence or other final order and
- (j) the date on which the proceedings terminated

863 Record —Although the object of a summary procedure is to shorten the course of trial it is nevertheless incumbent on the Magistrate to put on record sufficient evidence to justify his order—27 Cal 450 10 C W N 79 Ratanlal 778 If the particulars required by this section are not clearly given in a judgment in a summary trial convicting the accused the judgment is defective and the conviction cannot stand—*Gulam v Emp* 23 Cr L J 161

The record should be written by the Magistrate himself, there is no provision enabling him to delegate this duty to a clerk—6 Mad 397 The record should be made at the time of the trial and not afterwards. If admission of the accused should also be recorded at once—25 Mad 23

District Magistrates should satisfy themselves from time to time by examination of the records of summary trials that the law relating to summary trials is properly observed and especially that Magistrates do not exceed their jurisdiction in this regard —Cal G R & C O 5 21

864 Evidence —In a summary trial of a *summary trial*

Magistrate need not record the evidence of witnesses in writing—1905 A W N 143 Ratanlal 334 But this does not mean that this section excuses a Magistrate from *hearing* the evidence of witnesses. If the accused denies the charge the complainant and his witnesses must be examined and the case must be decided upon the effect of their evidence though the evidence need not be recorded—39 Cal 931

If at the commencement of the trial the Magistrate is unable to determine whether the proper sentence to be passed should be an appealable one or not he must make a memorandum of the substance of the evidence of each witness as his examination proceeds. But if he can at this stage determine that the sentence will be in any event non appealable he need not record the evidence. If however he actually does so the notes of the evidence form part of the record of the case and cannot be destroyed by him. Where the Magistrate had destroyed such record the High Court in revision was unable to form an opinion on the propriety of the conviction and set it aside—*Satish Chandra v Emp* 48 Cal 280 32 C L J 451 22 Cr L J 462 *Lal Chand v Emp* 46 Cr L J 1454 (Nag)

855 **Frame of charge**—This section exempts the Magistrate from framing a charge in cases in which no appeal lies. If however he passes an appealable sentence in the case he must frame a charge—*Natabar v A E* 27 C W N 923 23 Cr L J 1270 Although it is not necessary under this section to frame a charge still the accused must be called upon to answer to the particulars of the offence charged and the Magistrate must specify the offence complained of in such a way as to give the accused notice of what is charged against him—16 C W N 595

866 **Particulars of the offence**—The record should show clearly the precise nature of the offence and should be complete in all particulars—1881 A W N 59 The facts found by the Magistrate must show what offence has been committed by the accused—3 C W N 281 1887 P R 7 1889 P R 5 Further the record however brief must show the necessary ingredients of the offence charged—3 L B R 3

The offence charged the offence proved and the reasons for conviction must be recorded in such a manner as to enable the Revision Court to say aye or no from within the four corners of the record itself whether the offence charged is an offence in point of law whether the offence proved is an offence in point of law and whether the reasons for the conviction are good and sufficient—10 C W N 79

Under clause (f) the value of the property must be set forth. The Magistrate ought to direct his mind to the question and satisfy himself that the property in respect of which he was trying the accused was less than Rs. 50 in value. It is not enough that it is ascertainable from the records—*Brij Nandan v Emp* 6 P L T 114 A I R 1922 Pat 227

867 Examination and plea of accused —See clause (g) The plea of the accused must be recorded, omission to record the plea will vitiate the conviction—9 C W N 1111 In all *warrant* cases there *must* be some examination of the accused as laid down in sec 342 Sec 263 does not give the Magistrate any discretion whether he will examine the accused or not The words if any in clause (g) are intended for summons cases and do not apply to warrant cases in the latter cases the examination is imperative—41 Cal 743 3 P L T 347 Even the plea of the accused cannot take the place of the examination of the accused and render it unnecessary—3 P L T 347 But the *Second* Court holds that the examination of the accused is imperative in all *summary trials* whether of *summons* or of *warrant* cases The words if any in this section do not limit the obligation imposed on Courts by sec 342 or render it inapplicable to summary trials but merely have reference to those cases in which owing to the admission or plea of accused (sec 243) or owing to the weakness of the evidence called in support of the prosecution (sec 245 253) the accused can either be convicted on his own plea without the taking of evidence or acquitted on the evidence without the examination referred to in sec 342 —*Emp v Nabu* 26 Cr L J 1554 A I R 1926 Sind 1 (F B)

868 Finding —In summary trials it is very important that there should be clear findings on questions of fact because it is only through such findings that the Court of Revision can form its own judgment with regard to the legality or otherwise of the proceedings of the trial Court—*Emp v Jagmohan* 24 Cr L J 916 (Oudh)

869 Reasons for conviction —The Magistrate in a summary trial must in recording the reasons for the conviction state them in such a manner that the High Court may in revision judge whether there were sufficient materials before the Magistrate to justify the conviction—1899 A W N 81 1885 A W N 213 3 C W N 281 1883 A W N 114 1886 A W N 181 *Jagan Nath v Lmp* 16 O C 357 6 Cal 579 13 C P L R 17 1 L B R 208 3 P L T 499 *Janaki v Raghunath* 19 Cr L J 719 (Pat) Magistrates should set out so much of the reasons that have influenced them as to satisfy the accused that the Magistrate has considered each of the ingredients of the offence necessary in law for the conviction to which the Magistrate has proceeded—21 All 189 *Brij bas v K E* 10 A L J 251 *Ram Harakh v Crown* 9 S L R 89 and while this should be recorded with brevity the brevity should not be such as to tend to obscurity—21 All 189 Thus a judgment in a single line is not a judgment according to law—20 Cr L J 431 (Patna)

[Failure to record a brief statement of reasons is fatal and the whole proceedings are illegal and liable to be set aside—6 C W N 40 6 579 18 Bom 97 *In re Dervish* 46 Mad 253 *Magsud v Emp*, 1 P.

716 *K E v Mianjan* 24 O C 293 13 C P L R 17 Even the defect could not be cured by the Magistrate (Presidency) subsequently submitting the reasons to the High Court when the record was called for under section 441—*In re Dervish Hossain* 46 Mad 253 9 C W N lxxv But if the record submitted under section 441 disclosed sufficient grounds for the Magistrate's decision the High Court condoned the irregularity if no failure of justice had occurred—46 Mad 253 (256) The Bombay High Court holds that the omission to record reasons for conviction on the part of the Bench Magistrates is only an irregularity which can be cured by sec 537 where there is clear evidence justifying the conviction It is an omission which does not occasion failure of justice—*Emp v Namdeo* 26 Bom L R 1236 See also *In re Thurman* 20 L W 330 25 Cr L J 1084

264 (1) In every case tried summarily by a Magistrate Record in appealable or Bench in which an appeal lies such cases Magistrate or Bench shall before passing sentence record a judgment embodying the substance of the evidence and also the particulars mentioned in section 263

(2) Such judgment shall be the only record in cases coming within this section

870 Record —The record of the trial must be made at the time of the trial and not subsequently prepared after the close of the trial from memory or from rough notes—15 Mad 83 The judgment which is the only record in appealable cases must be written by the Magistrate himself He cannot delegate that duty to a clerk nor can affix his signature to the record or judgment by a stamp—6 Mad 396

Where a Magistrate passes an appealable sentence he can not make his record in the manner prescribed by sec 263 but must record the evidence and frame a charge—*Natabar v Kt g Emp* 27 C W N 13 *Contra*—*Kallu v Emp* 26 Cr L J 1331 (Oudh) which lays down that even in appealable cases it is not necessary to frame a charge

871 Substance of evidence —The Magistrate is not bound to record the substance of every separate deposition but he is to state generally what is the substance of the witnesses evidence—25 W R 6 The evidence should be recorded in such a way as to enable the Appellate Court to form an opinion whether the evidence is sufficient to support a conviction—4 L B R 338 1 All 680 Where the judgment convicting the accused did not embody the substance of the evidence but the Magistrate merely recorded that the prosecution witnesses supported the complainant and that the evidence of the defence witnesses was conflicting and unreliable held that the judgment was defective and the conviction could not stand—*Salim v Emp* 24 Cr L J 484 A I R 1924 Oudh 167

In a summary trial a Magistrate made rough notes of the evidence which he subsequently copied and placed on the record and destroyed the original notes. It was held that the Magistrate's action was improper because the destruction of the original notes was tantamount to destroying the original record with the result that there was no legal evidence on the record which an appellate Court could go into—1 P L T 63 See also *Saish Chandra v Emp* 48 Cal 280 and *Lal Chand v Emp* 26 Cr L J 1454 (1925)

But the defect in recording the evidence is not always a sufficient ground for quashing the conviction. When the evidence is very imperfectly recorded the Appellate Court may require the Lower Court to remedy the defects by properly recording the evidence in a fresh judgment after re-examining the witnesses or it may order a retrial with that view—1 All 680

265 Records made under section 263 and judgments recorded under section 264 shall be written by the presiding officer, either in English or in the language of the Court or, if the Court to which such presiding officer is immediately subordinate so directs in such officer's mother tongue

(2) The Local Government may authorize any Bench of Magistrates empowered to try offences summarily to prepare the aforesaid record or judgment by means of an officer appointed in this behalf by the Court to which such Bench is immediately subordinate and the record or judgment so prepared shall be signed by each member of such Bench present taking part in the proceedings

(3) If no such authorization be given the record prepared by a member of the Bench and signed as aforesaid shall be the proper record

(4) If the Bench differ in opinion any dissentient member may write a separate judgment

The record must be written by the Magistrate himself see 6 Mad 396 cited under sec 264

CHAPTER XXIII.

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION.

A—Preliminary

266 In this Chapter, except in sections 276 and 307, and in Chapter XVII, the expression "High Court defined Court" means a High Court of Judicature established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and includes *the Chief Court of Oudh, the Courts of the Judicial Commissioners of the Central Provinces and Sind* and such other Courts as the Governor-General in Council may, by notification in the Gazette of India, declare to be High Courts for the purposes of this Chapter and of Chap'er XVIII.

The words Chief Court of Oudh have been added by the Oudh Courts Act (XXXII of 1925) and the other italicised words in the middle of the section have been added by sec 12 of the Criminal Law Amendment Act XII of 1923. The words and of Ch XVIII at the end of the section were accidentally omitted when the Act of 1898 was framed and have now been added by sec 76 of the Criminal Procedure Code Amendment Act (XVIII of 1923).

The Judicial Commissioner (e.g. of Sind) is a High Court only for the purposes of Chapters 18 and 23 but not for the purpose of Ch 31 (Appeal). A Judicial Commissioner holding a sessions trial on the Original Side is to be deemed a Sessions Judge and not a High Court for the purpose of Ch 31, so that an appeal will lie from his decision to the Bench of the Judicial Commissioners Court—*Khudabux v Emp*, 26 Cr L J 562 A I R 1925 Sind 249.

267. All trials under this Chapter before a High Court shall be by jury, and notwithstanding anything herein contained, in all criminal cases transferred to a High Court under this Code or under the Letters Patent of any High Court established under the Indian High Courts Act, 1861, or the Government of

Trial before High Court to be by jury

India Act 1915 the trial may if the High Court so directs be by Jury

268 All trials before a Court of Session shall be either by jury or with the aid of assessors

Trials before Courts of Session to be by jury or with assessors

Trial ordinarily with assessors—In the absence of any Notification under sec 269 a trial in the Court of Session must be with the aid of assessors—1858 P R 18

872 Trial by jury and trial with assessors—Difference—In a trial by jury the jury is the real tribunal and is aided by the Judge and in certain matters directed by the Judge but in a trial with the aid of assessors the Judge is the sole tribunal and judge of law and fact and the responsibility of the decision rests solely with him though in the decision of the case he is expected to take into consideration the opinion of each assessor In a trial by jury the jury form a tribunal or body with a foreman and the verdict is the verdict of the body and when there is no unanimity among the members of the body the opinion of the majority prevails as the verdict of the body But in the case of a trial with the aid of assessors the assessors do not form a body but each acts and expresses his opinion individually and the Judge is to invite the opinion of each separately and record it—*A. E. v. Thirumalai* 24 Mad 523 27 Cal 295 14 Bom L R 710 *Jaisukh v Emp* 43 All 125 19 A L J 1 *Jairam v Emp* 20 N L R 129 25 Cr L J 459 In a trial with the aid of assessors the individual opinion of each assessor is taken but in a trial by jury the individual opinions of the members of the jury are never intended to be disclosed—36 Mad 585 But the law makes no distinction as to the procedure between a trial by jury and a trial with the aid of assessors except as to the summing up of the case in the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are respectively taken—33 Bom 423

Trial when begins—A trial by jury or with assessors begins only when the charge has been read and the accused claims to be tried—15 Bom 514

268 (1) The Local Government may,* * by order in the official Gazette direct that the trial of all offences or of any particular class of offences before any Court of Session, shall be by jury in any district, and may, with the like sanction, revoke or alter such order

Local Government may order trials before Court of Session to be by jury

(2) The Local Government, by like order may also declare that in the case of any district in which the trial of any offence is to be by jury, the trial of such offence shall if the Judge on application made to him or of his own motion so directs be by jurors summoned from a special jury list, and may revoke or alter such order

(3) When the accused is charged at the same trial with several offences of which some are and some are not triable by jury he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session with the aid of the jurors as assessors for such of them as are not triable by jury

The words with the previous sanction of the Governor General in Council which occurred in the first line of subsection (1) have been omitted by the Devolution Act XXVIII of 1920. The words with the like sanction occurring near the end of that subsection should also be omitted and have been retained obviously through oversight

873 Class of offences —The classes of offences referred to in this section are not restricted to the classification found in the Penal Code *e g* offences against the State offences against public tranquility etc or to the classification found in this Code *e g* bailable offences cognizable offences etc Offences may be classified according to the persons who commit them or according to the person or property against whom or which they are committed or in regard to the particular occasion in connection with which they are committed—23 Mad 632

Where by a Notification the Government directed that in a particular district an offence under sec 436 I P C was to be tried by jury and not with the aid of assessors held that an offence under sec 436 read with sec 149 I P C should also be tried by jury and not with the aid of assessors because an offence under sec 436-149 I P C is not a different offence from an offence under sec 436 I P C—*Ramsundar v Emp* 7 P L T 178

874 Trial of jury case with assessors and vice versa —If a jury case is tried with the aid of assessors and no objection is taken at the trial the trial will stand good by virtue of sec 536 (2)—23 Mad 632

So also the trial by jury of a case properly triable with assessors is not invalid on that ground—3 Cal 765 And unless the accused objects to such procedure before the verdict is delivered he cannot be allowed to object with regard to it subsequently in appeal—33 Bom 423 Where an assessor case is tried by jury the Judge cannot treat the verdict of the jury as the opinion of assessors so as to be able to concur with the

opinion of the minority if he disagrees with the opinion of the majority. If the Judge disagrees with the opinion of the majority he must submit the case to the High Court under sec 307 of the Code—5 Cr L 555

875 Joint trial of jury case and assessor case —Under sub-section (3) an accused may be tried simultaneously at one trial by the jury for offences triable by jury and by the Judge with the aid of the same jurors as assessors for offences triable with the aid of assessors—2 L W 933 But in such a trial the Judge must always preserve a distinction between the two cases (the jury case and the assessor-case) and must not treat the whole case as a jury-case. He must separately record the verdict of the jury in the jury-case and must separately record the opinions of the jurors as assessors in the assessor case. If he disagrees with the verdict of the jury he must not send the whole case to the High Court but must send only the jury-case under sec 307 and pass judgment with reference to the assessor case under sec 309—9 Bom L R 1057 Ratanlal 600 If in the course of such trial it appears that only one offence was committed viz an offence triable with assessors and the Judge tries the case with the jury and disagrees with the verdict of the jury he cannot send the case to the High Court under sec 307 but should pass judgment under sec 309 because he must treat the case as one triable with the aid of assessors and he must treat the jurors as assessors—2 Mad 15

Again in such joint trial of two cases (a jury case and an assessor case) all persons who would serve as jurors in the jury case must serve as assessors in the assessor-case. Where the Judge after taking the verdict of the jurors in the jury case took only the opinion of two of them in the assessor case it was held that the Judge's procedure was illegal he should have taken the opinion of all the jurors as assessors—*Ramkrishna v Emp*, 26 Mad 598 Similarly where in such joint trial the Judge selected five gentlemen as jurors in the jury case and two of them only as assessors in the assessor case it was held that the Judge acted illegally he ought to have taken all the five jurors as assessors in the assessor case—*Pingai v K E* 21 M L J 520

876 Transfer of case from jury district to non jury district and vice versa —The words trial shall be by jury in any district mean that the trial shall be by jury if the case is tried in the district in which the notification is in force they do not mean that the case shall be tried by jury even if it is transferred from a jury district to a district where jury trial does not prevail. The High Court has power under sec 526 to transfer a sessions case from a jury district to a non jury district and section 269 does not in any way limit that power but in such a case the trial in the latter district will be with the aid of assessors—*Emp v Jumo*, 10 S L R 154 18 Cr L J 31

dacoits for some distance but returned back almost immediately and had nothing to do with the dacoity that afterwards followed it was held that such a statement did not amount to a plea of guilty—7 W R 39 Where the plea of guilty is accompanied by qualifying statements such a plea is not properly speaking a plea of guilty Thus where the accused said that he killed his wife but that he did so under grave provocation (e.g. in consequence of discovering her in an act of adultery) such a statement was not a plea of guilty to murder—11 Cal 410 So also where the prisoner admitted the guilt but said that he had committed the offence under the influence of certain persons mentioned it was held that the plea was not one of guilty—1886 A W N CC Where the prisoner pleaded guilty but stated further that he committed the offence because he was subject to epileptic fits it was held that this was not a plea of guilty on which the accused could be properly convicted—Ratanlal 698 Where the prisoner admitted that he killed his wife but stated that he was not in his right mind at the time it was held that this was not a plea of guilty—5 N W P H C R 110

Partial plea of guilty —Where the accused is charged with having made two contradictory statements and he pleads guilty to one charge that does not show that he pleads not guilty in respect of the other charge It may be that both statements may be false In such a case the prisoner ought not to be allowed to elect which statement he shall admit to be false—8 W R (Cr Let) 6

Plea of not guilty —The accused can plead guilty under sec 271 or he can claim to be tried under sec 272 or he can refuse to plead which is taken to be the same as claiming to be tried The plea of not guilty is not recognized by this Code—41 Cal 1072 A plea of not guilty amounts to a claim to be tried

Record of plea —If the accused pleads guilty the plea should be recorded Where no such plea appears on the record the conviction is bad and must be set aside—5 M L T 75 7 Cal 96 5 A L J 157

If the statement is made by the accused in a foreign language it is not necessary that the plea must be recorded in the words of that language It should be recorded in the language in which it is conveyed to the Court by the interpreter—5 Cal 826

881 *Conviction on plea* —The word thereon shows that the conviction must be upon the plea recorded before the Sessions Judge and not on a confession made before the committing Magistrate If the prisoner before the Court of Session has pleaded what in effect amounts to a plea of not guilty the Judge is not justified in convicting him upon a confession made by him before the committing Magistrate—2 N W P H C R 479 Some corroborative evidence is necessary to warrant

a Court of Session in acting upon a confession made before the committing Magistrate but retracted at the trial—1898 A W N 22, 23 Bom. 316

Where an accused person pleads guilty to the specific offence with which he is charged, he cannot on such plea be convicted of an offence *other than* that specifically charged—2 Weir 335 Thus, where the prisoner has pleaded guilty to the offence of murder, he cannot be convicted of culpable homicide not amounting to murder—3 S L R 58 2 Weir 335 Where the accused has pleaded guilty to a charge of culpable homicide, he cannot be convicted of the offence of grievous hurt for which he was not tried—Ratanlal 413

Conviction discretionary —It is discretionary with the Sessions Judge to accept or not the plea of guilty of the accused He may or may not convict the accused on such plea It is open to the Judge to go into the evidence and leave the case to the jury, despite a plea of guilty—2 Weir 335, 20 O C 136 *Shanker v Emp* 24 A L J 318 27 Cr L J 449 If the Judge does not think fit to convict the prisoner on the charge to which he has pleaded guilty, he should proceed to try him as if the plea has been one of 'not guilty,' and he will have to take all the evidence in order to determine whether the prisoner has committed the offence to which he has pleaded guilty or any other offence with which he is charged—13 W R 55 23 Mad 151 Where there are several co-accused who are to be tried jointly, and one accused has pleaded guilty, the Judge has a discretion to decide either that the accused be convicted on such plea or that he should be put on his trial in spite of his plea of guilty The proper procedure to follow in such a case is that if the Judge convicts the accused on the plea of guilty he should be removed from the dock, in which case he can be called as a witness against the other accused, or that the Judge should put it on his record that he decides to put the accused on his trial in spite of his plea of guilty—*Kesho Singh v King Emp*, 20 O C. 136, 23 Mad 151

Where the Judge ought not to convict on plea —Where the accused has pleaded guilty to one offence, but there is clear *prima facie* evidence of a different offence, the Judge ought not to convict the accused on his plea, but should proceed to try the case Thus where there is clear *prima facie* evidence of the offence of murder but the prisoner has pleaded guilty to a charge of culpable homicide not amounting to murder on grave and sudden provocation, the Judge ought not to convict him for the latter offence, but should proceed to try him for the former offence—Ratanlal 410

A plea of guilty should not be accepted in capital offences—1905 P. R 54, *Emp v Laxmya*, 19 Bom L R 356 In a case of murder, it has long been the practice of the Court not to accept the plea of guilty, for

murder is a mixed question of fact and law Unless the Court is perfectly satisfied that the accused knew exactly what was implied by his plea of guilty the case should be tried especially where the accused is an illiterate person—*Dall v Emp* 20 A L J 326 20 A L J 669 In capital cases, where there is doubt whether the persons who pleaded guilty to the charge of murder fully understood the meaning and effect of such plea the Judge should proceed with the trial and take evidence—19 All 119 A person may plead that he hit somebody who thereby died without necessarily admitting that he committed murder for murder under the I P C requires a certain intention or a certain knowledge In such cases it is advisable not to convict solely upon the plea of the accused but to proceed to trial—8 Bom L R 240 The Nagpur Court holds that it is not illegal to convict in a murder case on a plea of guilty and in each case the circumstances must be examined to see whether the plea of guilty is one which should have been acted on Where the accused is represented by a pleader and a trial is not claimed and the accused's answer amounts to a plea of guilty it is quite legal to convict him on that plea—*Manjoo v Emp* 24 Cr L J 570 (Nag)

882 Charge for one offence conviction on plea for another —It is illegal to convict a person of an offence upon his own plea when there is no formal charge in respect of that offence Thus where an accused person was charged with the offence of murder and the charge was not proved but the Court convicted her of the offence of concealment of birth which it considered was admitted by her in her examination by the Court it was held that such conviction was illegal A charge of concealment of birth should have been framed and the accused tried thereon—*Ratanlal* 386

Postponement of conviction —Where an accused person pleads guilty the Court should record his confession and forthwith convict him thereon If there are other persons being tried with him for the same offence the Court should not postpone his conviction merely for the purpose of allowing the statements he may have made to be considered against the co accused It is against the spirit of the law to postpone his conviction so that he may technically be said to be tried jointly for the same offence with the other co accused and any statement in the nature of a confession he may make may be used against them—30 All 540 12 A L J 1239 13 C W N 552 After a plea of guilty a trial may be continued when it is thought necessary to ascertain the part taken by the accused in order to assess the punishment but it is unfair to defer the conviction of the accused solely with the view of having his confession considered against his co accused who have pleaded not guilty—23 All 53

Trial ends if plea accepted —If the Court accepts the plea of guilty

and convicts the accused his trial is at an end and he may be called as a witness against or for any person who has been accused along with him—3 Mad 151 Where in a joint trial of several persons one of the accused pleads guilty his statement affecting himself and the other accused is not entitled to be considered under sec 30 of the Evidence Act for the statement following the plea of guilty ceases to be the statement of a person jointly tried because the trial ends so far as he is concerned with his plea—27 Mad 491 1911 P R 15 15 Bom 66 19 Bom 195 7 Mad 10 4 Cal 483 ~C W N 749 17 All 524 22 All 445 7 All 160

272 If the accused refuses to or does not plead or if he claims to be tried the Court shall proceed to choose jurors or assessors as hereinafter directed and to try the case

Refusal to plead or
claim to be tried

Provided that subject to the right of objection hereinafter mentioned the same jury may try or the same assessors may aid in the trial of as many accused persons successively as the Court thinks fit

Trial by some jury or
assessors of several of
defenders in succession

283 If the accused refuses to or does not plead —The accused cannot be called upon to plead not guilty such a plea is not recognised in the Code The accused may either claim to be tried or refuse to plead which is taken to be the same as claiming to be tried—41 Cal 1072 If he pleads not guilty the Judge will proceed to try him

In a case where the prisoner pleads not guilty and the Public Prosecutor does not offer evidence in support of the charge the Judge ought to instruct the assessors that they are bound to find the prisoner not guilty—4 M H C R App 39 Where there is nothing which can be believed amount to proof the case should not be put to the jury at all as a verdict of guilty (if the jury pronounces such a verdict) cannot under such circumstances be sustained—16 W R 19

If the accused makes no answer to the inquiry whether he is guilty or has any defence to make it should be ascertained whether he is obstinately mute or dumb *ex coactione Dei* If he be found to be obstinately mute the plea of not guilty should be recorded and the trial should proceed If he is found to be dumb an inquiry should be made whether he is sane or insane or incapable of being tried If he is found to be sane a plea of not guilty should be recorded and the trial should proceed but if he is found to be insane the procedure laid down in Chapter XXXIV should be followed—Ratanlal 19

Claims to be tried—The actual trial does not begin until the charge

has been read and the accused claims to be tried—15 Bom 514 25
Bom 694

Same jury may try several persons successively —By the term 'successively' is understood that one trial is to follow the other : at the conclusion of one trial the same jury may proceed to try the accused in the next case. The law does not contemplate that the two trials shall be conducted piecemeal in such a manner that at their conclusion the jury shall be called upon to decide at one and the same time upon two distinct classes of evidence which though they may have points in common require careful discrimination as bearing upon the guilt or innocence of two sets of accused—6 Cal 96

273 (1) In trials before the High Court, when it appears to the High Court, at any time before the commencement of the trial of the person charged, that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to that effect

Entry on unsustainable charges

(2) Such entry shall have the effect of staying proceedings upon the charge or portion of the charge as the case may be

Effect of entry

284 If the Court is clearly of opinion that no offence has been made out it is the duty of the Court to stay the proceedings by making an entry as contemplated by this section—21 Cal 97

Applications under this section should be disposed of by the High Court in its original criminal jurisdiction—9 Cal 397

C—Choosing a Jury

274 (1) In trials before the High Court the jury shall consist of nine persons

Number of jury

(2) In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than five or more than nine, as the Local Government by order applicable to any particular district or to any particular class of offences in that district, may direct

Provided that where any accused person is charged with an offence punishable with death the jury shall consist of not less than seven persons and, if practicable of nine persons

The word 'five' has been substituted for 'three' and the proviso has been added, by sec 13 of the Criminal Law Amendment Act, XII of 1923 "In the Sessions Court the number should be any uneven number from five to nine which the Local Government may select Thus, five should be substituted for three in section 274 as the minimum number of jury in a Sessions Court In murder cases, before the Sessions Court, we are of opinion that the number of jury should if practicable be nine"—*Report of the Racial Distinctions Committee, Para 25*

The number fixed by the Local Government must be strictly adhered to Where the Local Government has fixed the number at five, a trial by a jury consisting of seven members is *ultra vires*—26 All 211

275 (1) *In a trial by jury before the High Court or Court of Session of a person who has been found under the provisions of this Code to be an European or Indian British subject, a majority of the jury shall, if such person before the first juror is called and accepted so requires, consist, in the case of an European British subject, of persons who are Europeans or Americans and, in the case of an Indian British subject, of Indians*

Jury for trial of European and Indian British subjects and others

(2) *In any such trial by jury of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, a majority of the jury shall, if practicable and if such European or American before the first juror is called and accepted so requires, consist of persons who are Europeans or Americans*

This section has been redrafted by sec 14 of the Criminal Law Amendment Act, XII of 1923 Prior to the amendment, it stood as follows —

In a trial by jury before the Court of Session of a person not being an European or an American a majority of the jury shall if he so desires, consist of persons who are neither Europeans nor Americans

The reason of the amendment has been thus stated The most difficult question for the Committee to decide is that of trial by the jury of European British subjects This is the point on which non official European opinion is most emphatic, namely that it is essential that a mixed jury should remain both in the High Court and in the Sessions Court in all cases which are to be tried by jury under our proposals, subject however to certain provisions and safeguards namely —The same law as to the composition of the jury shall apply to Indians as to Europeans that is to

say the majority of the jury if an Indian accused so desires shall consist of persons who are not Europeans or Americans. This is already the law in Sessions Courts and section 275 should be so amended as to make it apply to the High Court also — *Report of the Racial Distinctions Committee* Para 25

885 This section must be read as controlled by the provisions of section 528B. That section lays down that if a person does not claim to be dealt with as an Indian subject before the committing Magistrate he shall not assert the claim at any subsequent stage of the case. It follows therefore that if an Indian subject does not claim to be dealt with as such before the committing Presidency Magistrate he will not be entitled to claim before the High Court to be tried by a jury the majority of which must be Indians according to the provisions of section 275 — *Emperor v Hareendra* 31 Cal 980 (991) 29 C W N 384 26 Cr L J 385. The same result will happen if the claim to be dealt with as an Indian subject is made before the Presidency Magistrate but is rejected by him — *Ibid* (at p 990)

A Native Christian is not entitled to say that he must be tried by a Christian jury. But he can like any other accused object to the jurors individually—: W R ~

276 The jurors shall be chosen by lot from the persons summoned to act as such in such manner as the High Court may from time to time by rule direct

Jurors to be chosen by lot

Provided that—

first, pending the issue under this section of rules for any Court the practice now prevailing in such Court in respect to the choosing of jurors shall be followed

Existing practice maintained

secondly in case of a deficiency of persons summoned the number of jurors required may, with the leave of the Court be chosen from such other persons as may be present,

Persons not summoned when eligible

thirdly in a trial before any High Court in the town which is the usual place of sitting of such High Court

Trial before special jurors

(a) if the accused person is charged with having committed an offence punishable with death, or

(b) if in any other case a Judge of the High Court so directs, the jurors shall be chosen from the special jury list hereinafter prescribed and

fourthly, in any district for which the Local Government has declared that the trial of certain offences may be by special jury the jurors shall in any case in which the Judge so directs be chosen from the special jury list prescribed in Section 325

Change —In the *third* proviso the words in a trial sitting of such High Court have been substituted for the words in the presidency towns by sec 77 of the Criminal Procedure Code Amendment Act XVIII of 1923 The object of this amendment is to include those High Courts which are not situated in Presidency Towns *e g* the High Courts at Allahabad Lahore Patna Rangoon Similar amendments have been made in sections 315 and 316

886 Chosen by lot —The object of the Legislature in choosing a jury by lot is to render impossible any intentional selection of jurors to try a particular case and the accused is entitled to a strict observance of the provisions contained in this section and sec 279 Irregularities in choosing the jury by lot affect the constitution of the Court and cannot be cured by sec 537—7 C W N 188 33 All 385 In 8 Cal 739 and 1917 M W N 1 however where the Judge himself selected the jurors instead of choosing them by lot it was held that such a procedure was merely irregular and the verdict would not be interfered with if no prejudice was caused to the accused and no objection was taken by him to such a procedure at the trial

The persons who are to be chosen by lot ought to be selected from the entire number of persons summoned to act as jurors and the selection ought to be made from one box—1 Bom 462

In order to nominate a jury for the trial of any prisoner or other person to be tried by a jury a Sessions Judge shall cause to be put together in one box cards or pieces of paper containing the names of all the persons summoned to attend except such of the said persons as shall have been excused by the Sessions Judge from serving on that day in consequence of their having served as jurors on the previous day or for any other cause Such cards or pieces of paper shall be as nearly as may be of equal size and shall bear the name of one person summoned to attend The Sessions Judge shall then in open Court draw or cause to be drawn out of the said box one after another as many of the said cards or pieces of paper as may represent the number of jurors required to try the case and if any of the jurors whose names shall be so drawn shall not appear or if any be objected to and the objection be allowed then such further number

shall be drawn as may be necessary to complete the number of jurors required for the case — *Cal G R & C O* p 19

Second proviso, — The second proviso provides that in case of a deficiency of persons summoned the number of the jurors required may with the leave of the Court be chosen from such other persons as may be present. But there is nothing in the proviso that these persons must be chosen by lot or that they should be on the jury list — *Govt of Bengal v Muchu Khan* 29 C W N 652 26 Cr L J 819. If the Judge is unable to obtain a panel in the manner provided by the second proviso his duty is to postpone the trial and to summon jurors under the provisions of sec 326 (2) — 7 C W N 188

277 (1) As each juror is chosen, his name shall be called aloud, and upon his appearance, the
 Names of jurors to be called accused shall be asked if he objects to be tried by such juror

(2) Objection may then be taken to such juror by the
 Objection to jurors accused or by the prosecutor, and the grounds of objection shall be stated,

Provided that, in the High Court, objections without grounds
 Object on without grounds stated shall be allowed to the number of eight on behalf of the Crown and eight on behalf of the person or all the persons charged

Where the Judge instead of hearing and deciding objections proceed ed to exempt some of the persons present merely on their own representations, the procedure was irregular and the irregularity could not be cured by sec 537 — 7 C W N 188

278 Any objection taken to a juror on any of the follow-
 Grounds of objection ing grounds, if made out to the satisfaction of the Court, shall be allowed

- (a) some presumed or actual partiality in the juror,
- (b) some personal grounds, such as alienage, deficiency in the qualification required by any law or rule having the force of law for the time being in force, or being under the age of twenty one or above the age of sixty years,
- (c) his having by habit or religious vows relinquished all care of worldly affairs,

- (d) his holding any office in or under the Court ,
- (e) his executing any duties of police or being entrusted with police duties ,
- (f) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury .
- (g) his inability to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted ,
- (h) any other circumstances which, in the opinion of the Court, renders him improper as a juror

887. Clause (d) —The fact that a person is a clerk in the office of the Magistrate of the district is not sufficient to disqualify him from sitting as a juror—7 Cal 42

279 (1) Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final

(2) If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by Section 276, or if there is no such other juror present, then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to supply on the jury

Provided that no objection to such juror or other person is taken under Section 278 and allowed

Under subsection (1) the trial Judge has a wide discretion of accepting or overruling objections to jurors and his decision is final. *Gout of Bengal v Muchu* 29 C W N 652 26 Cr L J 317

280 (1) When the jurors have been chosen, they shall appoint one of their number to be foreman

(2) The foreman shall preside in the deliberations of the jury, deliver the verdict of the jury, and ask any questions from the Court that is required by the jury or any of the jurors.

(3) If a majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman he shall be appointed by the Court

281 When the foreman has been appointed, the jurors shall be sworn under the Indian Oaths Act, 1873

Swearing of jurors

282 (1) If, in the course of a trial by jury, at any time before the return of the verdict, any juror, from any sufficient cause, is prevented from attending throughout the trial, or if any juror absents himself and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given or when such evidence is interpreted, the language in which it is interpreted, a new juror shall be added, or the jury shall be discharged and a new jury chosen

Procedure when juror ceases to attend, etc

(2) In each of such cases the trial shall commence anew

888 *Unable to understand language* —Where a juror was deaf and blind he was held to be unable to understand the language of the trial and was discharged and the case was tried *de novo*—19 Mad 375

Absence of witness —The Judge can discharge the jury owing to the absence of a juror but he cannot do so owing to the absence of a witness —4 Bom L R 939

Trial shall commence anew —Where a juror was discharged and replaced by another and the trial was not commenced anew but the Judge called the witnesses who had been examined read out their statements to them which they admitted to be correct and the trial proceeded it was held that there was no valid trial—36 All 481

But the trial which becomes null and void owing to the incompetence of a juror under this section is not null and void for all purposes Thus if a witness has given false evidence during such trial he can be prosecuted under sec 193 I P C The nullity of the trial will not affect the liability of the witness for prosecution for perjury—19 Mad 375

889 *Discharge of jury for misconduct* —After the close of the prosecution case and before the counsel for the accused called his witnesses the foreman of the jury informed the Court that they had arrived at an unanimous verdict (which was unfavourable to the prisoner) and did not desire to hear anything more The Court remarked that

the conduct of the jury in arriving at a verdict unfavourable to the prisoner before they had heard the evidence which the accused wished to call for, was unfair to the accused and against all principles of justice. The counsel for the accused thereupon pressed for the discharge of the jury for such misconduct and for empanelling a fresh jury. But the Standing Counsel remarked that the case was not covered by sec 282 or sec 283 (which were the only sections relating to discharge of the jury during the trial) and the jury could not therefore be discharged, but under instructions from the Advocate-General he entered a *nolle prosequi*—*Emperor v Olu Muhammad*, 7 C W N xxxi. The point was therefore left undecided in that case, but in a recent case of the same High Court the question arose again, and it has been decided that although section 282 or section 283 of the Criminal Procedure Code does not provide for the discharge of the jury for improper conduct during the trial, (as for instance where some of the jury were seen one day associating with the man who was looking after the case for the accused), nor is it specifically provided by any other section of the Code, still the Sessions Judge has an inherent power to discharge the jury for misconduct. But such power is not to be exercised lightly, nor until the Judge has satisfied himself, by such form of inquiry as in the circumstances he can adopt, that reasonable grounds for exercising such a power exist—*Rahim Sheikh v Emperor*, 50 Cal 872. In England also, the Judge has the power to discharge the jury for improper conduct, *e g* where one of the jurors had left the box without leave—*Reg v Hard*, (1867) 10 Cox C C 573.

The discharge of the jury for misconduct is not equivalent to a verdict of acquittal, but the prisoner can be remanded for a fresh trial and a new jury should be empanelled—*Reg v Davison*, (1860) 8 Cox C C 360, *Rahim Sheikh v Emperor*, 50 Cal 872. If the jury have misconducted themselves, they may be discharged and a new trial directed with a new jury but no such action can be taken unless the misconduct has been established by what is regarded as evidence in the eye of the law—*Mamfru v Emp*, 51 Cal 418 (430, 431).

Discharge of jury in case of sickness of prisoner.

283 The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar.

D.—Choosing Assessors

284. When the trial is to be held with the aid of assessors, *not less than three and, if practicable, four* shall be chosen from the persons summoned to act as such

Assessors how chosen

Change —The italicised words have been substituted for the words "two or more" by sec 15 of the Criminal Law Amendment Act XII of 1923. We add the further recommendation that in all cases triable with the aid of assessors, there shall be, if possible, four, and in any case not less than three, assessors"—*Report of the Racial Distinctions Committee*, Para 26

890 Choosing assessors —The choice of jurors is by lot but the choice of assessors is entirely with the Judge, who in the exercise of this power should pay every consideration to any reasonable objection raised although the law does not, as in the case of jurors, provide for objections being taken to an assessor. In the selection of assessors, regard must be had to the nature of the case, to the person tried, and to the public feeling excited. They ought not to be pleaders nor young men fresh from the College and devoid of experience. They ought to be persons of independent conditions in life, men of judgment and experience—23 W R 35

Though there is no express provision for objecting to the selection of an assessor, still there is no reason why an objection of presumed or actual partiality should not be allowed, particularly when it is urged at the time of selection of the assessor. The opinions of assessors are of great value both to the Judge who tries the case and to the Superior Courts. It is therefore necessary as an elementary principle that they should be above suspicion. The relationship of landlord and tenant or of master and servant creates an incapacity in a person to sit as an assessor in a case. An objection to an assessor that he is a tenant of the person interested in the prosecution is a valid objection—*Shivdhan v Emp*, 3 P L T 32

*From the persons summoned —The assessors must be chosen from the persons summoned to act as such. The Judge is not competent to select any one to act as an assessor who has not been summoned under sec 326 or 327. Where out of several persons summoned the Judge selected only one, and he selected two other persons at random from the persons present in Court, it was held that the trial was bad as it was practically conducted with one assessor only—1894 A W N 207 *Man Singh v Emp*, 35 All 570 *Balak Singh v K E*, 3 P L J 141. Where in the absence of assessors duly summoned, the Judge appointed the Nazir of the Court to act as an assessor, the trial was held to be illegal as the Nazir was not duly summoned and in choosing assessors there is no provision corresponding to the second proviso to sec 276 (in choosing jurors)—13 O C 337. But where a person was summoned to serve as an assessor on a particular date in a particular case and he failed to appear in Court on that date but appeared on a subsequent day when another trial had to commence, and he was selected to act as an assessor in that

trial his selection would not be improper—*Chutla v Emp* 17 Cr L J 17 (All)

Number of assessors —Under this section as new amended there must be at least *three* assessors. A trial held with less than the required number of assessors is null and void and the illegality cannot be cured by sec 537—*Jairam v Emp* 25 Cr L J 459 20 N L R 129 *Pragi v Emp* 11 O L J 245 *Ram Narain v Emp* 27 O C 213 26 Cr L J 359. A trial commencing with the aid of *one* assessor is not a legal trial and sec 537 cannot cure the defect—*A. L. v Jairam* 25 Bom 694 15 Bom 514. If there were two assessors (which was the required number prior to the present amendment) but one of them was deaf and blind there was properly speaking only one assessor and the trial was invalid—11 All 106 2 Weir 340.

This section lays down that the number of assessors should be not less than three and *if practicable four*. Where four assessors are not chosen it is right that the Court should give reasons in the order sheet to explain the impracticability of choosing four. But the trial with three assessors without the record of these reasons is not irregular but is still according to law—*Jamal v Emp* 26 Cr L J 713 (Pat).

Trial without assessors —The trial will be invalid if a portion of the trial which consists in the taking of additional evidence takes place after the discharge of the assessors—15 All 136.

284 A (1) *In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European or Indian British subject if the European or Indian British subject accused or where there are several European British subjects accused or several Indian British subjects accused all of them jointly, before the first assessor is chosen so require, all the assessors shall in the case of European British subjects be persons who are Europeans or Americans or, in the case of Indian British subjects be Indians*

Assessors for trial of European and Indian British subjects and others

(2) *In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American all the assessors shall, if practicable and if such European or American before the first assessor is chosen so requires, be persons who are Europeans or Americans*

This section has been newly added by sec 16 of the Criminal Law Amendment Act XII of 1923. Under this section Indians and Europeans can claim to be tried before their own countrymen as assessors. In any district in which for any class of offences Indians are normally triable in a Court of Session with the aid of assessors and in which no racial considerations are involved the accused whether Indian or European shall be tried with assessors who if the accused so claims shall all be of the nationality of the accused.—*Report of the Racial Distinctions Committee* Para 26

Subsection (2) embodies the old section 460 with certain modifications

891 The accused if he intends to avail himself of the provisions of this section must make a claim to the privilege conferred by it failure to make a claim will amount to waiver—1912 P R 6

285 (1) If in the course of a trial with the aid of assessors, at any time before the finding, any assessor
 Procedure when assessor is unable to attend is, from any sufficient cause, prevented
 from attending throughout the trial, or
 absents himself and it is not practicable to enforce his
 attendance, the trial shall proceed with the aid of the other
 assessor or assessors

(2) If all the assessors are prevented from attending or absent themselves the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors

892 Absence of assessors.—This section contemplates that at least one assessor must attend continuously throughout the trial—6 C W N 715 *K E v Thirumalai* 24 Mad 523 Therefore where in a Sessions trial beginning with three assessors one of the assessors died at an early stage of the proceedings and later on another assessor became too ill to be present and the third was absent before the pleader for the defence addressed the Court it was held that the trial was a nullity—13 All 337

An assessor who is absent during a part of the trial cannot be allowed to resume his seat as assessor once he is absent he ceases to occupy the position of an assessor Where such an assessor was allowed to resume his seat and the evidence recorded in his absence was read over to him and he gave his opinion just like the other assessors it was held that the procedure was not in accordance with law His opinion ought not to have been taken—8 C P L R 9 6 C W N 715 *Ratanlal* 695 In a Madras case however it has been held that such a procedure is merely irregular but not illegal Though the proper course would have been to proceed with the trial with the aid of the other assessor alone, and to accept his

opinion only still the fact that the absent assessor was allowed to resume his seat and take part in the trial and give his opinion would not vitiate the opinion of another assessor which was validly given. The assessors merely assist the Court but do not form part of the tribunal which decides the case and the assessors unlike the jury give their opinions separately and not as members of a body. And the invalidity of the opinion of one does not affect the validity of the opinion of the other—*A. E. v. Thirumalai* 24 Mad 523

If assessor is an interested person—Where in the course of a trial it is found that one of the assessors is interested in the trial and is unfit to sit as an assessor there is no provision of law to meet such a contingency. In such a case the proper course is to refer the case to the High Court to set aside the order appointing the incompetent assessor and all subsequent proceedings in the trial. Then the Sessions Judge will be asked by the High Court to choose another assessor and proceed with the trial *de novo*—1917 M W N 378 13 Cr L J 473

DD—Joint Trials

285 A In any case in which an European or American is accused jointly with a person not being an European or American, or an Indian British subject is accused jointly with a person not being an Indian and such European Indian British Subject or American is committed for trial before a Court of Session he and such other person may be tried together but if he requires to be tried in accordance with the provisions of Section 275 or Section 284A and is so tried and the other person accused requires to be tried separately, such other person shall be tried separately in accordance with the provisions of this Chapter

This section has been newly added by sec 17 of the Criminal Law Amendment Act XII of 193. It provides that in cases in which Indians and Europeans are sought to be tried jointly they can claim to be tried separately before jurors or assessors who are their own countrymen

E—Trial to close of cases for Prosecution and Defence

286 (1) When the jurors or assessors have been chosen
Opening case for the prosecutor shall open his case by
prosecution reading from the Indian Penal Code
other law the description of, the offence charged, and

shortly by what evidence he expects to prove the guilt of the accused.

(2) The prosecutor shall then examine his witness

Trial cannot be postponed—After the jurors have been chosen the prosecutor shall open his case and the trial cannot be postponed to enable the prosecutor to examine a witness by commission—19 Cal 113

893 *Examination of witnesses*—The object of a prosecution is not to secure a conviction but to see that justice be done. The prosecutor is bound to call all the witnesses who prove their connection with the transaction in question and who also must be able to give important information. If such witnesses are not produced without sufficient reason being shown the Court may properly draw an inference adverse to the prosecution—8 Cal 121 *Muhammad Yunus v Emp* 50 Cal 318 (326) 7 All 904, 1 P L T 161 3 S L R 200. The duty of the prosecution is not to secure a conviction but to assist the Court in arriving at the truth and for that purpose to place before the Court all the material evidence at its disposal—44 Cal 477 (F B) 42 Cal 957. All the persons alleged or known to have knowledge of the facts ought to be brought before the Court to be examined. The fact that certain witnesses were examined by the committing Magistrate against the express desire of the police officer conducting the prosecution is not a ground for not calling them—10 Cal 1070. All the witnesses who were present at the scene of the crime must be called by the prosecution even if they give contradictory versions so that the jury may draw their own conclusions from their depositions—Ratanlal 581 1 P L T 491, 42 Cal 422 and it is not a sufficient reason not to call such a witness simply because the opinion he has formed shows an unconscious bias on his part—9 C W N 438. The prosecutor is not free to choose how much evidence he will bring before the Court, he is bound to produce all the evidence in his power directly bearing upon the charge. It is his duty to call all witnesses who can throw any light on the case whether they support the prosecution theory or the defence theory—1 P L T 161, and the prosecutor should not refuse to call and examine any witnesses for the prosecution merely because his evidence may in some respects be favourable to the defence—*Queen Emp v Durga* 16 All 84 (F B)

But the prosecution is not bound to call or put into the witness box for cross examination, any witness whom he believes to be false or whose evidence is unnecessary for the trial—*Ranjit v King Emp*, 2 Pat 309 (315), *Emp v Reed*, 49 Cal 277, *Muhammad Yunus v Emp* 50 Cal 318, *Q E v Durga* 16 All 84, *Emp v Balaram*, 49 Cal 358 (367) *Q E v Stanton*, 14 All 521 *Q E v Bankhandi*, 15 All 6 *Emp v Dhumno* 8 Cal 121 *Kaimi v Crown*, 1916 P R 12, *Darassami v Emp*, 45 M L

J 846, or who will misrepresent facts or will misstate what has happened—9 C W N 438 Although the Court is entitled to draw an inference adverse to the prosecution on the ground that independent eye witnesses have not been called, still if the witnesses who have been called by the prosecution are worthy of credit, the Court is not entitled to disbelieve them simply because some persons who could have thrown light on the case have not been put before the Court by the prosecution. It is of course not for the police or the Public Prosecutor to champion a particular theory and to suppress the evidence of a reliable witness simply because his testimony is inconsistent with it, but if the police or Public Prosecutor is of opinion that a witness is a false witness or is likely to give false testimony or that his evidence is unnecessary, he is justified in not sending up or producing that witness, and his absence at the trial ought not to be a reason for disbelieving the other prosecution witnesses if they are otherwise worthy of credit—*Ranjit v King Emp*, 2 Pat 309 (314, 315)

All the witnesses sent up by the committing Magistrate must be examined, and the Sessions Judge is not competent to pick and choose among them. It is the duty of the Court to examine all such witnesses unless it has good and sufficient reason to believe that the witnesses came to the Court-house with a pre-determined intention of giving false evidence—15 All 6 14 Cal 245 7 All 904 2 Weir 378 In 14 All 521, however, it has been held that the prosecution is not bound to examine a witness examined before the committing Magistrate except when the committing Magistrate has stated in his order of commitment that he has been influenced by that particular witness in ordering the committal. No further duty is imposed on the prosecution than that of having in attendance every witness examined before the committing Magistrate so that the witness may be cross examined or not by the defence counsel as he chooses.

Where there is no ground for disbelieving the witnesses all the witnesses must be examined and the trial cannot be stopped and no final opinion as to the falsehood or insufficiency of the prosecution evidence ought to be arrived at, until all the witnesses have been examined. Thus, where after the examination of some of the witnesses the Judge asked the jury whether they wished to hear any more evidence and they stated that they did not believe the evidence and wished to stop the case, and the Judge recorded a verdict of acquittal, it was held that the procedure was wrong. All the remaining witnesses ought to have been examined before any verdict was recorded—20 Mad 445

If some of the prosecution witnesses examined before the committing Magistrate are not examined before the Sessions Judge by the Public Prosecutor, still the accused is entitled to have them put into the box for cross examination—*Nagendra v King Emp*, 27 C W N 820 When Public Prosecutor does not call a witness examined before the

Magistrate on the ground that he will not speak the truth he should explain to the Court that this is the reason and should tender him for cross-examination. In the absence of any such explanation or other reasonable grounds apparent on the face of the proceedings inferences unfavourable to the prosecution will be drawn from the non production of the witness—7 All 904

The witnesses must be *orally* examined in Court before the jury it would be a faulty procedure to dispense with their examination and to read over to the jury the recorded statement of the evidence given by them at a previous hearing of the case. If such a procedure is adopted the jury would have no opportunity of gauging the value of the testimony of each individual witness by his general demeanour. A witness may show a suspicious hesitancy in answering certain questions put by the counsel for the prosecution or he may show an equally suspicious excess of zeal. Both Judge and jury are undoubtedly influenced to a considerable extent by the manner in which a witness gives his evidence in chief and moreover the demeanour of a witness during the examination in chief may be of the greatest help to the counsel for the defence in his cross-examination. All these advantages would be lost if a mere record of the evidence is read over instead of examining the witness—*Lyme v Crown* 4 Lah 382 (at p 386). And so in an English case Sir John Coleridge has made the following remarks on the impropriety of reading over at the retrial of a case the Judge's note of evidence given by the witnesses at the previous trial instead of examining them fully. Those of their Lordships who have been used on motions for new trials to hear the Judge's note of the evidence read probably know well by experience how difficult it is to sustain the attention or collect the value of particular parts when that evidence is long. But this is not all. The most careful note must often fail to convey the evidence fully in some of its most important elements those for which the open oral examination of the witness in the presence of the prisoner Judge and jury is so justly prized. It cannot give the look or manner of the witness his hesitation his doubts his variations of language his confidence or precipitancy his calmness or consideration it cannot give the manner of the prisoner when that has been important upon the statement of anything of particular moment. It is in short the dead body of the evidence without its spirit which is supplied when given openly and orally by the ear and eye of those who receive it — *Attorney General v Bertrand* (1867) 36 L J P C C 51 (57) L R 1 P C 520 (535)

The evidence must be taken *in the presence of the accused*. It is an irregular procedure to examine witnesses in the absence of the accused and then to read over to the accused the evidence recorded in his absence the accused being allowed to cross-examine the witnesses. Such a pro

cedure prejudices the accused in his cross-examination and defence—
5 C P L R 33

The prosecution must give positive evidence of the guilt of the accused, and cannot depend upon the weakness of his adversary's case. The Court is concerned not so much with the truth or otherwise of the theory suggested by the accused as with the case for the prosecution. The proof of the case against the prisoners must depend for its support not upon the absence or weakness of explanation on their part but upon the positive and affirmative evidence of their guilt that is given by the Crown—*Mamfru v Emp*, 51 Cal 418 (425 426)

Witnesses not examined before the committing Magistrate—The prosecution cannot demand as of right that any witness not examined in the preliminary inquiry should be called and examined at the trial. But the Court if it considers necessary may call and examine him—14 All 212. But the mere fact that a witness has not been examined before a committing Magistrate is no ground for refusing to take the evidence of such witness. There is nothing in the Code which restricts the examination at the trial only to the witnesses examined before the committing Magistrate. But the prosecutor should as a matter of justice and fairness to the accused state in his opening address the name of such witness—1889 P R 1

894 *Cross-examination*—As a rule the cross examination of a witness should take place after his examination in chief and cannot be postponed. There is no provision of law which authorises the Judge to allow all the prosecution witnesses to be examined at once and to permit the cross examination to be reserved to a subsequent date—2 Weir 381. But though the accused is not entitled to such postponement as of right still there is no reason why the Sessions Judge should refuse an application for such postponement where the application was a reasonable one under the circumstances of the case—41 Cal 299

A Sessions Judge is not justified in stopping the cross examination and turning the witness out of Court because he is of opinion that the witness is not speaking the truth and no reliance can be placed on the deposition of a witness whose cross examination has been thus stopped—1900 A W N 149

Cross-examination of a witness not examined in chief—The ordinary practice in properly constituted Courts is that where a witness for the prosecution is not examined by the Crown he is placed in the witness-box in order that the defence may have an opportunity of cross examining him—5 Cal 614 11 Bom L R 1162 15 W R 64 14 All 521 14 Ca 245. But there is no provision in the Code analogous to English practice entitling the prisoner, as a matter of right, to have a witness for

secution who is not called put into the box for cross examination and the disallowing of it is no error in law—5 B H C R 85, 14 Cal 245 14 All 521

287. The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence

895 *The examination of the accused* —This section contemplates an examination of the accused although sec 209 does not make it imperative on the committing Magistrate to examine the accused—Ratan lall 100 The examination of the accused recorded by the Magistrate should be put in before the accused is called on to enter on his defence—2 Weir 361 Cal G R & C O p 23

The whole of the examination should be read out—4 M H C R App 4 8 W R 38 9 M L T 316 Where the prisoner had made two statements before the Magistrate the one amounting to a confession of the guilt and the other to a denial thereof the trial Court ought to consider both the statements and their relative credibility—10 B L R 332 18 All 78

This section permits a previous statement of the accused to be read as a part of the case for the prosecution only so far as such statement refers to the offence for which the accused is being tried and not so far as it relates to a previous conviction The portion as to previous conviction cannot be read out to the jury or assessors under sec 310 until they have given their verdict or opinion—Taka Ahir v K E 5 P L J 706

Where the accused was examined about a confession which was not admissible in evidence the questions and answers to them could not be said to be duly recorded as the questions were not such as were allowed by the law to be put and the answers to these questions were not admissible in evidence against the accused—4 L B R 244

Committing Magistrate —The phrase committing Magistrate in Secs 287 and 288 is merely a compendious way of referring to the Magistrate or Magistrates who held the preliminary inquiry on which the commitment was made Where a subordinate Magistrate inquired into a case and discharged the accused and the District Magistrate acting under sec 436 (now 437) committed the accused for trial the examination recorded by the subordinate Magistrate would be the examination recorded by the committing Magistrate within the meaning of this section—31 Mad 40

The examination of the accused before the committing Magistrate must be given in evidence at the trial It is not optional with the prosec-

cution to put in such statement or not. If it is not tendered by the prosecution the Judge is bound to call for it—15 Mad 352 13 W R 63

This section requires that the statements made by the accused before the committing Magistrate must be read out to the prisoners at the trial, but it is not necessary for the Judge to ask them specifically if they have any objection to the reception of these confessions—14 W R 9

288 The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may, Evidence given at Preliminary inquiry admissible in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872

895A Change —The word recorded has been substituted for taken the words under Chapter XVIII have been substituted for the words before the committing Magistrate and the italicised words at the end of the section have been newly added by section 78 of the Cr P C Amendment Act XVIII of 1923 The words under Chapter XVIII have been used in place of the committing Magistrate to cover the case of evidence recorded by a Magistrate other than the committing Magistrate under sec 219 —*Report of the Select Committee of 1916 Abdul Gani v Emp* 53 Cal 181 42 C L J 205 26 Cr L J 1577 Besides there is no special procedure laid down in Ch XVIII for recording evidence and any evidence recorded by a Magistrate before commitment whether recorded with a view to commitment or in the ordinary course of trial is evidence recorded in the presence of the accused under Ch XVIII —*Abdul Gani v Emp* 53 Cal 181 42 C L J 205 26 Cr L J 1577 A I R 1926 Cal 235

896 Object and scope of section —This section is intended to provide for the contingency that may arise when a witness who is produced before the Court of Session holds back information and evidence, and tells a different story from that which he gave before the Magistrate in the preliminary inquiry—2 All 646

This section refers only to the evidence of witnesses recorded under Chap XVIII Statements made by witnesses before a Police officer or to an investigating Magistrate are not contemplated by this section—31 Mad 127 A statement made by a witness at a search does not come under this section—36 Mad 159 A statement given by a witness before a monigar cannot be used under this section—*Malaya v Emp* 4 L J 278

Evidence of approver —If an accomplice to whom a conditio

has been tendered is examined as a witness in the trial his deposition made before the committing Magistrate may be used as evidence—1894 P R 14, 21 All 175 15 Mad 352 It may be used as evidence against the accused even if it is retracted at the Sessions trial—21 All 175 The reliability of such statement is no doubt injuriously affected by the fact of its being retracted before the Sessions Court but it does not follow that it is not entitled to any weight or credibility—8 S L R 203

Duly taken in the presence of accused —A statement made in the absence of the accused cannot be treated as evidence against him under this section—1904 P R 3 23 Cal 361 35 All 260 So also where the accused was merely allowed to be present but was not allowed to cross examine the witnesses before the committing Magistrate, the evidence of such witnesses cannot be said to be duly taken and cannot be treated as evidence under this section—21 Cal 642 Such *ex parte* statements by witnesses without the accused being allowed to rebut them by cross examination is not evidence at all under this section—*Ibid*

897 Produced and examined —The evidence of witnesses given before the committing Magistrate may be used as evidence if the witnesses have been *produced* and *examined* at the trial a statement made before the committing Magistrate by a person who has since disappeared is inadmissible in evidence because the witness is not produced and examined before the Sessions Judge—16 N L R 30 Mere producing of the witnesses is not sufficient they must be *examined*—1913 M W N 544 If examined by the prosecution and not merely tendered for cross examination by the accused without being examined in-chief—9 Mad 83 Moreover the deposition given before the committing Magistrate may be treated as evidence *after* the witnesses are examined at the trial The Sessions Judge is not justified in convicting the prisoner solely upon the evidence of the witnesses given before the committing Magistrate without examining them afresh—24 W R 11 1883 P R 23 This section does not allow the use of the deposition as a substitute for examination at the trial This section is not an exception to sec 286 it does not dispense with the examination of the witnesses directed by sec 286—9 Mad 83 1 W R 14 Without examining the witness it is improper to read his deposition given before the Magistrate and to ask him if it is true Such a procedure amounts to putting a leading question to the witness and it is an implied intimation that the same story is expected from him again—6 C P L R 33 Further the statements made by a witness before the committing Magistrate should not be read out to the witness in the trial before the defence has had an opportunity of cross examining him—3 Lah 144

Moreover the deposition of the witness before the committing

Magistrate can be used as evidence if the witness is examined at the trial as a witness. Where the witness [before the committing Magistrate being found concerned in the offence was committed to take his trial along with the accused in the case his deposition in the Magistrate's Court could not be treated as evidence against the accused under this section he not being a witness in the trial—1883 P R 23

898 Use at the trial of the deposition before the Magistrate.—Where a deposition of a witness given before the committing Magistrate is tendered in evidence at the Sessions trial the Sessions Judge should then and there determine the question of its admissibility and record his reasons for its admission as evidence—1 Bom L R 156

Where the witnesses made certain statements implicating the accused before the committing Magistrate but at the trial before the Sessions Judge they resiled from those statements and told an altogether different story *held* that the statements made before the committing Magistrate were not merely relevant for the purpose of contradicting or negating the statements made before the Court of Session under sec 155 Evidence Act but that under sec 288 could also be treated as evidence in the case *as substantive evidence* of all the facts therein deposed to—46 Bom 97 *Amir Zaman v Crown* 6 Lah 199 26 P L R 361 26 Cr L J 1245 *Abdul Gani v Emp* 53 Cal 181 42 C L J 205 26 Cr L J 1577 *Tuli v Emp* 47 All 276 26 Cr L J 450 *Rahha v Emp* 6 Lah 171 26 P L R 304 A certain witness made a statement before the committing Magistrate but resiled from that statement before the Sessions Judge whereupon his statement made before the committing Magistrate was put in evidence under sec 288 and in order to corroborate this statement a statement made by that witness before the Police was proved and put in evidence *Held* that the statement made before the committing Magistrate was testimony within the meaning of sec 157 of the Evidence Act and therefore the prior statement made before the Police was admissible in evidence to corroborate the statement made before the committing Magistrate—*Mam Chand v Crown* 5 Lah 324 (328) 25 Cr L J 1201 Where a Sessions Judge being of opinion that certain previous depositions had been gained over by the accused *allowed* their depositions given before the committing Magistrate to be received in evidence *held* that this section enabled the Court to treat such depositions as substantive evidence in the case at the trial where for purposes of justice the adoption of such a course was found necessary by the Judge. Such evidence may be used as much in favour of the defence as of the prosecution and the Court is not restricted in permitting the production of the evidence before the committing Magistrate to use it solely for the purpose of contradicting the witnesses at the Sessions trial—24 414 2 Pat 517 Depositions of witnesses taken before the com

Magistrate, and subsequently retracted before the Sessions Judge, may, in the discretion of the Judge, be admitted in evidence at the trial in the Sessions Court and when so admitted, they are on the same footing as any other evidence on the record—28 All 683, 5 Lah 324 (328) 25 Cr L J 1201, 45 Mad 766 The evidence recorded by the committing Magistrate, if admitted, may be considered by the jury or by the Judge, as part of the material or as substantive evidence upon which the verdict or the finding is to be based—1887 P R 51, *Abdul Gani v Emp*, 42 C L J 203, *Fazarruddin v Emp*, 42 C L J 111 26 Cr L J 1553, *Emp v Basappa*, 27 Bom L R 113 It is a matter for the discretion of the Judge whether such evidence should be used in the interests of justice In many cases it would be extremely dangerous to rely upon such evidence where the witnesses have proved themselves in the Sessions Court altogether unworthy of credit—*Gansa Oraon v King Emperor*, 2 Pat 517 A Court of Session may admit in evidence the statements made by witnesses before the committing Magistrate, when such evidence is to a certain extent corroborated by independent testimony before itself If there is no such corroborative evidence it is not proper to base a conviction solely upon the deposition made before the Magistrate—21 All 111 *Pirih v Crown*, 1917 P R 37, *Ratanlal* 894 Where a witness was not examined in the Sessions Court with regard to the particular statements made by him before the committing Magistrate and he did not repeat those statements before the Sessions Court, it was held that the Sessions Judge could not properly admit such statements in evidence under this section as they were not corroborated—4 C W N 49 A conviction cannot be based upon statements of witnesses made before the committing Magistrate, when they afterwards came forward before the Sessions Judge and gave only circumstantial evidence insufficient to connect the accused with the commission of the crime—*Ghanwara v Crown*, 1915 P W R 15

A statement made by a witness before a committing Magistrate and subsequently repudiated by him before the Sessions Court, is admissible in the Court merely for the purpose of contradicting the witness But the substance of such repudiated statement should not be used by the prosecution as substantial evidence of the allegations unless it is corroborated in some material particulars by independent evidence—21 W R 49, 22 All 445 27 Cal 295, 10 C W N 107, 21 All 111, *Ratanlal* 966, *Mam Chand v Crown*, 5 Lah 324 (328), 12 Mad 123 2 Weir 374 375 A conviction based solely on evidence given by the witnesses before the committing Magistrate and retracted by them at the trial is unsustainable—*Sher Dil v Crown* 1919 P R 17 If it were permissible to convict an accused person relying solely upon the evidence given by a witness before the committing Magistrate the logical consequence would be that the taking of evidence before the Sessions Court might be altogether dis-

pensed with—21 W R 49 Evidence given before a committing Magistrate cannot be effectually utilised in support of a conviction unless it is shown by other corroborative evidence that the evidence given before the committing Magistrate should be preferred to and substituted for the evidence given at the trial—*A E v Jehal Teli* 3 Pat 781 (794) 6 P L T 53 26 Cr L J 270 *Q E v Jadub Das* 27 Cal 295

In a case in which there was a fight between the villagers of two neighbouring villages and there was a complaint of offences under secs 148 324 and 326 I P C the prosecution witnesses spoke to the fight alleged and also identified the assaultants before the committing Magistrate In the Sessions Court the witnesses gave a general account of the fight but as regards the identification of the particular assaultants each witness professed his inability to make any such identification The Sessions Judge found that in order to save one another the members of each party had agreed not to identify their assaultants in the Sessions Court and that the witnesses retracted that portion of their evidence before the committing Magistrate in pursuance of a concerned conspiracy to defeat the ends of justice The Sessions Judge accordingly relied upon the statements made before the committing Magistrate under sec 288 Cr P Code and believing those statements in preference to the statements made before the Sessions Court convicted the accused *Held* that under this section the Sessions Judge was in the circumstances of the case perfectly justified in admitting the statements as evidence in the trial—*Peda Somadu v Appigadu* 45 M L J 602

A Sessions Judge does not show a proper discretion in allowing a statement made before the committing Magistrate by a witness to be used as evidence under this section when the witness repudiates it at the Sessions and attributes it to improper influence in the course of the investigation and when the circumstances are such that the Judge cannot rely on it—7 C W N 345 Where a witness who in the Sessions trial reciles from his deposition given before the Magistrate states that the latter deposition was made under the influence of the Police the Judge should exercise a proper discretion in making some inquiry by examining the Inspector of Police regarding the restraint and pressure put upon the witness before admitting such statement as evidence—4 C W N 49

899 Subject to the provisions of the Evidence Act —It is difficult to understand exactly what the amendment of the section intended to effect but there were certain difficulties felt by the Courts with regard to how far the evidence taken before a Magistrate should be relied upon But these words should not be interpreted to mean that evidence duly taken before a Magistrate can only be utilized at a trial in a case where the Evidence Act specifically authorises its use Such a construction is erroneous because there are only certain sections in the Evidence

Act (secs 32 33 145 155, 157) which can in any way be regarded as even remotely dealing with this subject but none have any direct bearing. There is indeed in the Evidence Act nothing at all which permits or specifically provides for the use of evidence taken before a Magistrate as evidence at a trial. Nor should those words be construed to mean that sec 288 can be utilized in all cases except those in which the Evidence Act directly prohibits such use because there is no such prohibition in the Evidence Act at all. What is really meant by the amendment is that evidence duly taken before a Magistrate can be used for all purposes in a trial Court so long as the evidence is evidence within the meaning of the Evidence Act or, in other words, Magisterial depositions can be utilized in a trial Court as of evidential value only if the matter contained therein is according to the rules of evidence laid down in the Evidence Act of evidential value. For instance if mere hearsay evidence was contained in a Magisterial deposition it would not simply because it was so contained be capable of being utilized by a Sessions Judge as of evidential value at the trial. The amendment may also probably mean that the evidence taken before a Magistrate can only be used at the trial subject to the procedure laid down in the Evidence Act—*King Emp v Jehal Tek* 3 Pat 781 (788 790) 6 P L T 53 26 Cr L J 270.

The words 'for all purposes subject to the provisions of the Evidence Act' do not mean that the evidence given before the committing Magistrate can be used in the Court of Session only for the purpose of corroboration and contradiction in accordance with sections 155 and 157 of the Evidence Act. Such evidence may be acted upon by the Sessions Court precisely as if that evidence has been deposed to before the Sessions Judge. The words merely mean that the law of evidence enacted in the Evidence Act must be complied with. For instance evidence which had been wrongly admitted by the committing Magistrate in violation of the provisions of the Evidence Act cannot be transferred to the file of the Sessions Judge and used at the trial. The amendment is obviously introduced for the purpose of removing any doubt as to the right of the Court to treat the evidence given before the committing Magistrate as *substantive evidence* in the trial, when such evidence has in the discretion of the trial Court been properly brought on that Court's record—*Amir Zaman v Crown* 6 Lah 199 26 P L R 361 26 Cr L J 1245 A I R 1925 Lah 452 *Abdul Gam v Emp* 53 Cal 181 142 C L J 205 A I R 1926 Cal 235 *Emp v Basappa* 27 Bom L R 113 26 Cr L J 705.

900 Practice and procedure.—The counsel for the prisoner is not entitled to refer to the deposition for the purpose of contradicting the witness without having drawn the attention of the witness to the alleged contradiction in his deposition, and without having given him

an opportunity of explaining it—31 Cal 142 *Lachmi Lal v. H. E.* 3 P. L. T. 398 Before a Judge can use as evidence the deposition given before the Magistrate he is bound to let his intention or the possibility that he may do so be known to the accused and the prosecution in order to afford the accused and the prosecution an opportunity for testing such statement by cross examination or otherwise dealing with such statement as part of the case which may be taken into consideration by the Judge. Otherwise it is impossible for the prosecution or the defence to deal with the matters which may influence the Judge's mind in coming to a decision—1886 A. W. N. 256

It is improper for the Judge trying a case to take a witness's deposition bodily from the committing Magistrate's record and to treat it as evidence before the Court itself—7 All 86 21 All 111 The Judge is bound to put to the witnesses whom he proposes to contradict by their previous statements the whole or such portion of their depositions as he intends to rely upon so as to afford them an opportunity of explaining their meaning or denying that they had made any such statements and so forth—7 All 86

When a counsel or pleader cross examines a witness with reference to a previous deposition the parts thereof to which the cross examination is directed should be set out in the Judge's minute of the proceedings; the depositions must also be numbered and translated in the minute of the proceedings—Ratanlal 343

Power of High Court.—Where in an appeal the High Court was of opinion that the statements made before the committing Magistrate by certain witnesses who were also examined before the Sessions Judge should have been brought upon the record by the exercise of the powers conferred by section 288 it directed the Sessions Judge to take proceedings for the purpose after giving notice to the accused persons that it was proposed to use those statements against them—19 A. L. J. 917

289 (1) When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded the accused shall be asked whether he means to adduce evidence

Procedure after examination of witnesses for prosecution

(2) If he says that he does not, the prosecutor may sum up his case, and if the Court considers that there is no evidence that the accused committed the offence it may then, in a case tried with the aid of assessors record a finding or in a case tried by a jury, direct the jury to return a verdict, of not guilty.

(3) If the accused, or any one of several accused says that he means to adduce evidence and the Court considers that there is no evidence that the accused committed the offence, the Court may then in a case tried with the aid of assessors record a finding, or in a case tried by a jury, direct the jury to return a verdict, of not guilty

(4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence

901 Examination of the accused —The words 'if any' show that it is optional with the Judge to examine the accused. The omission to examine the accused is a mere irregularity which does not vitiate the trial—27 Mad 238 9 C L J 55 But see notes under sec 347

Sum up —The prosecution has a right to sum up under subsection (2) when all the accused say that they do not mean to adduce evidence—18 Bom 364

902 No evidence —Subsection (2) or (3) applies only where there is no evidence and would not cover cases where the Court considers that the charge is itself improper—12 All 551

When there is no evidence the jury should be *directed* to find a verdict of not guilty and it is wrong to leave it to the jury to say whether the accused is guilty or not guilty—7 W R 39 When there is no evidence which can if believed amount to proof the case should not be put to the jury at all as a verdict of guilty if the jury returns such a verdict cannot under such circumstances be sustained—16 W R 19

The words no evidence do not mean no satisfactory trustworthy or conclusive evidence. If the Court is satisfied that there is not upon the record any evidence which even if it were perfectly true would amount to legal proof of the offence charged against the accused then the Court has power without consulting the assessors to record a finding of not guilty but the Sessions Judge has no such power merely because he considers the evidence *untrustworthy* or *unsatisfactory* or *inconclusive*. It is not the intention of the Legislature that the assessors or the jury should give their opinion or verdict in those cases only where the Judge is inclined to *believe* the evidence for the prosecution—10 All 414 16 Bom 414 If there is any evidence *relevant* to the charge prepared the accused

must be called upon to enter upon his defence, and the trial should be completely gone through even though the Sessions Judge may consider such evidence unworthy of belief—2 Weir 382 9 C P L R 24 The case can be withdrawn from the jury only on the ground that there is no evidence at all and not on the ground that the Judge disbelieved the evidence for the prosecution on the strength of the medical evidence—16 W R 20

The accused must be acquitted under this section if there is no evidence on the prosecution side and he cannot be convicted on the evidence given against him by the witness called by the co accused in his defence—5 M L T 75

When a judgment of acquittal is recorded under this section the opinions of the assessors need not be recorded—7 B H C R 82

Finding of not proven —The Code does not provide for a finding of not proven The proper course is to record a finding of 'not guilty' —2 Weir 381

903 Defence —A criminal case ought not to be adjudged on mere probabilities The burden of proof is always on the Crown and not to any extent on the accused and unless the evidence is of such a nature as to enable the Court to judge rather than conjecture the accused should not be called upon to make his defence—Ratanlal 772 Ratanlal 773

It is not a mere formality but an essential part of the criminal trial to call upon the accused to enter on his defence and omission to do so is not a mere irregularity curable by Sec 537—23 Cal 252 In *James v Emp* 16 A L J 41 however the omission to call upon the accused to enter on his defence was held to be a mere irregularity cured by Sec 537 unless the accused was prejudiced thereby

The accused shall be called upon to adduce evidence witnesses are examined for it is only when evidence has been produced that he can be called on to enter on his defence it is extremely irregular to examine the defence without the evidence of the prosecution evidence but the conviction is valid if the irregularity has not prejudiced the accused—41 Cal 252

If the accused has not his witnesses present the case—23 W R 58

290 The accused or his pleader may

Defence stating the facts or law

to rely, and make such

statements as he thinks necessary on the evidence for the prosecution

then examine his witnesses (if any) and cross-examine

and re-examine (if any) witnesses called by the prosecution

904 Examination of defence witness —The accused is at liberty to meet the case in any way he likes. He can as to the whole or any part of the case against him rely on the witnesses for the prosecution or may call fresh evidence himself. No adverse inference will be drawn against him if he does not produce or examine any witnesses—8 Cal 121 10 Cal 140 21 C W N 1152 (per Huda J). But where a *prima facie* case of circumstances making out or tending to support the charge against the accused is established and he withholds evidence in disproof or explanation available to him and not accessible to the prosecution, an inference unfavourable to the accused may legitimately be drawn—*Ashraf Ali v K E* 21 C W N 1152 (per Teunon J).

When the accused are being tried separately each would be a competent witness at the trial of the other—23 Bom 213 16 Bom 661

The burden lies on the prosecution to prove beyond all reasonable doubt that the offence was committed by the accused. If the prosecution cannot prove the guilt of the accused beyond all doubt the accused is under no obligation to explain how the offence was committed or who committed the offence or by what means—*Ratanlal* 686. When there is no *prima facie* evidence sufficient to convict the accused he is not under any obligation to explain to the Court his movements at the time of the offence—10 Cnl 970.

The record is not complete unless it shows the nature of the defence set up. If the accused makes any statement it must be recorded. If he makes no statement or refuses to answer when called upon to enter upon his defence a note should be made accordingly and when there is nothing to show the nature of the defence a note of the address to the Court (if any) should be recorded—15 W R 16.

905 Cross examination —An accused person must be allowed to cross examine the witnesses called by another co accused for his defence if the case of the latter is adverse to that of the former—21 Cal 401. But the accused cannot cross examine his own witness. Thus where a prosecution witness was examined before the committing Magistrate but was not called in the Sessions Court and thereupon the counsel for the defence examined him he would be treated as a witness for the defence and the defence counsel was not entitled to cross examine him unless it appeared that the witness was suppressing the truth or was lying or refusing to give information—20 All 155.

291 The accused shall be allowed to examine any witness

Right of accused as to examination and summoning of witnesses not previously named by him, if such witness is in attendance, but he shall not, except as provided in Sections 211 and 231, be

entitled of right to have any witness summoned, other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial

906 Summoning witnesses—The accused is entitled as a matter of right to secure the attendance of all witnesses *named in the list* delivered to the Magistrate—2 W R 6 3 W R 36 15 W R 34 23 W R 56 and a conviction without summoning and examining the defence witnesses is liable to be set aside—12 W R 22 47 Cal 758

If some of the witnesses whose names have been entered in the list given to the committing Magistrate (under sec 211) fail to appear in the Sessions Court the Judge ought to summon them and he cannot refuse to do so on the ground that the application for summons has been made at a late stage of the trial (*viz* at a time when the examination of the other defence witnesses has been ended and the case is ready for arguments)—47 Cal 758

The accused person cannot however require the Sessions Judge as of right to summon and examine witnesses *other than those named in the list*—3 W R 29 And the Judge's refusal to grant an adjournment to summon a witness not named in the list is not illegal—*Nazir Singh v Emp* 7 Lah L J 478 26 P L R 767 But the Sessions Judge has an inherent power if he thinks proper to exercise it to summon those witnesses—8 All 668

A Sessions Judge should not refuse to enforce the attendance of certain witnesses for the defence on the ground that there is ample evidence on the record about the matter it is for the accused person and not for the Judge to say what amount of evidence it would be proper to place before the jury in order to establish the case for the defence—7 C W N 188

Prosecutor's right of reply 292 *The prosecutor shall be entitled to reply,*

- (a) *if the accused or any of the accused adduces any oral evidence,*
- (b) *with the permission of the Court on a point of law or*
- (c) *with the permission of the Court when any document which does not need to be proved is produced by any accused person after he enters on his defence*

Provided that in the case referred to in clause (c) the reply shall unless the Court otherwise permits, be restricted to comment on the document so produced

Change —This section has been redrafted by section 79 of the Cr P C Amendment Act XVIII of 1923 Prior to this amendment the section stood as follows —

292 If the accused or any of the accused adduces any evidence the prosecutor shall be entitled to reply

Clauses (a) and (b) have been drafted by the Joint Committee (1922) and clause (c) has been added during the debate in the Assembly on the motion of Mr Srinivasa Rao See the *Legislative Assembly Debates* February 7 1923 page 2011

907 Object and scope of section —The object of the law in this section is to let each side have an opportunity of commenting on the evidence of the other and not to give an additional advantage to the prosecution Therefore where the defence counsel first said that he meant to adduce evidence but afterwards informed the Court that he did not mean to call evidence the Judge should not allow the right of reply—10 Cal 140 This section makes the right of reply dependent upon the fact of evidence having been *actually* adduced—30 Bom 421 11 Bom L R 177 Under the Code of 1882 the prosecutor had a right of reply if the accused stated that he meant to adduce evidence whether he did or did not actually adduce evidence

908 What amounts to adducing evidence —The putting in of the depositions of certain prosecution witnesses made before the committing Magistrate and of the statements of the accused made under sec 16 to a Police constable forming part of the record sent up by the Magistrate cannot be said to be adducing evidence by the accused within the meaning of this section The tender of them as evidence by the accused is merely an application to the Judge for the exercise of the discretion vested in him by sec 288—31 Cal 1050

The prosecution shall be entitled to reply if the documentary evidence for the defence is adduced *after* the case for the prosecution is closed—43 Cal 426 See clause (c) of the section Therefore where during the cross examination of the prosecution witnesses and *before entering upon defence* the accused puts in some documentary evidence it does not give a right of reply to the Crown because so long as the case is in the hands of the prosecution the putting in of documents cannot be said to take the prosecution by surprise and this is the correct test for determining whether the prosecution should have the right of reply—10 C W N cclxvii 14 Cal 245 17 Cal 930 43 Cal 426 10 Cal 1024 14 Bom 436 7 L B R 84 *Contra*—14 All 212 11 Mad 339 16 All 88 30 Bom 421 4 L B R 5 and 1 S L R 91 where it has been held that the prosecution is entitled to a right of reply even if any documentary evidence is put in by the defence *before* the close of the evidence for the prose

cution (e.g. if any document is produced by the defence during the cross examination of prosecution witnesses) This view is no longer correct by reason of clause (c) newly added in the section

If while the case for the prosecution is going on the defence in his cross examination utilises a witness for the prosecution to his own advantage or puts in a lot of documentary matter through such witness it cannot deprive him of his right to the last word because it does not amount to adducing evidence for the defence—11 Bom L R 177

909 Reply —Reply means reply generally to the whole case Even if one of the accused calls witnesses and the others do not the prosecution is entitled to reply not merely on the evidence adduced by one of the accused but generally on the whole case It is not the intention of this section that the prosecution is to sum up as to such of the accused as do not call evidence and to reply only on the evidence adduced by the other —18 Bom 364

293 (1) Whenever the Court thinks that the jury or assessors should view the place in which the offence charged is alleged to have been committed or any other place in which any other transaction material to the trial is alleged to have occurred the Court shall make an order to that effect and the jury or assessors shall be conducted in a body under the care of an officer of the Court to such place which shall be shown to them by a person appointed by the Court

(2) Such officer shall not except with the permission of the Court suffer any other person to speak to or hold any communication with any of the jury or assessors and unless the Court otherwise directs they shall when the view is finished, be immediately conducted back into Court

This section speaks of the view of the *locus in quo* by jury or assessors whereas section 539B relates to the view of the place by Magistrates

Examination of witness not permitted —The assessors cannot view the scene of the alleged offence and cannot examine the witnesses at the spot because by subsection (2) the officer conducting the jury or assessors to the spot cannot suffer any other person to speak to or hold any communication with any of the jury or assessors —5 W R 59

294 If a juror or assessor is personally acquainted with any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be sworn, examined, cross-examined and re-examined in the same manner as any other witness

295 If a trial is adjourned, the jury or assessors shall attend at the adjourned sitting, and at every subsequent sitting, until the conclusion of the trial.

310. When trial should be adjourned —A Judge is bound to adjourn a case in which a witness summoned for the defence is absent especially if he is a material witness and the case cannot be satisfactorily decided in his absence—15 W R 34, 18 W R 20, 23 W R 58 But under such circumstances the Judge will not be justified in discharging the jury in the midst of a trial and adjourn the case to the next Session—4 Fom L R 939.

296 The High Court may, from time to time, make rules as to keeping the jury together during a trial before such Court lasting for more than one day; and subject to such rules the presiding Judge may order whether and in what manner the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes.

In every case involving the punishment of death or of transportation for life in which the trial lasts for more than one day, the jury should be kept together during the trial by the Sheriff or Deputy Sheriff or such other officer as the presiding Judge may appoint for that purpose, and in every other case in which the trial shall last for more than one day, it shall be in the discretion of the presiding Judge whether the jury shall be kept together in manner aforesaid or shall be allowed to return to their respective homes—*Bombay Gazette, 1875, Part I, p. 653.*

R.—Conclusion of Trial in Cases tried by Jury.

297. In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution

and defence, and laying down the law by which the jury are to be guided.

911. When the case.....are concluded —This section specially enacts that the Judge shall only charge the jury when the case for the defence and the prosecutor's reply are concluded, *i.e.* after *all* the evidence has been taken on both sides, and the counsel of both parties have finished addressing the jury. A Judge who charges the jury and takes verdict as regards some only of the accused and afterwards hears arguments and takes verdict as regards the remaining accused, will be acting irregularly and contrary to the provision of this section—36 *Mad* 585. After the witnesses for the prosecution and a certain number of witnesses for the defence had been examined, the foreman of the jury asked if the defence could not cut down the number of witnesses they had summoned, the defence thereupon agreed to dispense with all further witnesses save one. The Judge taking the foreman's intervention as an indication that the jury had decided to acquit, proceeded to charge the jury upon the case as it stood. The jury however found the accused guilty, whereupon the Judge ordered the remaining witnesses for the defence to be examined, and after this was done he again addressed the jury and then the jury again gave their verdict. *Held* that the procedure was entirely illegal, because all the evidence on both sides must be concluded before the case could be submitted to the jury. Both the verdicts were therefore null and void—*Lynn v Crown*, 4 *Lah* 382.

The procedure adopted by the Judge in requiring the jury to give a finding on one of two questions of fact constituting the proof in the case, before he concluded his charge with reference to the other question of fact, was irregular, if not illegal, and was certainly calculated to embarrass the jury in arriving at a proper verdict as to the character of the offence, if any proved—2 *Weir* 499.

912. Charge to jury —The form and contents of a charge vary with the circumstances of individual cases, with the nature of the evidence the Judge is to deal with, and the mode in which the case for the prosecution and the case for the defence are conducted. Generally speaking, it is usual to begin a charge by setting out the offence or offences which the prisoner is charged with having committed, and explaining the law relating to those offences. Then the case for the prosecution and the case for the defence may be referred to, and such comments made on the evidence adduced by the other side as the Sessions Judge may think it desirable or useful to make to the jury. Care should be taken to place the defence set up fairly before the jury and to ensure that the jury appreciate the issue or issues which they have to try. The charge should include the usual warning as to the duty of the jury to the prosecution on the one hand to the prisoner on the other—*Afruddi v A*, 23 *C W N* 833.

In addressing the jury the Judge should endeavour to speak in a manner simple and direct. The charge must not be involved nor should the language be extravagant—11 Cr L J 538 (Cal). He should not use expressions assuming the guilt of the accused nor should he use slang and colloquial phrases and the interrogative method in charging the jury—45 Cal 557. In charging the jury it is the duty of the Judge to give a narrative and history of the case to the jury and to place the evidence and facts in a clear manner before them so as to enable them to grasp the details and come to a right decision—6 Bom L R 31.

If a charge is to be delivered in Bengali and the Sessions Judge is not sufficiently acquainted with that language to prepare the charge in Bengali it is open to him to obtain such assistance as he requires from the officers of his Court. But it is not desirable that he should resort to the services of the Public Prosecutor for this purpose—*Afiruddi v K E* 23 C W N 833.

913 Summing up of evidence.—The object of a summing up is to enable the Judge to place before the jury the facts and circumstances of the case both for and against the prosecution so as to help them in arriving at a right decision upon the points which arise for their consideration—*Khiyiruddin v Emp* 42 C L J 504 27 Cr L J 266. Where the provisions of this section are neglected and the Judge does not sum up at all the conviction will be set aside and a new trial ordered—9 W R 51 23 Cal 252. The summing up contemplated by this section cannot mean any statement of the evidence which a Judge may in his caprice think proper to make to the jury but a proper summing up containing a full and distinct statement of the evidence on both sides, with such advice as to the legal bearing of the evidence and the weight which properly attaches to the several parts of it as a sound judicial discretion would suggest. The Judge in a proper summing up must formulate and specify simple issues for consideration and collate the evidence *pro* and *con* bearing upon the issues in order to assist the jury to arrive at the correct decision thereon. Merely summarising the evidence examination in chief cross examination and re examination of the different witnesses who have deposed at the trial and putting before the jury all that has been said by the witnesses or by the lawyers appearing on the two sides and budding together important facts as well as trivial points without any attempt at discrimination is not a proper summing up. Such a summing up instead of aiding the jury only confuses them—*Jessarat v Emp* 29 C W N 526 26 Cr L J 1009 A I R 1925 Cal 729. It is the duty of the Judge to state to the jury what are the principal points in the evidence and how they bear for or against the prisoner in short to render the jury every assistance in his power towards coming to the right conclusion—6 W R 72. The jurors ordinarily are not men who are used to weighing the evidence and

it is therefore necessary that all help should be given to them in the light of the observations made by the learned Judges in the decided cases—*Abdul Gani v K E*, 53 Cal 181 42 C L J 205 He should state the evidence *pro* and *con* with a running commentary as to its agreement and disagreement with the other facts of the case—1 W R 25, 25 W R 54. Where a fair and proper statement of the evidence has not been placed before the jury, the High Court will set aside the conviction—13 C W N. 754 Where the Judge did not sum up the evidence at all but simply charged the jury with these words— "It is for you to say from the evidence you have heard whether you consider the accused guilty or not," it was held that the charge was wholly insufficient, and a retrial was ordered in the case—1902 A W N 201 Where the Judge did not sum up the evidence to the jury, but only treated it generally and called it a very poor evidence which standing alone amounted to nothing, it was held that the charge to the jury was defective—23 Bom 316 But it is not necessary for the Judge, in his charge to the jury, to go into the minutest details in the evidence—40 Cal 367

In summing up the case, the Judge must place before the jury all facts of prime importance in favour of the accused—6 Bom L R 31. He cannot omit any matters of prime importance, especially if they favour the accused merely because they have been elaborately discussed by the Advocate—27 Bom 644, 3 S L R 102, 40 Bom 220 So also, he cannot omit to draw the attention of the jury to what appears to be a possible answer to the charge against the accused, notwithstanding that it has escaped the counsel of the accused—19 C W N 653 This section makes it imperative on a Sessions Judge to place in his summing up to the jury evidence both for the prosecution and the defence The fact that the pleaders for the accused thought it unnecessary to place much reliance upon the defence of the accused would not absolve the Sessions Judge from his duty of placing before the jury all the facts in favour of the accused—17 Cr L J 19 (Mad) Omission to put the material facts or to put the defence to the jury is sufficient to cause the High Court to quash the conviction if this Court comes to the conclusion that the verdict of the jury was affected thereby—*K E v Barendra Kumar Ghose*, 28 C W N 170 (199); *R v Hill*, (1911) 7 Cr App Rep 26 *R v Wilson*, (1913) 9 Cr App. Rep 124, *R v Smith*, (1920) 84 J P 67 But where the Judge made a reference to the statement made by the accused, the mere omission to draw the attention of the jury to the defence of the accused is not a misdirection and does not vitiate the trial—*K E v Barendra Kumar Ghose*, 28 C. W N 170 38 C L J 411 (*Sankaritola Postmaster Murder Case*)

The Judge must always be careful that he does not usurp the of the advocate, and that the evidence of the case is presented to in as dispassionate and impartial a manner as is expected of the

officer He ought not to express any opinion on the reliability of the evidence for the prosecution or the defence—25 C W N 682

In cases of very serious offences and where the evidence is merely circumstantial the evidence should be read over *in extenso* to the jury (and not merely summed up)—5 B H C R 85 Where the trial has been a prolonged one the Judge ought to read over to the jury the important testimonies in the trial—Ratanlal 850 But an omission to read out the material portions of the evidence is not in itself sufficient for the reversal of the verdict of the jury In each case it must be a question whether such omission was such as to mislead the jury and the Appellate Court will not interfere unless it has prejudiced the accused—5 Bom L R 207

The law does not expressly require a Judge to formulate at the conclusion of the delivery of his charge specific questions for the jurors reply Such a practice is however helpful in deciding the legal effect of the Judge's finding but the formulation of such questions requires great care and the queries should be confined within the narrowest possible compass—*Rupan Singh v K E* 4 Pat 626 27 Cr L J 49 A I R 1925 Pat 797

914 Laying down the law —It is the duty of the Judge to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the facts and to enable them to decide the point at issue—8 Cal 739 Thus where in a trial for murder grave and sudden provocation causing loss of power of self control is suggested for the defence it is the duty of the Judge to explain the distinction between murder and culpable homicide and the jury as judges of facts have to decide the issue as to sudden provocation—Ratanlal 766 In a charge of rioting the jury must be told that a rioting can only take place when there is an unlawful assembly consisting of at least five men with one of the common objects mentioned in the I P C and it is essentially necessary to mention what an unlawful assembly is The jury are not experts in law—*Abdul Sheikh v Emp* 17 Cr L J 92 (Cal) Mere reference to the sections of the I P C defining offences (25 Cal 736) or mere reading out to the jury the sections of the I P C does not amount to a sufficient explanation of the law—*Sri Prosad v Emp* 4 C W N 193 Nor should the Judge merely give a copy of the Penal Code to the jury to read and interpret it for themselves but he must explain the law to them and tell them in a kind of popular language of what offence they are to convict the accused—14 Cal 164 It is necessary for a Judge to read the very words of the section itself to the jury if he purports to give them what the provisions of law are and then if necessary to explain what is the meaning of the section Where the only direction as to what constitutes murder was contained in one sentence murder is the intentional killing of another

human being with malice or forethought," held that though it was a comprehensive way of describing what the meaning of murder was, it was not the way in which the Court ought to charge the jury in this country. It is usual to refer to the sections which relate to culpable homicide, and to direct the jury as to what is culpable homicide and in what circumstances culpable homicide amounts to murder—*Emp v Durga Charan*, 26 C W N 1002. Moreover it is the duty of the Judge to call the attention of the jury to the different elements constituting the offence and to deal with the evidence by which it is proposed to make the accused liable—*Taju Pramanik v Q E*, 25 Cal 711 21 Cr L J 694 (Cal), *Mari Valajan v Emp*, 30 Mad 44. It is also the duty of the Judge to explain the law as regards abetment—47 Cal 46. In complicated cases, the Judge should in his charge to the jury not only explain the law, but should draw their attention to the evidence in the case and explain how they shall apply the law to the particular facts of the case—*Rupan Singh v K E*, 4 Pat 626 27 Cr L J 49.

The Judge cannot omit to explain the law on the ground that it has been sufficiently explained by the pleaders on both sides in their addresses to the jury. The responsibility of laying down the law for the guidance of the jury rests entirely with the Judge, and the verdict given by the jury in the absence of any such direction on the law by which they should be guided cannot be accepted as a valid verdict in the case—29 Cal 379; *Ramprasad v Emp* 26 Cr L J 1090 (Nag). The Judge's charge is not only for the purpose of stating the law and explaining it to the jury, but also of helping them to find facts. He has to advise the jury as to the logical bearing of the evidence admitted upon the matters to be found by them. He ought to do that to limit the chances of error of the jury—*Afiruddi v K E*, 23 C W N 833.

But in explaining the law upon a particular offence the Judge ought not to discourse in all branches and departments of the crime, especially in a case of complicated offence as murder or culpable homicide. It is so is to confuse the jury and possibly to direct their deliberation into channels that have nothing to do with the case—19 C W N 652. The Judge should lay down the law only in so far as it has a bearing on the evidence adduced in the particular case, to simplify the issues before the Court, to keep the jury within proper limits and not to perplex their minds with considerations that are outside the scope of the inquiry—19 C W N 653. All unnecessary facts and arguments should be avoided by the Judge, and the charge should be strictly confined to the evidence adduced and the application of the law to such evidence—S W R 87. No rulings of the Court should be cited by the Judge in his charge to the jury, nor should he attempt to differentiate or form any opinion whatever as to the merits of the case.

a procedure confuses the minds of the jury and constitutes a misdirection—*Meher Sardar v. K E*, 16 C W. N. 46

915 Misdirection to Jury —Examples —(1) Omission to give the jury a sufficient explanation of the law so as to enable them to decide the point at issue is a misdirection—8 Cal 739, 25 Cal 561, 2 Weir 500, 9 M L T 345, 35 Cal 736 Thus, where in a dacoity case, the Judge stated to the jury "Dacoity is committed when any number of persons not less than five conjointly commit robbery" but did not explain to the jury what was necessary to constitute the offence of robbery, it was an omission to lay down the law, and amounted to a misdirection—*Mani Valayan v Emp*, 30 Mad 44, *Nawab Ali v K E*, 11 O L J 315, 25 Cr L J 1129 So also, omission to explain to the jury the difference between murder and culpable homicide, or to tell them under what view of the facts the accused ought to be convicted of murder or culpable homicide or to be acquitted, is a misdirection—3 L B R 75 Where the act of the accused was so imminently dangerous that it must in all probability cause death and thus came within the definition of murder (punishable under sec 302 I P C) and the Judge himself described the act to the jury as 'imminently dangerous' but said that the offence was punishable under section 304 I P C (culpable homicide not amounting to murder), held that there was a misdirection in not explaining to the jury as to how the act which he himself described as "imminently dangerous" was rendered punishable under section 304 I P C—*Muhammad Yunus v Emperor*, 50 Cal 318 (324) In a case of criminal breach of trust, the Judge should tell the jury that the test they are to apply is whether the circumstances relied upon by the accused showed an intention of causing 'wrongful gain' or 'wrongful loss,' and the Judge should also explain the meaning of these terms Omission to do so amounts to a misdirection—*Browne v K E*, 7 Bur L T 20 It is a misdirection not to adequately explain to the jury the law in regard to abetment—47 Cal 46, or in regard to onus of proof—26 C W. N 972.

(2) Failure to call the attention of the jury to the different elements constituting the offence is a misdirection—25 Cal 711 Thus, where in a case of murder, the Judge simply asked the jury to find whether the prisoner inflicted the injuries on the deceased, it was held to be a misdirection the jury ought to have been asked to find as to the intention of the accused to cause death or the knowledge that he was likely to cause death—1 Bom L R 784, 35 Cal 531 Similarly, where in a case under secs 474 and 475 I P C, the Judge told the jury that the only issue which they had to decide was whether the forged documents were in the possession of the accused, ignoring altogether the question of knowledge combined with intention which is so absolutely requisite to justify a conviction under sec 474 I P C, it was held that the Judge had misdirected the

jury—16 Bom 165 Where in a case of retaining stolen property, the Judge directed the jury to decide whether the property was stolen and whether it was retained by the accused without asking them to decide whether the accused *knew* or had reason to believe the property to be stolen, it was held that this amounted to a misdirection—15 Bom 369 So also in a case of receiving property stolen in the commission of a dacoity (sec 412 I P C) the Judge directed the jury to the effect that if they found that the properties were properly identified as having been the properties stolen at the time of the dacoity and were found in the accused's possession, they were bound to presume the accused's guilt but the jury were not properly directed that it was their duty to weigh all the circumstances of the case and consider the accused's explanation and then decide whether or not they should make such a presumption, *held* that this was a serious misdirection—*Satya Charan v Emp* 52 Cal 223 26 Cr L J. 1155

(3) Failure to point out to the jury as to the relevancy or otherwise of a confession made under inducement, and merely telling the jury that if the confession was true it was enough to warrant the conviction of the accused, is a misdirection—26 Mad 38 See notes under sec 298

(4) Omission to explain to the jury the attitude to be taken towards a retracted confession as evidence against a co accused is a misdirection—47 Cal 46 Where the Sessions Judge directed the jury that the retracted confession of a co accused is practically of no value against anybody but the confessor, but asked the jury to take into consideration the confession while considering the cases of the other two co accused individually, *held* that this was a misdirection as it was likely to prejudice the jury and lead them to give some weight to such statements when they should have disregarded them altogether—*In re Ibrahim* 42 C L J 496 26 Cr L J 1146 A I R 1926 Cal 374

It is a misdirection to tell the jury that the retracted confessions are not to be held true unless they are corroborated by independent reliable evidence because there is no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars—23 Bom 316 (*Contra*—18 All 78 2 Weir 507 and 2 Weir 509, where it has been held that if a confession is subsequently retracted and it is not corroborated by independent evidence the Judge should point out to the jury that it is not safe to rely on the retracted confession unless it is corroborated by independent reliable evidence and an omission to point this out to the jury amounts to a misdirection) It is also a misdirection to the jury to tell them to leave out of consideration the retracted confessions of the accused—8 M L T 372 The question to be put to the jury regarding such confessions is not whether they are corroborated by independent evidence but whether having regard to the

circumstances under which they were made and retracted and all the circumstances connected with them it was more probable that the original confessions or the statements retracting them were true. An omission on the part of the Judge to put this question to the jury amounts to a misdirection—21 Mad 83

(5) A Sessions Judge should caution the jury not to accept the accomplice's evidence unless it is corroborated in material particulars. Omission to state this amounts to a misdirection—24 C W N 119 12 Mad 196. But a recent Calcutta case lays down that an uncorroborated evidence of an accomplice is admissible in law although it has long been the practice for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice. Therefore it is not a misdirection to tell the jury that a conviction upon the evidence of the approver alone will not be illegal—*Emp v Jamal* 51 Cal 160 (1963) following the judgment of Lord Reading C J in *R v Baskerville* [1916] 1 K B 658 (663). *Ledu Molla v Emp* 52 Cal 595 42 C L J 501 26 Cr L J 1037

(6) An omission to arrange the facts deposed by witnesses is a misdirection—10 W R 7. Omission to point out to the jury that there was an absence of evidence material to the case for the prosecution is a misdirection—23 W R 21

(7) Where there are several accused persons and the case is against all of them does not stand on the same footing omission by the Judge to ask the jury to consider the case as against each of the accused individually is a serious misdirection—*Khyiruddin v Emp* 42 C L J 504 A I R 1926 Cal 139

(8) When a charge to the jury placed prominently before them all the circumstances that went against the accused and did not call their attention to any of those that were in favour of the accused it was held that there was a misdirection sufficient to vitiate the trial—4 C W N 196 40 Bom 220 21 Cr L J 670 (Cal). Omission to make the jury acquainted with the nature of the case for the prosecution and the nature of the case for the defence is a misdirection—23 C W N 833. But the fact that every point in favour of the accused has not been put to the jury does not amount to a misdirection. The charge must be judged as a whole and one must see whether judging it as a whole the case for the two sides has been fairly put so that the jury can understand what they have to decide and can come to a right conclusion. It is not necessary for the Sessions Judge to repeat everything that has been said by the pleader for the defence in his speech. But he should draw the attention of the jury to the more essential items and the strongest argument that has been advanced for the defence. A mere reference to the argument of the pleader is insufficient—*Haricharan v Emp* 34 C L J 512 *Abdul*

Salim v Emp. 49 Cal 573 The fact that the address of the defence counsel to the jury is a lengthy one does not excuse the Judge from pointing out important points of the defence argument to the jury—*Pearcy v Emp.* 20 C W N 436 (F B) A verdict obtained from the jury without placing before them an important piece of evidence in favour of the defence, whatever may have been its real worth cannot be sustained—*Ahijiruddin v Emp.* 42 C L J 504 • 27 Cr L J 266

(9) A Judge's direction to the jury to consider the proof of previous convictions as evidence giving rise to an inference regarding the character of the prisoner amounts to a misdirection—5 Cal 768 See section 310

(10) Omission to tell the jury that the accused is entitled in the benefit of any reasonable doubt that they may have on any point is a misdirection—34 Cal 698

(11) Where the Judge stated in his charge to the jury that there was a mass of oral evidence on behalf of the prosecution as well as for the defence, but that the jury might neglect it all, it was held that this was a misdirection, because it is the duty of the jury to give their verdict upon considering the whole of the evidence—6 Bom L R 31

(12) Omission to invite the jury to consider carefully what each of the accused said in his statement with reference to the charges framed against him, is a misdirection—47 Cal 46

(13) The Sessions Judge is guilty of misdirection where he has failed to draw pointed attention to the fact that the jury have to rely upon the testimony of an absent witness and where evidence which ought not to have been allowed to be given has been improperly admitted under sec 33 of the Evidence Act—39 Mad 449

(14) In a case of theft the failure on the part of the Judge to call attention to the whole of the evidence telling against the accused and especially his observation as to the case resting wholly on the identification of certain jewels with which the evidence went to show that the accused had dealt, constitutes a misdirection—2 Weir 488

(15) Where in a case of theft, the evidence against the accused was the possession of stolen property 5 years after the occurrence, it was held that the Judge had misdirected the jury by saying "On this evidence, notwithstanding that it is nearly 5 years since the crime occurred, you will decide whether you are satisfied with the prisoner's explanation for his possession of the stolen property" The proper course would be to tell them to consider whether after 5 years it was reasonable to require the prisoner to prove how he came by the goods or whether his story, not being in itself improbable, ought not to be accepted—2 Weir 489

(16) A direction to the jury that they should convict the prisoner if they believed that he had shown the stolen property to the Police, is a misdirection, because the mere fact that a person knew where the stolen

property was and showed it to the police is not equivalent to possession of stolen property—2 Weir 493

(17) Where a Judge directed the jury to acquit one of the prisoners on the ground that the witnesses who identified him had deposed falsely it was held that the Sessions Judge ought to have made it clear to the jury that if they disbelieved the witnesses on whose testimony the case hinged in regard to any of the prisoners that was a circumstance to be carefully weighed by them in estimating the credibility of the testimony so far as it affected the other accused. His omission to do so amounted to a misdirection—2 Weir 501

(18) Omission to point out to the jury the discrepancies in the evidence of the principal witnesses for the prosecution constitutes a misdirection—33 C L J 150 *Emp v Durga Charan* 26 C W N 1002

(19) Where a number of persons who could have given important information were not examined as witnesses for the Crown the Judge should direct the jury to draw an inference adverse to the prosecution. His omission to do so amounts to a misdirection—*Muhammad Yunus v Emp* 50 Cal 318 (326) *Tenaram v K D* 33 C L J 180

(a) Where the accused raised the plea of private defence and the case for the prosecution was that there was no right of private defence at all the Judge should simply tell the jury that the question they had to decide was whether or not the right of private defence came into existence and not how far it extended or whether it was exceeded. Moreover in dealing with the law as to the right of private defence there are several important points the omission of which would amount to a serious misdirection. Thus in a murder case in which the right of private defence is set up the Judge in explaining sec 100 I P C which contains a list of six heads of offences should point out those heads which would and those which would not apply to the case they were trying otherwise the jury would naturally disregard those to which their attention was not specially directed by the Judge. Moreover in explaining the law as to private defence the Judge should also explain to the jury the provisions of section 101 I P C in a case where there is a charge of culpable homicide not amounting to murder as well as the minor charge of causing grievous hurt. The omission on the part of the Judge to explain these points amounts to a misdirection—*Muhammad Yunus v Emp* 50 Cal 318 (325-326). On a charge under sec 304 I P C where the defence of the accused is that the deceased came into his house for robbery at midnight and that the accused inflicted wounds on him which proved fatal the Judge should expound the law to the jury not only with reference to the right of private defence of person but also with reference to the right of private defence of property and should direct the jury to consider whether the accused had not used more force than was necessary for preventing the deceased

from running away with the stolen property. Omission to so charge the jury amounts to a misdirection—*Basaruddin v Emp* 28 C W N 585 39 C L J 525

(21) The Judge is entitled to tell the jury that when a prisoner is charged with causing hurt to another the burden of proving that it was done in the exercise of the right of private defence lies on the prisoner—23 C W N 833. But when the accused has examined witnesses to prove the defence (e.g. the right of private defence) set up by him it is no longer necessary for the Judge to refer to the law relating to burden of proof (because the accused has discharged that burden) the Judge should simply ask the jury to decide the question of fact on the evidence before them. If in such a case the Judge refers to the provisions of section 105 of the Evidence Act it would mislead the jury and lead them to think that the defence set up by the accused would require a higher standard of proof. This is clearly a misdirection—50 Cal 318 (at page 325)

(22) It is a misdirection to suggest to the jury that in capital cases stronger evidence of a higher degree of certainty is required than in other criminal cases—49 Cal 167

(23) Omission to warn the jury to pay no attention to the previous proceedings amounts to a misdirection—*Mir Mowz v A E* 31 C L J 305

(24) Where one of the witnesses for the prosecution is himself suspected of being implicated in the offence the jury should be directed not to accept his evidence without the most careful scrutiny. Omission to give such a direction amounts to a serious misdirection—*Satya Charan v Emp* 52 Cal 223 26 Cr L J 1155

(25) The question as to whether the accused was under 12 years of age and incapable of understanding the nature of his act is one for the jury to decide notwithstanding no proof may have been adduced on the point and if the Judge attempts to exclude the consideration of the question from the jury by saying that they should leave that question out of account altogether the Judge is in error and his summing up on this point amounts to a misdirection—*Emp v Ah Raza* 28 O C 69 26 Cr L J 310

(26) Where the witnesses who had made certain statements before the committing Magistrate retracted those statements at the trial the Sessions Judge ought to tell the jury that the witnesses should be looked upon with suspicion and that their evidence should be regarded with great caution and the Judge ought to ask the jury to decide for themselves as to which of the two versions is correct. If instead of doing so the Judge expresses his opinion with a certain degree of assertion to effect that the statements made before the committing Magistrate true and that the depositions given before him are false his cha

the jury is vitiated by misdirection—*Abdul Gani v K E* 53 Cal 181
42 C L J 205 A I R 1926 Cal 235

(27) It is a misdirection not to explain to the jury the difference between a crime and a civil wrong (e g the distinction between a civil and a criminal trespass)—41 Cal 662

916 Effect of misdirection —A misdirection does not justify a reversal of the verdict of the jury unless the misdirection has in fact occasioned a failure of justice—*Legal Remembrancer v Shyam Sundar* 26 C W N 558 Unless the misdirection is material the conviction will not be disturbed in appeal —*In re Mullimayandi*, 45 M L J 845 21 Cal 955 The High Court will not set aside a verdict where it is not erroneous in spite of the misdirection—*Emp v Nannaddi*, 22 C W N 572 21 Cal 955 See Note 1151

917 Non direction —Mere non direction is not necessarily misdirection those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood—1 P L J 317 *Abrath v N W Railway Co*, (1886) L R 11 A C 247 *R v Stodder* (1909) 25 T L R 712 *King Emp v Barendra*, 28 C W N. 170 (at p 199) 44 Cal 477 In a charge of unlawful assembly the omission to explain clearly to the jury the alleged common object of the unlawful assembly is not a misdirection but a mere non direction which will not justify the verdict being set aside if the prisoner was not prejudiced thereby—4 C W N 196 17 Cr L J 92 (Cal) Failure to point out to the jury the weakness of the evidence against the accused and the possibility of the offence having been committed by another is not a positive misdirection but merely a non direction—5 W R 13 Omission to call the attention of the jury to the evidence of defence witnesses whom the High Court considered to be untrustworthy is a mere non direction and not a misdirection—7 Cal 42 Omission to enter into details concerning the identification of stolen articles is not a mis-direction—1 W R 22

Duty of Judge. 298. (1) In such cases it is the duty of the Judge—

- (a) to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to prove and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties, and in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties,

- (b) to decide upon the meaning and construction of all documents given in evidence at the trial
- (c) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given
- (d) to decide whether any question which arises is for himself or for the jury and upon this point his decision shall bind the jurors

(2) The Judge may if he thinks proper in the course of his summing up express to the jury his opinion upon any question of fact or upon any question of mixed law and fact relevant to the proceeding

Illustrations

(a) It is proposed to prove a statement made by a person not being a witness in the case on the ground that circumstances are proved which render evidence of such statement admissible

It is for the Judge and not for the jury to decide whether the existence of those circumstances has been proved

(b) It is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed

It is the duty of the Judge to decide whether the original has been lost or destroyed

918 Question of Law —In a charge under sec 376 I P C the question whether when the complainant had consented to the act the offence within the meaning of sec 375 I P C has been committed is one of law for the Judge to decide under this section and not a question for the jury—19 Bom 735 The question as to whether a communication is privileged or not is one of law for the Judge to decide and he should not leave it to the jury to find whether it is so or not—10 W R 14

Direction of the Judge —What a Judge says to the jury upon a point of law is a binding direction upon the jury—20 W R 41 They are not entitled to resort to a commentary on the law during their consultation about the verdict They should take the law from the Judge—6 Bom I R 258 If the jury return a verdict according to the direction of the Judge the High Court will not interfere with the verdict unless it is manifestly erroneous—11 Cal 85

1 919 Admissibility of evidence —The Judge has to advise the jury as to the logical bearing of the evidence admitted upon the matters to be found by them—23 C W N 833 This section expressly lays down that one of the duties of a Judge in a trial held with the jury is to prevent the production of inadmissible evidence whether it is or is not objected to by the parties If that is so the fact that the accused puts forward some particular ground for holding that the evidence is inadmissible would not relieve the Judge of his duty to look into all the circumstances in order to judge whether it is admissible or not—*Emp v Panch Kauri* 52 Cal 67 29 C W N 300 26 Cr L J 782 It is for the Judge to decide whether the evidence adduced before him is *admissible* or not the *credibility* of the evidence is to be left to the jury—*Albas v Q E* 25 Cal 736 45 Cal 557 Thus the question as to which documents or evidence the jury are to receive is for the Judge to decide and the question as to what they are to believe is for the jury—*Ratanlal* 452 It is a misdirection for the Judge to say that he sees no reason to disbelieve a particular witness He ought to leave the question of believing or disbelieving to the jury—7 C L J 246 The Judge is not entitled to say in a general manner that there is nothing in the evidence to support or even to lend a semblance of support to the contentions of the accused—*K E v Taribilla* 75 C W N 682

In case of accomplice evidence the Judge should caution the jury not to accept the approver's evidence unless it is corroborated Omission to say so will amount to a misdirection—12 Mad 196 24 C W N 119 The failure to tell the jury explicitly that the statement of one prisoner against another should not be considered in weighing the evidence against that other is such a grave irregularity as to vitiate the trial even though the Judge in summing up considered separately the evidence against each of the accused without referring at all to the statement referred to—6 B H C R 10 Put see 51 Cal 160 cited under Note 915(5) *ante*

Confessions —It is for the Judge to decide whether the statements or confessions made to the Magistrate and how much of the confessions made to the police are admissible leaving it to the jury to decide amounts to a misdirection—45 Cal 557 Omission to mention to the jury that a confession made by the accused to the police officer is inadmissible in evidence is a misdirection—*Soneshwar v Emp* 3 P L T 101 The Judge must decide whether the confessions are voluntarily made or not It is not for the jury to decide But once the confessions are admitted in evidence it is for the jury to determine the weight to be attached to them and the truth or otherwise of those confessions—11 Bom L R 332 But the Judge should charge the jury that the mere confessions of prisoners tried simultaneously with the accused for the same offence which are in a very qualified manner made operative as evidence by sec 30 of the CrP

dence Act, ought to be valued merely as accomplice's testimony, and to be treated as evidence of a peculiarly infirm and defective character requiring specially careful scrutiny before it can be safely relied on—21 W R 47 Where a Judge admitted in evidence a confession made before a Police Officer and directed the jury that the confession could and should be used not merely against the maker but also against his co accused, it was a misdirection—45 Cal 557

As regards retracted confessions see Note 915, no (4) under sec 297

920. Inadmissible evidence —It is the duty of the Judge to see that evidence which is not admissible in itself should not be allowed to go in to the prejudice of the accused—25 Cal 736 Where a document, which is not *per se* admissible, is admitted by the Court, and the accused having sufficient opportunity at the trial omits to take any objection, he cannot afterwards in appeal impeach the verdict of the jury on the ground that the document had been admitted without formal proof But it is competent to the High Court to consider whether, after excluding the evidence wrongly admitted, the rest of the evidence is sufficient to sustain the verdict—19 Cr L J 886 (Pat) Where during the trial before a jury the Public Prosecutor read an alleged confession of the accused which not being recorded according to law was inadmissible in evidence, held that the irregularity of allowing it to be read might have influenced the minds of the jury, however carefully the Judge might have endeavoured to remove any impression caused thereby, and that the accused was entitled to a retrial—3 P L T 52

Meaning and construction of document —The Judge must explain to the jury the legal construction to be put upon a document and its legal effect and bearing—3 W R 69 If there appears to be a palpable blot or alteration on the face of a document, the Judge has every right to draw the attention of the jury to it—17 W. R 58

921. Clause (c) —It is the duty of the Judge to decide upon all matters which it may be necessary to prove in order to enable evidence of particular matters to be given Thus, if it is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed, it is the duty of the Judge to decide whether the original has been lost or destroyed—Ratanlal 452 Where the accused made one confession before the committing Magistrate, and another confession before the Court of Session, retracting the previous confession, and alleged that he was beaten by the Police and the previous confession was caused by inducement offered by the Police, it was held that the jury was to decide whether the first confession was induced by illegal means, whether that inducement still existed or had been effectually removed when the Magistrate recorded the confession—Ratanlal 245

922 **Expression of opinion by Judge**—Though it is open to a Judge to express his opinion to the jury on any matter of fact still the Judge ought to refrain from expressing any decided opinion on matters of fact in unmistakable terms because the decision of the questions of fact is left entirely for the jury—1 W R 2 1 W R 25 4 C W N 196 The Judge in his charge to the jury ought not to express his own opinion in terms too dogmatic and unqualified even though he informs them that they are not bound by any opinion of his—18 C W N 180 *Topandas v Emp* 25 Cr L J 761 (Sind) The Judge should be careful to express his opinion in such a way as not in any way to interfere with the duties of the jury to finally decide according to their own view of the facts—*Fazaruddin v K E* 4th C L J 111 26 Cr L J 1553 The Judge should not impress his own opinion indelibly on the mind of the jury and thus give them no option but to arrive at a decision which he himself arrived at—*Akhyriddin v Emp* 4th C L J 504 27 Cr L J 166 He should present the facts in their natural aspect and ought to leave the jury to decide the facts for themselves and he must not suggest far fetched explanations of points that tell in favour of or against either party—2 Weir 386 14 V L T 44th If he expresses any opinion he should also add that it is his own opinion which is not binding on the jury and that the jury is at liberty to draw their own conclusions—2 Weir 385 10 Cal 970 *Topandas v Emp* 25 Cr L J 761 (Sind) 34 Cal 608 35 Cal 531

Duty of jury 299 It is the duty of the jury—

- (a) to decide which view of the facts is true and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned;
- (b) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine whether such words occur in documents or not,
- (c) to decide all questions which according to law are to be deemed questions of fact,
- (d) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning

Illustrations

(a) A is tried for the murder of B

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what view of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted

It is the duty of the jury to decide which view of the facts is true and to return a verdict in accordance with the direction of the Judge whether that direction is right or wrong, and whether they do or do not agree with it

(b) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence

Each of these is a question for the jury

923 **View of facts** —It means the whole view of facts alleged against the accused—the view taken by the prosecution which leads to the conclusion of his guilt or the view which is set up on his behalf and which would make him innocent—21 W R 72 In an offence under sec 193 I P C it is enough for the jury to find that the two contradictory statements are proved to their satisfaction and they need not find which of the two statements is false—21 W R 72

924 **Questions of fact** —It is the duty of the jury and not of the Judge to decide all questions of fact Where in the summing up the Judge left no question of fact for the jury to decide but decided all himself and said expressly that in his opinion it was proved that the accused had committed murder and the only thing he left to the jury was to say which of the exceptions to sec 300 I P C applied if the jury held that the offence did not amount to murder it was held that such a summing up was not in accordance with law and a new trial should be ordered—9 W R 51 But although the jury are the sole judges of facts still it is the duty of the Judge to help the jury to find facts He has to advise the jury as to the logical bearing of the evidence admitted upon the matters to be found by them—23 C W N 833

The following are instances of questions of facts —(1) The question of intent in a case of kidnapping—14 All 25, (2) the question as to whether there was free consent in a case under sec 376 I P C—1 W R 21 (3) the question whether a fact was or was not proved or what fact was proved—4 C W N 576 (4) the question as to the identity of thumb impressions

on two or more documents for the purpose of ascertaining whether the thumb impressions are of one and the same person—1 C L J 385 (5) the question whether the possession of the stolen property was recent enough to warrant a conviction for the substantive offence of larceny—26 Mad 467

Illustration (a) —Although Illustration (a) lays down that in a charge of murder the Judge should explain to the jury the distinction between murder and culpable homicide still where in a trial for murder a verdict for culpable homicide not amounting to murder could not be properly come to under any aspect of the case before the Court the Judge is not called upon to explain to the jury the distinction between murder and culpable homicide not amounting to murder—*Nga Mja v A E S L* B R 306 (F B)

300 In cases tried by jury, after the Judge has finished

Retirement to con his charge, the jury may retire to con sider sider their verdict

Except with the leave of the Court no person other than a juror shall speak to, or hold any communication with any member of such jury

925 After a charge is made to the jury the jury should not be allowed to disperse but should at once retire to consider the verdict Where after the charge they were allowed to go home and come back some hours later and then they considered their verdict held that the trial was vitiated—*Sariman v Emp* 6 P L T 552 26 Cr L J 861

This section which is explicit in its terms should be strictly observed and it is highly undesirable that a jury in any case should have any communication with any body (even the Judge) who is not a juror upon the subject matter of the trial It is also highly undesirable that a Police constable should be stationed anywhere or in any position in which he can hear the deliberations of the jurymen or that anybody should be in a position where it is possible for him to know the form the deliberations of the jury took or what view any particular juror expressed about the matter—44 Cal 723 Where it was proved that after the charge to the jury had been delivered a person other than a juror spoke to or held communication with a member of the jury without the leave of the Court it was held that that was sufficient to upset the verdict and it was not necessary to consider whether the irregularity had in fact prejudiced the accused—46 Cal 207 But where during an adjournment of the Court before the Judge's charge was finished one of the jurors was seen conversing with strangers but it did not appear that the conversation was about the case it was held that this was not a sufficient ground

for interfering with the verdict of the jury—*In re Pulla Subba*, 10 L. W. 379

After the conclusion of the evidence and after the conclusion of the address of the Public Prosecutor, and before the defence had been heard in full and before the Sessions Judge had summed up the case to the jury, one of the jurors, in a room occupied by the clerks of the pleaders, in answer to some questions put to him, intimated that in his opinion the accused was guilty of the charge against him, and the Sessions Judge, although informed of the fact, proceeded with the trial, and took the verdict of the jury, *held* that the verdict must be set aside and there should be a fresh trial before a fresh jury—*Emp v Nazir Ali*, 25 C W N. 240 After the jury had retired to consider their verdict in a criminal case they saw the Judge in his chamber and asked him for a direction on a point of law The Judge and the jury then went into the Court room and the jury in the presence of the pleaders put certain questions to the Judge, and the answers thereto were recorded *Held* that the mere fact that a question was put by the jury to the Judge not in open Court but in chamber did not vitiate the trial, but was at best an irregularity—*Bilaschandra v Emp*, 27 C W N 626

301. When the jury have considered their verdict, the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority

926 Verdict—It is a dangerous thing for a Court to rely upon any thing except the verdict of the jury, or to listen to the deliberations of the jury, or to the statements of individual jurymen made to this or that person after they had performed their duty and delivered their verdict—44 Cal 723

The law does not prescribe any specific form in which the verdict is to be returned The jury may return their verdict in any form they think fit—14 W R 59

The jury can return a verdict for a lesser offence ignoring the graver charge, if the evidence before them does not warrant a verdict for the latter—3 W R 41 And the jury may do so even though the accused was not charged with the lesser offence—26 Mad 243 Thus, the jury can return a verdict for abetment or attempt though the prisoner was charged with the substantive offence only—16 Cr L J 676 (Bur). 13 O C 295 Where the charge against the accused was under sec 149 read alternatively with sec 325 I P C (he being members of an unlawful assembly, and causing grievous hurt by implication) a verdict of guilty of the offence under sec 325 I P C alone, although it did not form the

on two or more documents for the purpose of ascertaining whether the thumb impressions are of one and the same person—1 C L J 385. (5) the question whether the possession of the stolen property was recent enough to warrant a conviction for the substantive offence of larceny—26 Mad 467

Illustration (a) —Although Illustration (a) lays down that in a charge of murder the Judge should explain to the jury the distinction between murder and culpable homicide, still where in a trial for murder, a verdict for culpable homicide not amounting to murder could not be properly come to, under any aspect of the case before the Court, the Judge is not called upon to explain to the jury the distinction between murder and culpable homicide not amounting to murder—*Nga Mja v K E*, 8 L B R 306 (F B)

300. In cases tried by jury, after the Judge has finished his charge, the jury may retire to consider their verdict.

Except with the leave of the Court, no person other than a juror shall speak to, or hold any communication with, any member of such jury.

325 After a charge is made to the jury, the jury should not be allowed to disperse but should at once retire to consider the verdict. Where after the charge, they were allowed to go home and come back some hours later, and then they considered their verdict, *held* that the trial was vitiated—*Sariman v Emp*, 6 P L T 552 20 Cr L J. 861

This section, which is explicit in its terms, should be strictly observed and it is highly undesirable that a jury in any case should have any communication with any body (even the Judge) who is not a juror upon the subject matter of the trial. It is also highly undesirable that a Police constable should be stationed anywhere or in any position in which he can hear the deliberations of the jury men, or that anybody should be in a position where it is possible for him to know the form the deliberations of the jury took or what view any particular juror expressed about the matter—44 Cal 723. Where it was proved that after the charge to the jury had been delivered, a person other than a juror spoke to or held communication with a member of the jury without the leave of the Court, it was held that that was sufficient to upset the verdict, and it was not necessary to consider whether the irregularity had in fact prejudiced the accused—46 Cal 207. But where during an adjournment of the Court before the Judge's charge was finished, one of the jurors was seen conversing with strangers but it did not appear that the conversation was about the case, it was *held* that this was not a sufficient ground

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926. Verdict —It is a dangerous thing for a Court to rely upon anything except the verdict of the jury, or to listen to the deliberations of the jury, or to the statements of individual jurymen made to this or that person after they had performed their duty and delivered their verdict—44 Cal 723

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subject of a separate charge was legally sustainable—5 Cal 871 When a person is charged with several offences arising out of a single act or series of acts the word verdict means the entire verdict on all the charges and is not confined to a verdict on a particular charge—22 Cal 377 Where there are several accused, the jury have to give their verdict on the facts against each man severally, and even when several prisoners are jointly tried, the jury can convict one and acquit the others—16 C W N 909

By verdict should be understood the *collective opinion* of the jury as a body, arrived at after mutual consultation and ascertained and announced by the foreman In case of disagreement among the jury the *individual opinions* of the members are never intended to be disclosed—*Public Prosecutor v Abdul Hamid*, 36 Mad 585 If a Judge records the individual opinions of the jurors by name, the procedure is opposed to the fundamental principle of the scheme of trial by jury—*Jagannath v Emp* 12 O L J 643 2 O W N 534 26 Cr L J 1346 Where it was alleged that the verdict of the jury was arrived at by casting lots whereupon the Judge held an inquiry and examined the individual jurors held that the statements of the jurors as to what happened in the jury room and as to the mode in which the verdict was arrived at were inadmissible—40 Cal 693

Where after the delivery of the verdict the jury wants to say some thing more it is undesirable to stop the jury at such stage of the proceedings for it may happen that before the verdict is recorded the foreman may make some observations in respect of that verdict which may show the Judge that the jury have not properly understood the case It would then be the duty of the Judge not to record the verdict but to re charge the jury so as to lay the case properly before them—30 Cal 485 Where the jury were apparently not able to follow the summing up of the Judge as regards the law bearing on the charges it is the duty of the Judge when the foreman told him of it to explain it to them again—1911 M W N 190 There can be no valid verdict if the jury have not rightly understood the nature of the offence in question—21 W R 1

302 If the jury are not unanimous, the Judge may require them to retire for further consideration
Procedure where jury differ
 After such period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous

927 Application of section —Under this section the Sessions Judge can ask the jury if they are not unanimous to retire for further consideration before the delivery of verdict but cannot do so after its actual delivery—7 L B R 140 36 Mad 585

But if the verdict is not clear, the Judge may require them, after delivery of verdict, to consider it even though they be unanimous, since a verdict which is ambiguous or not clear cannot be received—1 W R 50

928 If the jury are not unanimous —A jury may be required to retire for further consideration, only when their verdict is not unanimous. An unanimous verdict of the jury, unless it is contrary to law, must be received by the Judge—3 Cal 871 7 W R 22, 3 L B R 75. If the jury is unanimous, and there is no ambiguity in the verdict, the Judge cannot require them to reconsider their verdict—19 Bom 735 ; 20 Bom 215. If the Sessions Judge disagrees with the unanimous verdict of the jury, the only course open to him is to act under sec 307—28 Bom 412

When the jury are not unanimous, it is open to the Judge to require them to retire for further consideration, giving at the same time further directions on matters of law—6 Bom L R 258. But the Judge is not bound to summon a fresh jury—1 W R 41.

303. (1) Unless otherwise ordered by the Court, the jury

Verdict to be given
on each charge.
Judge may question
jury.

shall return a verdict on all the charges on which the accused is tried and the Judge may ask them such questions as are necessary to ascertain what their verdict is

Questions and answers
to be recorded,

(2) Such questions and the answers to them shall be recorded.

929 Verdict on all the charges —The Judge ought to call upon the jury to return a verdict on each one of the heads of the charges. If the trial is for murder of two persons, and the jury return a verdict of guilty, the Sessions Judge should ascertain whether the verdict relates to the killing of one or the other or both—Ratanlal 746, 22 Cal 377

Where there are more than one accused as well as several charges, it would be a convenient course if the officer of the Court were to take a verdict of the jury upon each charge separately. Thus, in a case the accused were charged under sections 147, 148, 304, 326 and 325 I P C, and the Sessions Judge asked the jury the comprehensive question "I shall want you to give me a verdict in respect of the offences under sections 147, 148, 304, 326 and 325 I P C for each of the accused" and the jury returned an incomplete verdict, i.e. they gave a verdict only as regards sections 147 and 148 and expressed no opinion as regards the other charges; and the Sessions Judge had to question the jury again on the other charges. The High Court held the procedure to be sanctioned and directed that in such a case the officer of the Court should at first question to the jury "What is your verdict with regard to the accused as regards the charge under section 147 I. P. C.?"

then get a clear answer upon this charge. Then he would ask 'What is your verdict with regard to each of the accused as regards the charge under section 148?' He would then get a definite answer to that question. Then he would proceed on the same way and ask 'What is your verdict with regard to each of the accused as regards the charge under section 304?' and so on. If this procedure is adopted there would be no difficulty in getting a complete verdict from the jury—*Eran Khan v Emp* 50 Cal 658 (663)

If a Judge charges the jury and takes verdict as regards some only of the accused and afterwards hears arguments and takes verdict as regards the remaining accused he acts irregularly and contrary to the provisions of this Code—36 Mad 585

930 Questioning the jury.—The Judge is entitled to question the jury as to their verdict only where it is ambiguous or incomplete so that it is necessary to ascertain what the verdict really is—36 Mad 585 37 Cal 759 15 Bom 452 21 Cal 955 20 Bom 215 21 W R 1. If the verdict of the jury is incomplete or is not free from ambiguity the Judge is wrong in accepting such verdict without questioning the jury as to what their verdict really is. Thus where the jury returned a verdict of guilty but not voluntarily under a charge of *voluntarily* causing grievous hurt and the Judge accepted the verdict to be one of guilty and convicted the accused it was held that the verdict was really one of not guilty and the Judge was wrong without further questioning the jury in treating it as a verdict of guilty—12 C W N 530 see also 7 C W N 135. So also where in a case there were several accused and several charges under sections 147 148 304 325 and 326 I P C and the jury returned a verdict of guilty under see 147 against some of the accused and under section 148 against the rest but gave no verdict on the other charges held that the verdict of the jury was incomplete and it was necessary for the Sessions Judge to put further questions to the jury to ascertain what their verdict was as regards the charges under sections 304 35 and 326 I P C—*Eran Khan v Emperor* 50 Cal 658 *Ram Prasad v Emp* 26 Cr L J 1090 (Nag). In a case of rioting if the verdict of the jury leaves it uncertain what the common object of the assembly is the Judge ought to ask the jury questions under this section to ascertain the common object. If he does not do so the verdict is bad in law—21 Cal 955. Where in a case under see 408 I P C the jury returned a verdict of guilty but were not definite as to the amount embezzled but gave some approximate amount which was a fraction of the amount charged and where the Judge was inclined to think that a much larger amount than that mentioned by the jury had been misappropriated held that in a case like this the Judge was entitled to ask the jury such questions as were necessary to ascertain what their verdict was—*Ahrode v A E*

29 C W N 54 40 C L J 555 26 Cr L J 532 Where the verdict is general and complete and free from ambiguity the Judge is not competent to put questions to the jury but must accept it without question—9 Cal 53 Ratanlal 442 15 Bom 45* 28 Bom 412 2 A L J 475 *In re Ram Natcher* 22 M L J 355 21 Cr L J 829 (Cal) 27 C W N 626

When the jury have delivered a verdict the Judge cannot ask them to reconsider their verdict The Judge is only entitled to question the jury to ascertain what their verdict really is—36 Mad 585 4 Lah 382 7 L B R 140 If he disagrees with their verdict he should proceed under section 307 but he cannot ask them to reconsider their verdict—7 I B R 140

Object of questions —This section never contemplates that on ascertaining that the jury are not unanimous the Judge should make minute inquiries to learn the nature of the majority and its opinion so that he would have the opportunity of accepting or refusing that opinion as a verdict according as it coincides with his own opinion or not Whatever may have been the individual opinion of the Judge if he went so far as to ask the jury what was the exact majority and what was the opinion of the majority the Judge ought to receive that verdict without hesitation—10 Cal 140

Asking reasons for verdict —This section enables the Judge to ask only such questions as are necessary to ascertain what the verdict is Questions put to the jury demanding their *reasons* for the verdict (*i.e.* reasons for convicting or acquitting the accused) specially if the verdict is unanimous exceed the limits of questioning which the law contemplates in this section—6 Bom L R 258 20 W R 50 9 Cal 53 43 Mad 744 *In re Ram Natcher* 22 M L J 355 13 Cr L J 586 (Mad)

But a reference under section 307 does not become invalid by reason of the Sessions Judge having asked the jury questions as to the reason of their verdict—43 Mad 744 On the other hand he should ask reasons under certain circumstances See Note 937 under section 307

Questions and answers to be recorded —The questions put to and the answers given by the jury must be recorded in their exact words it is not enough if their substance only is recorded—8 Cal 739

304 When by accident or mistake a wrong verdict is delivered, the jury may before or immediately after it is recorded, amend the verdict and it shall stand as ultimately amended

931 By accident or mistake —This section contemplates cases where the verdict delivered is not in accordance with what was to be delivered by the jury, such mistake being the result of an acc

only But where the jury commits a mistake in understanding the law, and such mistake results in an erroneous verdict, it cannot be amended by the jury under this section but can be corrected only by the Judge disagreeing with the jury and referring the case under sec 307 to the High Court—28 Bom 412 So also where the jurors being misled by the notes of the foreman as to some of the evidence, delivered an erroneous verdict, such a verdict could not be said to have been delivered by accident or mistake and could not be amended by the jury under this section—22 M L J 355

After the witnesses for the prosecution and certain witnesses for the defence were examined the Judge addressed the jury and asked them to give their verdict The jury gave a verdict of guilty, thereupon the Judge proceeded with the examination of the remaining witnesses for the defence, and after it was done, he again summed up the case to the jury and asked them to reconsider their verdict in the light of additional evidence The jury again returned a verdict of guilty and the Judge passed sentence on the accused Held that the first verdict was illegal because the Judge had charged the jury before the examination of the defence witnesses was finished (sec 297) and the second verdict was illegal because section 304 empowers the jury only to amend a wrong verdict delivered by accident or mistake but does not empower them to reconsider a verdict in the light of additional evidence As soon as the first verdict was delivered (even though it was illegal) the jury became *functus officio* and they had no power to deliver a fresh verdict on further evidence taken The procedure was wholly illegal the conviction and sentence must be set aside and a new trial held—*Lyme v Crown* 4 Lah 382

Where the verdict of the jury is clear and there is no accident or mistake in delivering it, it is a proper verdict and cannot be amended under this section and a second verdict delivered by the jury after being questioned by the Judge cannot be allowed to stand as an amendment—Ratanlal 982, 19 Bom 735

Before or immediately after it is recorded —The power of amending a verdict provided by this section must be exercised before or immediately after it is recorded and cannot be exercised after the jurors have dispersed In a trial by jury the foreman announced the verdict of 'not guilty' as the unanimous verdict of the jury and the verdict was recorded and the prisoner acquitted From information received some days afterwards the Judge was led to believe that the jurors were not agreed as regards the verdict the Judge summoned the foreman and examined him on oath he deposed that the verdict given as the unanimous verdict was really the verdict of a majority and was given as the unanimous verdict owing to a misunderstanding that the opinion of the majority was binding upon all jurors It was held that the Court had no jurisdiction in conse

quence of the foreman's subsequent statement to set aside the verdict and the order of acquittal—1913 P R 6 (F B)

305 (1) When in a case tried before a High Court the jury are unanimous in their opinion, or when as many as six are of one opinion and the Judge agrees with them, the Judge shall give judgment in accordance with such opinion

Verdict in High Court
when to prevail

(2) When in any such case the jury are satisfied that they will not be unanimous, but six of them are of one opinion the foreman shall so inform the Judge

(3) If the Judge disagrees with the majority he shall at once discharge the jury

Discharge of jury in
other cases

(4) If there are not so many as six who agree in opinion, the Judge shall, after the lapse of such time as he thinks reasonable discharge the jury

Under subsection (3) if the jury are divided in the proportion of six to three the Judge should ascertain the verdict of the majority before discharging the jury. Where six of the jury agreed to a verdict and the presiding Judge without ascertaining what their verdict was discharged the jury and ordered a retrial and the retrial came before another Judge and another jury it was held that the previous Judge having improperly discharged the jury without ascertaining what their verdict was and whether he agreed or disagreed with the verdict of the majority the previous Judge had the legal seisin of the case and no other Judge could try it—8 C W N 21viii

306 (1) When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly

Verdict in Court of
Session when to
prevail

(2) If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall, *unless he proceeds in accordance with the provisions of Section 562* pass sentence on him according to law.

The italicised words have been added by section 80 of the Cr P

Amendment Act XVIII of 1923 The amendment is merely verbal and is the same as that made in sections 245 (2) and 258 (2)

932 When the verdict of the jury has been delivered the Sessions Judge is bound to say and record whether he agrees with the verdict or not—7 W R 6 15 W R 46 It is not competent to a Sessions Judge after the jury has returned their verdict and gone away and in the absence of the accused to examine some witnesses and then to act on the evidence in determining whether or not he should differ from the jury—7 Bom L R 979 If he agrees with and accepts the verdict of the jury (or of the majority) he is bound to deliver judgment according to the verdict once he agrees with the verdict he cannot afterwards reconsider it or disagree with it and refer the matter to the High Court—4 C W N 683

Acquittal —As soon as the judgment of acquittal is pronounced the prisoner is entitled to be discharged from custody (if there is no other charge pending against him) and his further detention is illegal It is for the jail authorities in whose custody the prisoner was to satisfy themselves of the result of the trial and no formal warrant of release by the Court to the jail authorities is necessary—5 M H C R App 2

Sentence —If the verdict of the jury is one of guilty it is the duty of the Judge to pass an adequate sentence for the offence for which the jury have convicted the prisoner and the fact that the Judge has differed from the jury cannot be a ground for passing a light sentence In doing he usurps the functions of the jury—3 W R (Cr Let) 16 He cannot if he likes release the accused on taking bond under section 562

307 (1) If in any such case the Judge disagrees with the

Procedure where verdict of the jurors or of a majority of the jurors, on all or any of the charges of which any accused person has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed, and in such case, if the accused is further charged under the provisions of Section 310, shall proceed to try him on such charge, as if such verdict has been one of conviction

(2) Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried

but he may either remand *such* accused to custody or admit him to bail

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal and subject thereto it shall after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury acquit or convict *such* accused of any offence of which the jury could have convicted him upon the charge framed and placed before it and if it convicts him may pass such sentence as might have been passed by the Court of Session

Change —This section has been amended by sec 81 of the Criminal Procedure Code Amendment Act XVIII of 1923. The main changes are the following —*first* in subsection (1) the words any accused person have been substituted for the words the accused and the words in respect of such accused person have been added in subsection (2) and (3) the words *such* accused have been substituted for the words the accused. The reasons are thus stated. This amendment prescribes that when a Judge accepts the verdict of the jury in respect of some of the accused but not of others he need only refer the case of the latter to the High Court. —*Statement of Objects and Reasons* (1914)

Secondly the italicised words at the end of subsection (1) have also been newly added. We think however that a further amendment is required in section 307 to provide for the case of a person who is also charged with a previous conviction under section 310. It seems obvious that if the Judge disagrees with the verdict of the jury on the principal charge and submits the case to the High Court it is desirable that the record should be complete. We propose therefore to insert at the end of section 307 (1) a provision for the trial of the further charge under section 310. —*Report of the Select Committee of 1916*. Under the old law it was held that if a case was referred to the High Court under sec 307 there was no conviction or acquittal in the Court of Session. It was the High Court which could convict or acquit the accused and it was only after such conviction by the High Court that the accused could be asked under sec 310 to plead to a previous conviction—30 Mad 134. Under the present amendment provision is made for trial as to the charge of previous conviction in the Sessions Court itself.

933 Scope of Section —*Assessor case tried with jury* —Where the Sessions Judge tried the accused with jury for an offence triable by jury and with the jurors as assessors for an offence triable with assessors.

and differing from them in their verdict and opinion referred both matters to the High Court it was held that as to the matter triable with assessors the Judge should not have included it in the reference but should have disposed of it according to law—8 Bom L R 599 9 Bom L R 1057, Ratanlal 600 *In re Kambala Narayana* 36 M I J 452 But if the Judge tries the assessor case with the aid of the jurors as *jurors* and not as *assessors* and disagrees with their *verdict* (not opinion), he can refer the case to the High Court—23 Bom 696 25 Cal 555

Who can refer—The reference under this section must be made by the Judge who held the trial and heard the evidence and not by the officer who succeeds him as Judge—2 C L J 48 But see section 559

High Court—Since the High Court in this section does not include a Judicial Commissioner's Court (see sec 266) a Judge of the Judicial Commissioner's Court of Sind sitting in Sessions has no power to differ from the verdict of the jury and refer this case under this section to the J C Court in its High Court jurisdiction—*K E v Mithoo* 25 Cr L J 428 A I R 1925 Sind 34

934 *Disagreement*—The Judge can refer the case to the High Court if he disagrees with the verdict of the jury If he once *accepts* the verdict he cannot subsequently reconsider it, and disagreeing with the verdict refer the case to the High Court—4 C W N 683 The disagreement may be on questions of law as well as of fact—20 W R 1

It is not in every case of doubt nor in every case in which the Judge entertains a view different from that of the jury that a reference can be made under this section but the verdict of the jury must be manifestly wrong before such reference can be made—*Emp v Swarnamoyee*, 41 Cal 621 Where the jury misunderstands the law as explained by the Judge and delivers a wrong verdict the Judge should refer the case to the High Court under this section and not ask the jury to reconsider their verdict—28 Bom 412

Where the Judge in his direction to the jury himself expressed the opinion that the prosecution evidence was open to hostile criticism and the jury regarding the evidence with suspicion delivered a verdict of not guilty the Judge was not justified in referring the case to the High Court because there could not be said to have been a disagreement between the Judge and the jury but rather agreement—7 C W N 135

A reference should not be made where the disagreement between the Judge and the jury is merely on a technical point of law Thus where the Judge considered the offence to be under sec 366 I P C but left to the jury to decide whether the offence was under sec 363 or sec 361 I P C and the jury found that the offence was under sec 363 I P C, held that there was only a technical difference between the two sections,

and the Judge should in view of his own summing up have accepted the verdict of the jury and should not have made a reference to the High Court—*Emp v Ah Raza* 28 O C 69 26 Cr L J 310

A reference can be made to the High Court only on the ground of disagreement between the Judge and the jury and on *no other grounds*. Where the jury returned a verdict of not guilty the mere fact that in a similar case upon similar evidence the High Court had convicted some other persons is no ground for referring the case to the High Court—6 Bom L R 599

935 Necessary for the ends of justice —This section leaves the referring of a case to the High Court entirely to the discretion of the Judge for it is only where he disagrees with the verdict of the jury so completely that he considers it *necessary for the ends of justice* to submit the case to the High Court that he should do so. This discretion should however always be exercised when the Judge thinks that the verdict is not supported by evidence. It is the only way in which the miscarriage of justice by a perverse verdict of a jury can be remedied by the High Court—13 Mad 343 *Saroda Charan v Emp* 41 C L J 370 26 Cr L J 1006. When the Judge points out to the jury the weak links in the prosecution and they do not consider them it is proper for the Judge to refer the case to the High Court because such a reference is really necessary for the ends of justice—9 C L J 432

A reference should be made under this section when the Judge is clearly of opinion that such a reference is necessary for the ends of justice—25 Cal 555 that is when the disagreement between the Judge and the jury is such a complete dissent as to lead the Judge to consider it necessary for the ends of justice to submit the case to the High Court—2 Bom 525 20 Bom 215. The mere fact that the Sessions Judge does not agree with the unanimous verdict of the jury does not make it obligatory on the Sessions Judge to make a reference to the High Court. Section 307 clearly gives to the Sessions Judge a *discretion* in the matter and it is only when he is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court that he shall so submit it. If he is not clearly of that opinion his failure to submit the case is not a subject for interference by the High Court—*Eran Khan v Emperor* 50 Cal 658. Where a Sessions Judge made a reference on the ground that the question involved was a matter of importance but he did not state that it was necessary for the ends of justice to submit the case to the High Court or that he disagreed with the verdict of the jury the High Court sent back the case, directing the Judge to make a proper reference should he think it necessary for the ends of justice to do so—9 C W N 1xvi

It is no longer the law that before making a reference the Judge must be satisfied that the verdict is *perverse*. It is sufficient that he should

clearly of opinion that a reference is necessary for the ends of justice — *Ismail v Emp* 23 C W N 747 *Saroda Charan v Emp* 41 C L J 320 26 Cr L J 1006

936 Submit the case — *Whether whole case should be referred* — It is not intended that when the Sessions Judge is not prepared to accept the verdict of the jury in its entirety but is prepared to accept it as regards some of the accused the *whole* case is to be referred to the High Court Where the Judge agrees with the jury in respect of a particular accused the Judge ought to convict or acquit him as the case may be and it is only with reference to those accused in respect of whom he declines to accept the verdict of the jury that he should make the reference—42 Cal 789 This is now expressly made clear by the present amendment But where the disagreement between the Judge and the jury is as to some of the charges it is necessary that the whole case should be referred When the accused was tried on several charges and the Sessions Judge accepted the verdict of the jury as to some and disagreed as to the other charges and referred the case to the High Court only as to these latter it was held that by this limited form of reference the High Court was precluded from considering the entire evidence on record and that the Sessions Judge should have referred the whole case leaving it to the High Court to consider the whole of the evidence that was placed before the jury — *K E v Ananda Charan* 21 C W N 435

Recording the grounds of his opinion — In referring the case under this section the Sessions Judge should state what material portions of the evidence he believes to be true and his reasons for arriving at his conclusions so as to enable the High Court to appreciate them and to give due weight to them—*K E v Punit* 3 P L T 413 6 Bom L R 519 Where the Judge merely said that the verdict was against the weight of evidence and expressed no other opinion in his reference it was held that he ought to have set out on what portions of the evidence or on what facts the accused should have been convicted—7 C W N 345 So also where the Sessions Judge merely stated in his reference that the verdict of the jury was erroneous and inconsistent and could not be accepted and that if the evidence had been believed all the accused should have been found guilty held that the reference was not a proper reference as it did not state the grounds of his opinion The reference should be so complete and self contained that it ought not to be necessary to refer to the order sheet—25 C W N 682 He should state with some fulness his view of the evidence and the credibility of the more important witnesses because the High Court has to attach more or less weight to the opinion of the Judge who saw and heard the witnesses—10 Bom L R 173

Reflections on jurors — The reference of the Sessions Judge should not contain any extra judicial observations e g any reflections on the

conduct of the jurors which are not supported by any material on the record. The 'opinion' of the Sessions Judge is his opinion on the merits of the case and does not include his speculations as to the conduct of jurors. Such an imputation is not fair to the jurors—*Emp v Dhananjay* 51 Cal 347 (350 351) 38 C L J 384 *Mamfru v Emp* 51 Cal 418 (430) 38 C L J 397. It would be most unfortunate if persons of respectability called upon to discharge the responsible duty of jurors were exposed to the risk of aspersions upon their conduct. If the Judge disagrees with the verdict of the jury it is open to him to do so and to refer the case to the High Court if he is clearly of opinion that such a course is necessary for the ends of justice but this does not require that he should make reflections upon the conduct of the jurors which are not supported by evidence on the record. Such an imputation is unfair to the jurors unfair to the Judge himself unfair to the accused and unfair to the High Court also—*Mamfru v Emp* 51 Cal 418 (429 431) 38 C L J 397.

Recording evidence —The Judge should state in his reference the evidence for the prosecution and for the defence the facts which in his opinion are proved upon the evidence recorded in the case and the conclusions to which these facts led him—6 Bom L R 599.

Stating the offence —In case of an acquittal by the jury the Sessions Judge should state in his reference what offence the accused has in his opinion committed and on what grounds he differs from the jury—10 Bom L R 173 3 Cal 623 25 C W N 682.

If Judge refuses to refer —Where a jury convicted the accused against the opinion and advice of the Sessions Judge and the latter declined to refer the case to the High Court under this section it was held on appeal by the accused that the High Court had no power to interfere however wrong or absurd the verdict might have been in as much as there was no misdirection by the Sessions Judge and as there was evidence against the accused which was open to the jury to believe—14 Mad 36 4 M L T 483.

Notice to accused —Where the Judge differed from the verdict of the jury and made a reference under this section the High Court before proceeding with the case gave notice to the accused as in appeal to bring forward any objections to the Sessions Judge's recommendations—19 W R 38.

937 *Opinion of the jury* —The opinion of the jury in subsec (3) means nothing more than the verdict of the jury it does not mean the reasons on which the verdict is founded—36 Cal 629 *Emp v Tarapada* 18 C W N 615 *Emp v Dhananjay* 51 Cal 347 (352) 38 C L J 384, 3 P L T 413 29 Mad 91. What the Judge has to record in his reference is the conclusion (i.e. verdict) of the jury and not the reasons on which that

conclusion is based And the circumstance that no such reason has been ascertained does not warrant the High Court to decline to go into the evidence and arrive at its own judgment as to the guilt or innocence of the accused—29 Mad 91 But the Judge should do well to take the reasons of the jury for the view taken by them, especially when there is some inconsistency in their verdict—36 Cal 629, 6 P. L. J. 264 Even where the jury are unanimous in their verdict, the Judge should ask for specific findings on the particular facts on which he himself relies This would enable the High Court to understand the particular grounds on which the jury proceeded, and it will then only be necessary to consider the propriety of those grounds—2 Weir 388 Where in a trial by jury the case depends entirely on circumstantial evidence, and the jurors are divided in opinion, the Judge ought, if he intends to make a reference to the High Court under this section, to ascertain from the jurors the reasons for their opinion—1 P. L. T. 657, *K. E. v. Punt*, 3 P. L. T. 413.

938. When High Court will interfere —The High Court will exercise its discretionary powers with great caution and care The mere fact that upon a consideration of all the evidence before the Sessions Court the High Court would have arrived at a conclusion different from that arrived at by the jury, would not justify the High Court in interfering with their unanimous verdict—*Emp v Chirkua* 2 A. L. J. 475 *Emp v Nriha Gopal*, 38 C. L. J. 1 *Emp v Panna Lal*, 46 All 265 (267) *Emp v Ali Hyder*, 4 P. L. T. 425 The High Court upon a reference under this section is reluctant to interfere with the unanimous verdict of a jury and if that verdict is honest and not unreasonable and can upon the evidence be supported, the High Court will accept the verdict even though it may not wholly agree therewith—*K. E. v. Pramathanath*, 30 C. L. J. 503. *Emp v Premananda*, 52 Cal 987 29 C. W. N. 738; 42 C. L. J. 247; *Emp v Panna Lal*, 46 All 265 (268) The High Court which has not the opportunity to see the witnesses must act with great caution on a reference under this section, and therefore it will not ordinarily interfere with the unanimous verdict of the jury, which has been accepted by the Judge with regard to some of the accused—*Emp. v Akbar*, 51 Cal 271 (277) If the High Court is to interfere in every case of doubt, or in every case in which the evidence would have warranted a different verdict, then the real trial by jury would be at an end and the verdict of the jury would have no more weight than the opinions of assessors—*Q. v Sham Bagdi*, 20 W. R. 73

The High Court will not exercise its vast discretionary powers vested under this section in setting aside the unanimous verdict of a jury, unless it is perverse or patently wrong or may have been induced by an error of the Judge—*Emp v Dhunum*, 9 Cal 53; *Rig v Khanderav*, 1 Bom. 10 (13). *Emp v Panna Lal*, 46 All 265 (267); 22 A. L. J. 162; *Q. E. v.*

McCarthy, 9 All 420, 2 C L R 518 10 Bom 497. 15 Bom 452, 20 Bom 215, *Emp v Walker*, 26 Bom L R 610 26 Cr L J 211, *Emp. v Aritya Gopal*, 38 C L J 1, 11 Cal 85, *Ashgar v K. E.*, 22 C W N 811, *Emp v Sagarmal*, 28 C W N 947 40 C L J 135 The High Court has to give due weight to the opinion of the Sessions Judge and to the opinion (verdict) of the jury The measure of the relative weight to be attached to these two factors cannot be crystallised into an inflexible formula. The answer must depend upon the circumstances of each case But the trend of judicial opinion has been in favour of preference of the unanimous verdict of the jury If the verdict is not unanimous, the weight to be attached to it is necessarily diminished but if the verdict is unanimous, the High Court should not interfere with it unless it is clearly wrong—*Emp v Dhananjay*, 51 Cal 347 (353) *Emp v Jamalddi*, 51 Cal 160 (165) 28 C W N 536 25 Cr L J 1000 Although the High Court has very full powers under Section 307 to reopen all matters in connection with the verdict of the jury it does not follow that the High Court should feel justified in using those powers to the full If the verdict of the jury is unanimous and is neither perverse nor clearly and manifestly wrong the High Court should not reopen the matter *ab initio* and proceed to try it *de novo* For, if the case is reopened *ab initio*, it is difficult to see what useful function is performed by a jury—*Emp v Panna Lal*, 46 All 265 (267) 22 A L J 162 25 Cr L J 981 The High Court will not interfere upon any mere preponderance of evidence unless it is satisfied beyond reasonable doubt that the verdict is so distinctly against the evidence that it may be termed a perverse verdict—2 Weir 388, 22 C W N 811 *Emp v Mofizul* 29 C W N 842 26 Cr L J 1298, or unless it were established that the jury were wholly miscarried in their conclusion upon the case—*Q v Ram Churn* 20 W R 33 or unless the guilt of the accused is proved beyond reasonable doubt—22 C W N 1028 The High Court will not disturb the unanimous verdict of acquittal in a case where there is a substantial gap in the chain of evidence—*K E v Sukhu Bewa* 38 C L J 155 In dealing with an unanimous verdict of acquittal the High Court will have to consider whether the jury were entirely unreasonable in giving the benefit of doubt to the accused, and whether it was impossible for the jury to arrive at any other reasonable conclusion than that the guilt of the accused had been brought home to them—*Emp v Golam Kadir*, 28 C W N 876 25 Cr L J 1284

Where in a criminal trial the jury found the accused not guilty, and on being asked by the Judge to give reasons for their verdict they said that they gave the benefit of doubt and could give no other reason held that from the mere fact that the jury were unable to give their reasons beyond saying that they gave the accused the benefit of doubt, it could not be said that the jury had no adequate reasons for returning a verdict

of not guilty, and that the verdict was wrong, and the High Court would not interfere with the verdict. Even trained intellects often find it difficult to formulate and put before the Court the reasons for an opinion which they hold or which they wish to propound—*Emp v Nishi Kantu*, 41 C L J. 35 26 Cr L J 805 A I R 1925 Cal 525

939 Power of High Court.—In case of a reference under this section the High Court is to give due weight not only to the opinion of the jury but to that of the Judge as well—*Emp v Neamatulla*, 17 C W N. 1077, 6 P. L. J. 264, 3 P. L. T 413, 41 Cal 754, 29 Cal 128, 15 Cal 269. But although the High Court is bound in dealing with a reference under this section to give due weight to the opinions of the Judge and the jury, still it is not bound in any way by these opinions, and the question whether the decision in the case is to be for acquittal or for conviction is entirely open to the High Court and left open to it to decide after consideration of the evidence and the opinions of the Judge and the jury—*In re Nanni Audumbani*, 45 M L J 406 25 Cr L J 145, 11 C W N 715, 15 Bom 452, 36 Cal 629 9 C L J 432. When once a reference is made to the High Court, the language of the Code does not justify any undue preference being given to the opinion of the jury over that of the Judge. The High Court has to weigh both the opinions and consider the entire evidence on the record just as it would consider in any other criminal matter coming before it for decision—*K E v Ramoharan*, 27 O C 29 11 O L J. 210 25 Cr L J 785. The whole case is open to the High Court when hearing a reference, and in dealing with the reference the High Court exercises all the powers which it exercises on appeal—*Emperor v. Shankar Balkrishna*, 47 Bom 31 (32).

The High Court cannot consider any question on which the Judge and the jury are agreed—41 Cal 662. So also, the High Court cannot consider any question on which the Judge had accepted the verdict of the jury, although he did not agree with them—*Emperor v. Profulla*, 50 Cal 41. Although the High Court can consider the entire evidence, still it should not ignore the verdict of the jury on a question of fact. Unless there is an astounding reason for it, the verdict of the jury on a question of fact will not be set aside. The mere fact that another view of the evidence might be taken is not enough—*K. E v Punil Chaitan*, 3 P L T 413.

Power to convict for offence not charged—Ordinarily the High Court cannot convict the accused for any offence with which he was not charged—41 Cal 662. But the combined effect of this section read with sec 238 is that the High Court may, in dealing with a case coming before it under this section, convict an accused for a *minor* offence, although he was not charged with such offence—22 Cal 1006. And a Sessions Judge accepting the jury's finding on the graver charges can make a reference to the High

Court with the object of having some of the accused convicted on minor charges—*Emp. v Hari*, 37 C L J 34 But where in a case of offence under sec 147 I P C the common object assigned in the charge as framed to support the case has not been sustained the High Court on a reference under sec 307 of this Code cannot invent another common object in order to support the conviction—*Emp v Akbar*, 51 Cal 271 (275)

939A An appeal from High Court —A High Court in dealing with a reference under this section is not acting in the exercise of its original criminal jurisdiction but only as a Court of reference in a criminal matter—29 Cal 286, and therefore no appeal lies from its own judgment passed under this section—*Ratanlal* 691

Trial when ends —When a case is referred to under this section the trial cannot be deemed to be concluded until the High Court either convicts or acquits the prisoner—9 All 420

G—Retrial of Accused after Discharge of Jury.

308 Whenever the jury is discharged, the accused shall be detained in custody or on bail (as the case may be), and shall be tried by another jury unless the Judge considers that he should not be re tried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal

940 If a jury is discharged in the course of a trial for misconduct the Judge should hold a fresh trial before another jury newly empanelled—*Rahim Sheshh v Emperor* 50 Cal 872 (cited under sec 282)

This section does not affect the construction of sec 403 An accused who is re tried under this section is not *tried again* within the meaning of sec 403 but is being tried on the original indictment and on his original plea of not guilty Sec 403 therefore does not bar the retrial held under this section—*Emp v Normal* 41 Cal 1072

H—Conclusion of Trial in Cases tried with Assessors.

309 (1) When in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence and shall then require each of the assessors to state his opinion orally on all the charges on which the accused

Delivery of opinions
of assessors

has been tried, and shall record such opinion, and for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are. All such questions and the answers to them shall be recorded

(3) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

Judgment

(3) If the accused is convicted, the Judge shall, *unless he proceeds in accordance with the provisions of Section 562*, pass sentence on him according to law.

Change —This section has been amended by sec. 82 of the Criminal Procedure Code Amendment Act, XVIII of 1923. The following changes have been made —(1) The italicised words have been newly added in sub section (1). This amendment assimilates the procedure by which assessors give their opinion to that adopted for ascertaining the verdict of the jury, namely by question and answer —*Statement of Objects and Reasons* (1914). (2) The italicised words have been added in subsection (3). This amendment is merely verbal, and is the same as that made in sec. 306 (2).

941. Summing up —The object of summing-up the evidence is to enable the Sessions Judge, in long and intricate cases, to place the evidence in an intelligible form, so as to assist the assessors in arriving at a reasonable conclusion, and not to give the Judge an opportunity of expressing his opinion in emphatic terms on every single matter put in evidence—9 Cal 875. In summing up the evidence to the assessors, the Judge should not, as he may do in charging the jury, *express any opinion* upon any question of facts arising in the case—24 Mad 523, 22 Cal 805. He should not obtrude on the assessors his own opinion on the worthlessness or other wise of the evidence, because the assessors might become embarrassed in coming to an independent opinion of their own in the face of the very decided opinion expressed by him—9 Cal 875. But a discussion and statement of points by a Judge with the assessors with the object of getting the best assistance for the proper adjudication of the case are not improper, as the real object of appointing assessors is to assist the Court—15 W. R. 25. In a case of rioting where the dispute arises over the possession of a piece of land and the Crown admits the possession of the accused, and the accused themselves urge the plea of private defence, it is the duty of the Sessions Judge to explain to the assessors the legal aspect of the plea put forward by the accused, and to direct their attention to it by putting specific questions to them on the point—*Sunder Bahsh v. Emp.*, 3 P. L. J. 653 19 Cr. L. J. 983.

Record of summing up —The Sessions Judge should not ask the *pleader for the prosecution* to record his summing up to the assessors. If the Judge himself is incapable of recording the heads of the summing up, he should avail himself of the services of some Court Officer or direct it to be done by some independent person—9 Cal 875.

942. *Opinions of assessors* —A trial is altogether bad if the assessors are not asked and are apparently not allowed to give their opinions in the case—40 Cal 163. If a Sessions Judge decides a case without inviting the opinions of the assessors, he virtually holds the trial without the aid of assessors, and his finding or sentence will be without jurisdiction—22 W. R. 34, 24 Mad 523 (535). Even if he considers the evidence untrustworthy or unsatisfactory or inconsistent, he is bound to consult the opinions of the assessors, otherwise he acts without jurisdiction—10 All, 414. Where in a Sessions trial the accused first pleaded not guilty, but in the course of her examination after the completion of the prosecution evidence, she pleaded guilty, and thereupon the Judge without taking the opinions of the assessors found her guilty and sentenced her, *held* that it was the duty of the Judge to proceed with the trial as provided by this section and hear the defence and then take the opinions of the assessors—7 Bom L. R. 731. Where a trial was held for two offences, one with jury and the other with the jurors as assessors, and with regard to the latter offence the Judge convicted the accused without taking the opinions of the jurors as assessors, the conviction was held to be bad—2 Weir 334.

'The opinions of the assessors should be recorded separately. It is not, in the Court's opinion, sufficient that this record should contain a mere verdict of guilty or not guilty, or proven or not proven. What the Court requires is not only the result arrived at by each assessor sitting on a Sessions trial, but if possible, the reasons by which each assessor arrived at the result—that is, the grounds of his opinion. While avoiding prolixity, a Sessions Judge should be careful to be intelligible and precise in recording such opinions'—Cal G. R. & C. O., p. 26.

The opinions of *all* the assessors should be taken. Where the Judge took the opinions of two only of the assessors, the trial was illegal and not merely irregular—26 Mad 398. The opinion of each assessor is to be recorded in his own words—*Fatu Santal v K E*, 6 P. L. J. 147. Each assessor should be required to state his opinion *individually*. The Judge should not receive the *joint* opinion of all the assessors, delivered through one of them—9 Cal 875, 1887 P. R. 41.

Where the accused is being tried on several charges, the assessors shall be required to give their opinions on *each* of the charges—22 W. R. 34. This is now made clear by the present amendment.

The assessors are to give their opinions *orally*, and not in writing, or in the form of a judgment—39 Cal 119.

Consultation between assessors —There is no provision in this Code authorizing a Judge to allow or forbidding him to allow consultation between the assessors aiding him in trying a case. Though a Judge may allow one assessor to consult his co-assessors before giving his opinion yet a refusal to allow such a course does not amount to any irregularity and the Judge is entitled to have before him each assessor's individual and independent opinion—2 L. W. 933

Grounds of opinion —It is very desirable that the assessors should be invited and encouraged by Judges to state briefly the grounds of their opinions as well as the result—2 Bom. L. R. 322 2 Bom. L. R. 373. Assessors are appointed to aid the Judge in the trial and to give their opinions. When the opinion formed by the Judge differs from the opinions formed by the assessors he should always ascertain the grounds of the assessors' opinions—3 W. R. 6 3 W. R. 21 1905 P. R. 48

When opinion may be dispensed with —When there is absolutely no evidence to show that the offence has been committed by the accused the Judge can abstain from taking the opinions of the assessors—2 Weir 388 See sec. 289. But the Judge cannot do so simply because he considers the evidence unsatisfactory or untrustworthy—10 All. 414. When the case is withdrawn by the Public Prosecutor with the consent of the Court an acquittal should be recorded without taking the opinions of the assessors or whatever may be their opinions—Ratanlal 307

Reconsidering opinion —After once summing up the case to the assessors and after taking their opinions the Judge has no power to reopen the matter and press upon the attention of the assessors a part of the accused's confession in order to induce them to change their opinions—1886 A. W. N. 22

Taking fresh evidence after opinion —When the opinions of the assessors have been taken the trial is at an end except for the purpose of giving judgment. The Judge has no legal authority to reopen a trial or recall witnesses and cause fresh evidence to be summoned and take a second and third opinion from the assessors—1888 P. R. 29 15 All. 136. Where after the assessors had given their opinions and had been discharged the Judge sitting alone took some further evidence in the case before writing judgment the trial was held to be illegal and was set aside—43 All. 25. It is the Judge together with the assessors that constitutes the Court and not the Judge sitting alone and all evidence must be recorded by the Judge in the presence of the assessors—*Ibid*. In a trial for murder in which the soundness of the accused's mind was at issue the Judge after taking the opinions of the assessors reserved judgment and had a private interview with the Civil Surgeon as to the state of mind of the accused. It was held that the procedure was extremely illegal. Instead of discussing with the Civil Surgeon out of Court the Judge ought to

have examined him as a witness in the presence of the assessors, and the accused ought to have been given an opportunity of cross examining him—1889 A. W. N. 181.

943. Questions to assessors —Prior to the present amendment, the section did not expressly authorise the Judge to put any questions to the assessors, but it was laid down in some cases that if there was anything obscure in their opinions it was open to the Judge to put to them such questions as were necessary to elucidate or supplement their opinions—40 Cal. 163, 41 Cal. 350 This is now expressly provided by the present section as amended. But the questions can be asked only *after* the delivery of the opinion and not before, and for no other purpose except to clear up any obscurity in the verdict. The Judge cannot put questions to the assessors by way of cross examination—40 Cal. 163, 41 Cal. 350.

944. Judgment —In passing judgment the Judge is not bound to conform to the opinions of the assessors. Although the assessors no doubt assist the Judge and regard must be paid to their opinions, 24 Mad. 523, still it is the Judge who has to decide the case on the facts as well as the law, and he is not bound by the assessors' opinions—*Emp v Shanker*, 14 Bom L R 710. But the Judge cannot convict the accused for an offence in respect of which the opinions of the assessors were not taken. Thus, the accused was charged with and tried for abetment of murder. The opinion of the assessors was that he was not guilty of the offence charged. The Sessions Judge accepted the opinion, but convicted the accused of causing evidence of murder to disappear under sec 201 I P C. *Held* that it was imperative on the Judge to have taken the opinions of the assessors on the charge relating to sec 201 I P C. The conviction and sentence must be set aside—*Emp v Appayya*, 25 Bom L R 1318.

The Judge should form his opinion on the evidence at the trial, and not merely upon the views of the committing Magistrate—22 Cal. 805.

The judgment must be recorded. But failure to record judgment does not invalidate the trial, but is only an irregularity curable by sec 537—2 Weir 397.

The judgment must contain all the particulars specified in sec 367, even though the trial is held with the aid of jurors as assessors. A reference to the heads of the charges to the jury is not sufficient—Ratanlal 426.

The judgment must be recorded by the Judge who held the trial. Where after the assessors had given their opinions, the Judge left the district without recording his judgment, and his successor, after considering the evidence recorded at the trial, convicted and sentenced the accused, the conviction was set aside and a retrial ordered—21 W R 47.

Cancellation of trial.—The accused were committed to the Sessions on a certain charge. At the commencement of the trial, two more charg

were added. The trial then proceeded up to the point where the assessors' opinions were taken. The Judge reserved judgment but in writing it he was of opinion that one of the charges was improperly added and he therefore cancelled the trial and held a fresh trial. It was held that the second trial was invalid because the trial Judge had no authority to cancel or set aside the trial which had been originally held and the assessors' opinions having been recorded he had no option but to give his judgment in accordance with this section—*Emp v Nathu* 17 Bom L R 1074

I—Procedure in Case of Previous Conviction

310 *In the case of a trial by a jury or with the aid of assessors, when the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, the procedure prescribed by the foregoing provisions of this Chapter shall be modified as follows, namely—*

- (a) *Such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution, or any evidence adduced thereon, unless and until—*
 - (i) *he has been convicted of the subsequent offence, or*
 - (ii) *the jury have delivered their verdict, or the opinions of the assessors have been recorded on the charge of the subsequent offence*
- (b) *In the case of a trial held with the aid of assessors the Court may, in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction*

Change—The whole section has been redrafted by the Cr P C Amendment Act XVIII of 1923. The old section stood as follows—

310 *In the case of a trial by jury or with the aid of assessors where the accused is charged with an offence committed after previous conviction for any offence the procedure laid down in sections 271, 286, 305, 306 and 309 shall be modified as follows*

- (a) *The part of the charge stating the previous conviction shall not be read out in Court nor shall the accused be asked*

whether he has been previously convicted as alleged in the charge, unless and until he has either pleaded guilty to, or been convicted of the subsequent offence

(b) If he pleads guilty to, or is convicted of, the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the charge

(c) If he answers that he has been so previously convicted, the Judge may proceed to pass sentence on him accordingly, but, if he denies that he has been so previously convicted, or refuses to or does not, answer such question, the jury or the Court and the assessors (as the case may be) shall then hear evidence concerning such previous conviction, and in such case (where the trial is by jury), it shall not be necessary to swear the jurors again "

It should be noted that clause (b) of the present section is entirely new. This clause has been added in order to avoid the inconvenience which may at present arise in cases tried by assessors whose opinion is not binding on the Judge. Under the amendment in any trial held with the aid of assessors the Court is given a discretion to proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction—*Statement of Objects and Reasons* (1914)

945 Scope and object of section.—This section applies to trials before a Court of Session and not to trials before a Magistrate—50 Cal 367. The law as to the taking of evidence of previous conviction in a trial before a Magistrate has been enacted in the new section 255A.

The object of this section in prohibiting the proof of previous conviction to be put in until the accused is convicted, is to prevent the accused from being prejudiced at the trial—*Maung E Gyi v Emp*, 1 Rang 520. Therefore, where in the course of a trial a witness was allowed to say that he had heard that the accused was an old offender the verdict was set aside, because the improper statement of the witness might have influenced the verdict of the jury—1890 A W N. 12. Where the charge in regard to the previous convictions and the portion of the statement of the accused before the committing Magistrate admitting such previous convictions were read to the assessors before the conclusion of the trial for the substantive offence, the trial was vitiated—*Teka Ahir v King Emp*, 5 P L. J 706. A Judge's direction to the jury to consider proof of previous conviction as evidence regarding the character of the prisoner amounts to a misdirection—5 Cal 768. But where no failure of justice was caused i.e. where the accused was not prejudiced (e.g. in a *prima facie* case theft), the High Court refused to interfere in a case in which the

was called upon to plead simultaneously to a charge of theft and previous conviction—13 C L R 110

946 Previous conviction—The previous conviction referred to in this section must be a conviction within British India. A conviction outside British India (e g in Berar) does not fall within the purview of this section and cannot be taken into account for the purpose of affecting the punishment on a second conviction in British India. But it is not absolutely improper however to take such conviction into consideration—7 C P L R 24

The charge alleging the previous conviction need not show the amount of the former punishment—4 M H C R App 11

When previous conviction can be proved—It is most essential that the rules laid down in this section should be followed with precision and regularity and close attention—1890 A W N 12 and proof of previous conviction should be put in only after the trial is concluded—3 W R 38 1886 A W N 47 The jury ought to be informed that the accused is charged with previous conviction only after their verdict is taken and never before—2 Weir 393 And the record should invariably show that no reference to previous conviction has been made until the subsequent offence has been found proved against the accused—12 C L R 555

How to prove—If the accused admits that he had been previously convicted the Judge is justified under this section in passing sentence upon such admission—28 Cal 689 1916 M W N 327 especially when the Magistrate passes a sentence which is legal even without proof of the previous conviction—1916 M W N 327 But if he does not plead to the charge of previous conviction it cannot be proved by an extract from the record of previous conviction without proof of identity—2 Weir 393 15 W R 53 See also notes under section 511

311 Notwithstanding anything in the last foregoing sec

tion, evidence of the previous conviction may be given at the trial for the subsequent offence if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act 1872

In a trial of offences under secs 395 and 407 J P C the evidence of previous conviction is not permissible under sec 54 of the Evidence Act no evidence having been previously offered of the accused's good character. Nor does sec 6 or 14 of the Evidence Act justify the admission of such evidence—Teka Akir v A E 5 P L J 706

*J—List of Jurors for High Court, and summoning,
Jurors for that Court*

<p>312 The names of not more than four hundred persons shall at any one time be entered in the special jurors list</p>	<p>312 The High Court may prescribe the number of persons whose names shall be entered at any one time in the special jurors' list, provided that no definite number of Europeans or of Americans or of Indians shall be so prescribed</p>
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This section has been redrafted by sec 18 of the Criminal Law Amendment Act XII of 1923. The reason of this amendment is thus stated:

The High Court special jury list should in our opinion be revised and it should no longer be limited to 200 Europeans and 200 non Europeans. It should include all who are qualified to whatever nationality they may be long. This revision will probably increase the proportion of non Europeans in the list. This proposal involves the amendment of section 312 of the Code.—*Report of the Racial Distinctions Committee* Para 25

313 (1) The Clerk of the Crown shall before the first day of April in each year and subject to such rules as the High Court from time to time prescribes prepare—

Lists of common and special jurors

(a) a list of all persons liable to serve as common jurors, and

(b) a list of persons liable to serve as special jurors only

(2) Regard shall be had in the preparation of the latter list, to the property, character and education of the persons whose names are entered therein

(3) No person shall be entitled to have his name entered in the special jurors' list merely because he may have been entered in the special jurors' list for a previous year

(4) The Governor General in Council or the Local Commission in the case of the High Court at Fort William in P and in the case of other High Courts the Local G.

may exempt any salaried officer of Government from serving as a juror

(5) The Clerk of the Crown shall subject to such rules as aforesaid have full discretion to prepare the said list as seems to him to be proper and there shall be no appeal from or review of his decision

Discretion of officer preparing lists

The drawing up of the list of special jurors is entirely in the discretion of the Clerk of the Crown and the High Court will not interfere—*Ind Jur (N S)* 106

314 (1) Preliminary lists of persons liable to serve as common jurors and as special jurors respectively signed by the Clerk of the Crown shall be published once in the local official Gazette before the fifteenth day of April next after their preparation

Publication of lists preliminary and revised

(2) Revised lists of persons liable to serve as common jurors and special jurors respectively signed as aforesaid shall be published once in the local official Gazette before the first day of May next after their preparation

(3) Copies of the said lists shall be affixed to some conspicuous part of the Court house

315 (1) Out of the persons named in the revised lists aforesaid there shall be summoned for each session *in the town which is the usual place of sitting of each High Court as many of those who are liable to serve on special or common juries respectively as the Clerk of the Crown considers necessary*

Number of jurors to be summoned in presidency towns

(2) No person shall be so summoned more than once in six months unless the number cannot be made up without him

(3) If during the continuance of any sessions it appears that the number of persons so summoned is not sufficient such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions

Supplementary summons

The words in the town High Court have been substituted for the words in each Presidency town A similar amendment has been made in sec 316 and in the third proviso of section 276

316 Whenever a High Court has given notice of its intention to hold sittings at any place outside the town which is the usual place of sitting of such High Court for the exercise of its original criminal jurisdiction the Court of Session at such place shall subject to any direction which may be given by the High Court summon a sufficient number of jurors from its own list in the manner hereinafter prescribed for summoning jurors to the Court of Session

The italicised words have been substituted for the words Presidency town Similar amendment occurs in secs 276 and 315

317 (1) In addition to the persons so summoned as jurors the said Court of Session shall if it thinks needful after communication with the commanding officer cause to be summoned such number of commissioned and non commissioned officers in Her Majesty's Army resident within ten miles of its place of sitting as the Court considers to be necessary to make up the juries required for the trial of persons charged with offences before the High Court as aforesaid

(2) All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code but no such officer shall be summoned whom his Commanding Officer desires to have excused on the ground of urgent military duty or for any other special military reason

318 Any person summoned under S 315 S 316 or S 317 who without lawful excuse fails to attend as required by the summons or if he has attended departs without leave or the permission of the Judge or fails to attend the Court after being ordered to attend shall be guilty of a contempt and be liable by order of the Court

such fine as he thinks fit, and in default of payment of such fine, to imprisonment for a term not exceeding six months in the civil jail until the fine is paid

Provided that the Court may in its discretion remit any fine or imprisonment so imposed

K —List of Jurors and Assessors for Court of Session, and summoning Jurors and Assessors for that Court

319 All male persons between the ages of twenty one and sixty shall except as next herein after mentioned, be liable to serve as jurors or assessors at any trial held within the district in which they reside, or, if the Local Government on consideration of local circumstances has fixed any smaller area in this behalf, within the area so fixed

Where the Sessions Judge of Kanara asked the High Court for special permission to hold his Court at Sirsi instead of at Karwar the High Court declined to permit it as no assessors could be called upon to attend at Sirsi which was outside the area fixed —Ratanlal 304

Exemptions 320 The following persons are exempt from liability to serve as jurors or assessors namely —

- (a) officers in civil employ superior in rank to a District Magistrate,
- (aa) *members of either Chamber of the Indian Legislature and members of a Legislative Council constituted under the Government of India Act,*
- (b) salaried Judges,
- (c) Commissioners and Collectors of Revenue or Customs
- (d) police officers and persons engaged in the Preventive Service in the Customs Department,
- (e) persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty,

- (f) persons actually officiating as priests or ministers of their respective religions ;
- (g) persons in Her Majesty's Army, except when, by the law in force for the time being they are specially made liable to serve as jurors or assessors
- (h) surgeons and others who openly and constantly practise the medical profession ,
- (i) legal practitioners (as defined by the Legal Practitioners Act 1879), in actual practice
- (j) persons employed in the Post Office and Telegraph Departments ,
- (k) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, 1882 Sections 640 and 641
- (l) other persons exempted by the Local Government from liability to serve as jurors or assessors

Change —Clause (aa) has been added by the Legislative Members Exemption Act XXIII of 1925 on the recommendation of the Reforms Inquiry Committee (contained in Para 91 of their Report) that members of the legislatures in India should be exempt from sitting as jurors or assessors in criminal trials—*Statement of Objects and Reasons* (Gazette of India 1925 Part V p 180)

321 (r) The Sessions Judge, and the Collector of the district or such other officer as the Local Government appoints in this behalf shall

List of jurors and assessors

prepare and make out in alphabetical order a list of persons liable to serve as jurors or assessors and qualified in the judgment of the Sessions Judge and Collector or other officer as aforesaid to serve as such and not likely to be successfully objected to under Section 278, clauses (b) to (h), both inclusive

(2) The list shall contain the name, place of abode and quality of business of every such person and if the person is an European or an American the list shall mention the race to which he belongs

In selecting jurors and assessors the Sessions Judge should choose persons of an independent condition in life men of judgment and experience—23 W R 35 But persons of high social position *e.g.* a hereditary Raja should not be placed on the list or if put upon the list ought not to be summoned to serve as juror or assessor unless it were known that he would be willing to act as such—1897 A W N 167

Assessors can only be chosen from the list prepared under this section—Ratanlal 304

It is not open to the Sessions Judge or Deputy Commissioner to arbitrarily exclude from the list any person who is liable and qualified to serve as a juror or assessor and who is not likely to be successfully objected to under Sec 278 clis (b) to (h) both inclusive Special exemption from liability to serve can be granted only by the Local Government under cl (l) of Sec 320—C P Cr Cir Pt II No 33

322. Copies of such list shall be stuck up in the office of the Collector or other officer as aforesaid and in the court houses of the District Magistrate and of the District Court and extracts therefrom in some conspicuous place in the town or towns in or near which the persons named in the extract reside

323 To every such copy or extract shall be sub joined a notice stating that objections to the list will be heard and determined by the Sessions Judge and Collector or other officer as aforesaid at the sessions court-house and at a time to be mentioned in the notice

324 (1) For the hearing of such objections the Sessions Judge shall sit with the Collector or other officer as aforesaid, and shall, at the time and place mentioned in the notice revise the list and hear the objections (if any) of persons interested in the amendment thereof, and shall strike out the name of any person not suitable in their judgment to serve as a juror, or as an assessor, or who may establish his right to any exemption from service given by S 320, and insert the name of any person omitted from the list whom they deem qualified for such service

(2) In the event of a difference of opinion between the

Sessions Judge and the Collector or other officer as aforesaid, the name of the proposed juror or assessor shall be omitted from the list

(3) A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid and sent to the Court of Session

(4) Any order of the Sessions Judge and Collector or other officer as aforesaid in preparing and revising the list shall be final

(5) Any exemption not claimed under this section shall be deemed to be waived until the list is next revised

Annual revision of (6) The list so prepared and revised shall be again revised once in every year

(7) The list so revised shall be deemed a new list and shall be subject to all the rules hereinbefore contained as to the list originally prepared

All Collectors should exercise great care in the revision of the jurors list so as to include all qualified persons of intelligence who are liable to serve and to exclude unfit persons—*Mad G O* No 474 dated 16th March 1889 The list should show against each person the language or languages understood by him—*C P Cr Cir Pt II* No 33

325 In the case of any district for which the Local Government has declared that the trial of certain offences shall if the Judge so direct, be by special jury the Sessions Judge and the Collector of such district or other officer as aforesaid shall prepare in addition to the revised list hereinbefore prescribed a special list containing the names of such jurors as are borne on the revised list and are, in the opinion of such Sessions Judge and Collector or other Officer as aforesaid, by reason of their possessing superior qualifications in respect of property, character or education, fit persons to serve as special jurors Provided always that the inclusion of the name of any person in such special list shall not involve the removal of his name from the revised list, nor relieve him of his liability to serve as an ordinary juror in cases not tried by special jury

326. (1) The Sessions Judge shall ordinarily, seven days at least before the day which he may
 District Magistrate to summon jurors and assessors from time to time fix for holding the sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any such trial, and including, where any accused person is an European or an American, as many Europeans or Americans as may be required for the purpose of choosing jurors or assessors for the trial

(2) The names of the persons to be summoned shall be drawn by lot in open Court, excluding those who have served within six months unless the number cannot be made up without them, and the names so drawn shall be specified in the said letter

(3) *Where the accused requires and is entitled to be tried under the provisions of Section 275, there shall be chosen by lot, in the manner prescribed by or under Section 276, from the whole number of persons returned the jurors who are to constitute the jury until a jury containing the proper number of Europeans or Europeans and Americans or of Indians as the case may be, has been obtained*

Provided that, in any case in which the proper number of Europeans or Americans cannot otherwise be obtained, the Court may, in its discretion for the purpose of constituting the jury, summon any person excluded from the list on the ground of his being exempted under Section 320

(4) *Where under the proviso to subsection (3), the Court proposes to summon as a juror any person in His Majesty's Army, the provisions of Section 317 shall apply in like manner as they apply for the purpose of the summoning of military jurors for a trial under Section 316*

The italicised words have been added by sec 19 of the Criminal Law Amendment Act XII of 1923

947 Sections 326 and 327 Cr P C contemplate as the ordinary or normal procedure that all assessors should be summoned on the first day on which a criminal Session commences however many trials it may be proposed to hold in the course of that Session—17 Cr L J 17 (All)

The duty of issuing a precept to the District Magistrate to summon jurors and assessors is imposed upon the Sessions Judge himself it can not be performed by a Subordinate Judge in temporary charge of the current duties of the Court of Session—Ratanlal 148

Where owing to the fact that only three jurors attended the Court, the Judge summoned jurors from among the residents of the town on the day fixed for the trial held that the jury as constituted was not a proper jury and the fact that the Judge instead of selecting jurors from among those who were summoned in accordance with the provisions of Sec 326, chose persons specially selected (a thing which the Legislature has taken special pains to render impossible) was a serious irregularity which could not be cured by Sec 537—7 C W N 188

327 The Court of Session may direct jurors or assessors to be summoned at other periods than the period specified in S 326 when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole session oppressive or whenever for other reasons such direction is found to be necessary

328 Every summons to a juror or assessor shall be in writing, and shall require his attendance as a juror or assessor as the case may be at a time and place to be therein specified

329 When any person summoned to serve as a juror or assessor is in service of Government or of a Railway Company, the Court to serve in which he is so summoned may excuse his attendance if it appears on the representation of the head of the office in which he is employed that he cannot serve as a juror or assessor, as the case may be, without inconvenience to the public

330 (1) The Court of Session may for reasonable cause excuse any juror or assessor, from attendance at any particular session

(2) The Court of Session may, if it shall think fit, at the conclusion of any trial by special jury, direct that the jurors who have served on such jury shall not be summoned to serve again as jurors for a period of twelve months

331 (1) At each session the said Court shall cause to be made a list of the names of those who have attended as jurors and assessors at such session

(2) Such list shall be kept with the list of the jurors and assessors as revised under Section 324

(3) A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section

332 (1) Any person summoned to attend as a juror or as an assessor who, without lawful excuse fails to attend as required by the summons or who having attended departs without having obtained the permission of the Court, or fails to attend after an adjournment of the Court after being ordered to attend shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees

(2) Such fine shall be levied by the District Magistrate by attachment and sale of any moveable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order

(3) For good cause shown, the Court may remit or reduce any fine so imposed

(4) In default of recovery of the fine by attachment and sale such juror or assessor may, by order of the Court of Session be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term

948 Gentlemen on the jury list are under no obligation to notify their change of address to the Court before leaving their usual place of

residence or to make any arrangement for the acceptance of notice and for the giving of information to the Court that he would be unable to attend. Therefore where summons was served by affixing the duplicate on the door of the dwelling house of a juror who at the time was living away from home and had no knowledge of such service held that he was not liable to fine for non attendance—6 C W N 887

The issue of summons to a juror by a registered letter is illegal and no fine can be imposed for non attendance in such a case—1 C W N cxvi

The order of a Sessions Judge under this section fining an assessor is not appealable—8 W R 83

L—Special Provisions for High Courts

333 At any stage of any trial before a High Court under this Code before the return of the verdict, the Advocate General may if he thinks fit inform the Court on behalf of Her Majesty that he will not further prosecute the defendant upon the charge, and thereupon all proceedings on such charge against the defendant shall be stayed and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

949 Nolle prosequi.—After the trial had commenced and the evidence partly gone into the Judge retired from the case under sec 550 as he was a share holder of the prosecuting Bank and the case was adjourned without the jury being discharged. The Chief Justice purporting to act under Cl 13 of the Charter Act appointed another Judge to preside at the trial of the accused. In answer to a question by the Judge the Standing Counsel intimated that he intended proceeding with the trial from the point where it had been left whereupon it was contended on behalf of the accused that the presiding Judge could not proceed with the trial as the previous Judge and the jury empanelled before him had still the session of the case. The Advocate General thereupon in order to get rid of the many difficulties arising out of the case entered a *nolle prosequi*, and the accused was discharged—C W N 481. In another Calcutta case the jury in the first trial returned an unanimous verdict of not guilty on the main charge of murder and were divided in the proportion of 5 to 4 on other counts. In the second trial on the remaining counts (ordered under S 308 Cr P C) the jury returned a verdict of not guilty by a majority of seven to two. The Judge disagreed with the verdict. The case was brought up again before the learned Judge to be dealt with.

to law" The Advocate General thereupon appeared and entered a *nolle prosequi*—*Emp v Nirmal Kanta Roy*, 41 Cal 1072

After the close of the case for the prosecution and just as the counsel for the defence was going to call his witnesses, the foreman of the jury suddenly informed the Court that they had come to an unanimous verdict as to the guilt of the accused and did not desire to hear anything more. Upon this, the Counsel for the accused said that it was a misbehaviour on the part of the jury to give a verdict without hearing the evidence for the defence, he therefore asked the Court to discharge the jury and to empanel a fresh jury. But the Advocate General entered a *nolle prosequi*—*Emperor v Olu Muhammad* 7 C W N xxxi

Discharge—Acquittal—In 8 C W N xlviii, the Judge ordered that the discharge amounted to an acquittal but in 41 Cal 1072 and 7 C W N xxxi the Judge simply discharged the accused but did not acquit him.

An order of discharge under this section is no bar to fresh proceedings being taken before a competent Magistrate upon complaint or upon a Police report or under section 190 (c) of this Code. In spite of an order of discharge passed under sec 333 the accused may be sent up for trial upon the same charges, and the order of discharge does not require to be set aside for initiation of fresh proceedings on the same charge—*Emp v Sheskh Idoo*, 40 Cal 71. But in a recent case the same High Court has held that an order of discharge passed on a *nolle prosequi* entered under this section puts an end to the indictment on which the prisoner is brought before the Court, and he cannot be subsequently proceeded against on the same charge—*Emp v Jitendra Nath* 52 Cal 590 26 Cr L J 1397 A I R 1925 Cal 902. It is curious that no reference was made in this case to the earlier case of 40 Cal 71.

334 For the exercise of its original criminal jurisdiction

every High Court shall hold sittings on such days and at such convenient intervals as the Chief Justice of such Court from time to time appoints

335. (1) The High Court shall hold its sittings at the place at which it now holds them, or at such other place (if any) as the Governor-General in Council in the case of the High Court at Fort William, or the Local Government in the case of the other High Court, may direct.

(2) But it may, from time to time, in the case of the High Court at Fort William with the consent of the Governor-General

in Council, and in all other cases with the consent of the Local Government, hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints

(3) Such officer as the Chief Justice directs shall give notice before-hand in the local official Gazette of all sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court

336 (*Repealed*)

This section which dealt with the place of trial of European British subjects has been repealed by sec 20 of the Criminal Law Amendment Act XII of 1923

CHAPTER XXIV.

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

<p>337 (1) In the case of any offence triable exclusively by the Court of Session or High Court the District Magistrate a Presidency Magistrate any Magistrate of the first class inquiring into the offence or with the sanction of the District Magistrate any other Magistrate, may with the view of obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence under inquiry, tender a pardon to such person on condition of his making a full and true disclosure of the</p>	<p>337 (1) In the case of any offence triable exclusively by the High Court or Court of Session or any offence punishable with imprisonment which may extend to ten years or any offence punishable under S 211 of the Indian Penal Code with imprisonment which may extend to seven years or any offence under any of the following Sections of the Indian Penal Code namely Ss 216A, 369, 401 435 and 477A, the District Magistrate, a Presidency Magistrate a Sub divisional Magistrate or any Magistrate of the first class may, at any</p>
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whole of the circumstances within his knowledge relative to such offence, and to every other person concerned, whether as principal or abettor, in the commission thereof

stage of the investigation or inquiry into, or the trial of, the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof

Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof

(4) Every Magistrate other than a Presidency Ma- (1A) Every Magistrate * * who tenders a pardon under

Magistrate, who tenders a pardon under this section, shall record his reasons for so doing and when any Magistrate has made such tender and examined the person to whom it has been made he shall not try the case himself although the offence which the accused appears to have committed may be triable by such Magistrate

(2) Every person accepting a tender under this section shall be examined as a witness in the case

subsection (1) shall record his reason for so doing, and shall, on application made by the accused, furnish him with a copy of such record

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost

(2) Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial if any

(2A) In every case where a person has accepted a tender of pardon and has been examined under sub section (2) the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court as the case may be.

(3) Such person, if not on bail, shall be detained in custody until the termination of the trial by the Court of Session or High Court, as the case may be.

(3) Such person unless he is already on bail shall be detained in custody until the termination of the trial * *

Change —This section has been amended by section 86 of the Criminal Procedure Code Amendment Act (XVIII of 1923) The principal changes introduced are the following —

(a) The old section was restricted to offences triable by the High Court or the Court of Session the new section includes several other offences

(b) A change has been made as regards the Magistrates who can tender pardon The Magistrates who should be allowed to tender a pardon should in our opinion be Magistrates of the first class who are inquiring into the offence and any District Magistrate Presidency Magistrate Sub-divisional Magistrate or with the sanction of the District Magistrate a Magistrate of the first class having jurisdiction in any place where the offence might be inquired into or tried —*Report of the Joint Committee (1922)*

(c) The power to tender a pardon should be exercisable during an investigation as well as after a magisterial inquiry has begun —*Ibid*

(d) Subsection (4) of the section has been omitted The first part of that sub-section has now been re enacted as sub-section (1A) and the latter part has been omitted as unnecessary in view of the new sub-section (2A) See the *Report of the Select Committee of 1916*

950 Offences —The old section applied only to offences triable exclusively by the Court of Session—3 B H C R 59 73 Mad 61 10 Bom 190 1 Lah 102 7 P L T 125 72 Cr I J 676 These cases are now rendered obsolete by reason of the change made in this section

But where several offences are being inquired together the fact that some of the offences do not fall under this section will not debar the Magistrate from granting pardon in respect of the offences which fall under it All that the Section requires is that the offence in respect of which pardon is tendered must be an offence described herein—*Hartmal v Crown* 9 S L R 43 1915 P R 17 *Ismail v Emp* 26 Cr L J 1045 (Nag)

951 Pardon —*When can be tendered* —Under the old section a pardon could be tendered only in an inquiry (see the words offence under inquiry) but not during an investigation—*Emp v Motilal Hirajal* 46 Bom 61 But the Lahore High Court held that the word inquiry in the section included everything done by the Magistrate whether the case was eballed or not and therefore pardon could be tendered where the offence was only under investigation by the police—*Sher Afuhan mad v Crown* 3 Lah 431 This was also the view in Sind—*Crown v Andal* 5 S L R 174 This conflict of opinion has now been removed by the present amendment and under the present section it can be tendered at any stage of the investigation as well

All that this section requires is that there should be an investigation in progress regarding the offence If at the date of the pardon proceedings were going on against the accused for an offence mentioned in this section

the pardon is perfectly legal and the approver is a competent witness against the accused—*Ismail Panju v Emp*, 26 Cr L J 1115 (Nag) A pardon may be tendered to a person even after a charge has been framed against him—22 Cr L J 255 (Lah) A pardon can be tendered to an approver during the course of an inquiry even though the principal offender has absconded and the trial cannot therefore proceed In such a case the approver's statement will be recorded under Sec 512 of the Code—46 Bom 120

Who can grant pardon —See notes under Change above Where the offence is under investigation the Magistrate (other than the District Magistrate) tendering pardon must have jurisdiction over the offence A Magistrate of one district cannot tender pardon to a person implicated in an offence committed in another district and inquired into in the latter district The pardon so tendered is illegal and cannot be validated by the operation of Sec 529—20 All 40

Where the offence is under investigation the Magistrate can grant pardon only with the sanction of the District Magistrate This sanction should be a written sanction but an *oral* sanction though irregular would be valid—5 A L J 691

A Deputy Commissioner trying a case triable exclusively by the Sessions Court under the powers conferred by Sec 30 can offer a conditional pardon to an accused under this section—*Pabon Singh v Emp* 10 C W N 847

Power of Local Government —The Local Government has no power to offer a conditional pardon to an accused for the purpose of giving evidence against the other accused under this section—10 C W N 847 33 Cal 1353 But the Local Government as an executive authority has power to refrain from prosecution *independently* of this section—*Emp v Har Prosad Bhargawa* 45 All 226 (29) 21 A L J 42 This section is addressed to certain Courts of justice and has nothing to do with the powers or discretion of an executive authority such as the Local Government in the matter of instituting or refraining from instituting any prosecution The Local Government can grant pardon even though the case is not triable exclusively by the Court of Session or High Court It can examine an accomplice as a witness even though no formal tender of pardon has been granted to him Thus where the Government of C P having before it the case of a Subordinate Judge who was suspected of receiving bribes issued a notification to the effect that no prosecution would be instituted by the Government against any person who would come forward with evidence that he had paid or offered bribe to the accused (Sub Judge) and in consequence of the notification two men came forward and gave evidence against the Sub-Judge held that the evidence of two persons as witnesses was admissible on the principle of subsection

of this section although no pardon was formally tendered to them under sec 337 and although the offence (sec 161 I P C) was not triable exclusively by a Court of Session or High Court—*Emp v Har Prosad Bhargava* 45 All 226

To whom pardon can be tendered —Pardon can be tendered to any person who is supposed to be directly or indirectly concerned in or privy to the offence. The word supposed must be taken as intended to exclude merely the case of a man who has actually been convicted of the crime and not the case of a man who though admitted to be a party to the crime is unconvicted therefore where pardon was tendered to a person who pleaded guilty but was not convicted it was held that the pardon was properly granted and that his evidence was admissible—7 All 160 *Ratanlal* 750

It is not necessary that the person to whom a pardon is tendered should himself be charged with an offence triable exclusively by the Court of Session it is not even necessary that he should be an accused in the case all that is required by this section is that he should be supposed to have been directly or indirectly concerned in or privy to such offence with which another person is charged—*Ashim v Emp* 24 Cr L J 566 6 N L J 144

Pardon cannot be tendered to a person whose complicity in the crime is not admitted by himself such a person cannot be considered to be an approver and his evidence cannot be taken as that of an approver—*Sant Ram v Emp* 24 Cr L J 799

Condition of pardon —The only condition on which pardon can be tendered to an accused person is the one specified in this section. By the tender of pardon there should be no temptation offered to deviate from the truth. A tender of pardon on condition that the approver should testify to having been present at the scene of the offence and to have personal knowledge of the circumstances under which the offence was committed is illegal—*Ratanlal* 612

952 *Effect of Pardon* —A person who has been granted pardon under this section and who has fulfilled the conditions of pardon must be released and cannot be re-arrested in respect of the same offence or for any offence inseparably connected with it. Thus in a dacoity case an accused was tendered pardon under this section. He made a full statement implicating himself and others pointed out the place where he had a carbine and ammunition concealed gave them up to the Police and in all respects complied with the conditions of the pardon. At the close of the case he was released. He was then re-arrested and tried under section 20 of the Arms Act in respect of the possession of the carbine and ammunition which he had given up to the Police. Held that the possession of carbine and ammunition being an offence in connection with the matter

of the dacoity and inseparable from his guilt as a dacoit his prosecution for such an offence, after he had fulfilled his condition of pardon in the dacoity case, was improper and must be set aside—*Sham Sundar v Emp*, 19 A L J 717

A pardon tendered to a person in respect of one offence is no bar to his trial and conviction for an entirely different offence—*Emp v Sardara*, 46 All 236 (240) 12 A L J 35 25 Cr L J 956 But it will bar his trial and conviction in respect of offences which are so closely connected with the offence in respect of which the pardon was tendered that they may be said to be covered by the terms of the pardon—*Q E v Ganga Charan* 11 All 79

953 Sub-section (1A)—Recording reasons —Although sub-section (1A) requires the Magistrate, who tenders pardon to record his reasons for so doing still the recording of the reasons is not a condition precedent to the tender of pardon and its acceptance by the approver, and the pardon cannot be set aside merely because the reasons are not recorded—13 Cr L J 388 (All) When the facts which led up to the tender of pardon appear on the record the omission to state the reasons is not an illegality which vitiates the proceedings—36 Cal 629 *Crown v Warjam*, 5 Lab L J 408 nor even can it be a ground for excluding the approver's evidence as inadmissible—5 C L J 224

954 Sub-section (2) —Approver as witness —According to sub-section (2) the approver shall be examined as a witness in the case The expression in the case (see the old section) includes the preliminary inquiry, and does not refer to the trial alone—24 Mad 321 11 N L R 59 This is now made clear by the present amendment of this sub section

If the approver when examined as a witness in the committing Magistrate's Court did not comply with the conditions of pardon it was not necessary that he should be examined as a witness before the Court of Session—5 S L R 174

It is not compulsory to examine the approver in the Sessions Court if he has shown by his evidence in the Magistrate's Court that he is an untrustworthy witness—42 Cal 856

Where an approver when examined in the preliminary inquiry keeps back material evidence within his knowledge the Magistrate can withdraw the pardon, and the prosecution is not bound to put him forward as a witness in the sessions trial—24 Mad 321 A person who has not satisfied the conditions of pardon at the commitment, need not be examined at the trial in the Sessions Court the evidence given by him before the committing Magistrate can be used as evidence in proceedings taken against him—1907 U B R 4th Cr (Cr P C) 7 1905 P R 41 See notes under Sec 339

An approver cannot be examined as a witness unless and until

has been *discharged* by a written order a mere promise of immunity from prosecution given by the Local Government does not amount to an order of discharge Unless he is formally discharged he does not cease to be an accused person and cannot be examined as a witness and he does not cease to be an accused person by reason of the mere fact that the police did not send him up for trial—*Mahandu v Crown* 1 Lah 10 (dissenting from 1904 P R 21)

955 Accused illegality pardoned —It is illegal for a Magistrate to convert an accused into a witness (approver) except when a pardon has been lawfully granted under Sec 337—1 Bom 610 Therefore where a Magistrate tenders pardon to one of the accused persons in a case not exclusively triable by the Court of Session and examines him as a witness the statement made by that accused is irrelevant and inadmissible even as confession of a co accused—2 All 260 10 Bom 190 *Contra*—25 Mad 61

956 Conviction based on approver's evidence —Though a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an approver (Sec 133 Evidence Act) 7 All 160 5 W R 80 1 Mad 394 yet it is unsafe to convict a person upon such testimony—19 W R 68 20 W R 19 The evidence of an approver should not be believed without material corroboration and in order to see whether there is such a corroboration it is the duty of the Court to scrutinize and marshall out very carefully the proof relating thereto Where this duty has not been properly performed by the lower Court the High Court will interfere in revision and set aside the conviction—*Mama v Emp* 1911 P W R 3 12 Cr L J 35 A conviction is bad in law if the accused has been convicted on a retracted statement made by him under promise of pardon which so far from being corroborated by any other evidence whatsoever has been contradicted in important particulars by other prosecution evidence—1916 P W R 6 And the Judge in his charge to the jury should take care to point out that although a conviction based on the uncorroborated testimony of the approver is not illegal yet it is not the practice of the Court so to convict and should state also that the evidence of the approver was given on conditional pardon—10 W R 17 29 Cal 782 But when the Judge had warned the jury of the danger of convicting the accused on the uncorroborated testimony of the approver and the jury notwithstanding the Judge's remarks convicted the accused it was held that the conviction was valid in law and could not be questioned by the High Court—15 W R 37 6 B L R 108

As to the amount of corroboration necessary no hard and fast rule can be laid down it depends upon the nature of the crime on the extent of the complicity of the accused and the nature of the corroborative facts

—28 Cal 339 It is sufficient if the approver's evidence is corroborated in some of the leading circumstances of the story, so that the Court may be able to presume that he had told the truth as to the rest—11 W R 21. The evidence of the approver should be corroborated not only as to the circumstances of the case, but also as to the identity of the prisoner—3 B H C R 57 1 Bom 475, 10 Bom 319 and also in material particulars in respect to that person having committed the offence—21 W R 69, 18 C W N 550 The corroboration should be such as to support that portion of the approver's testimony which makes out that the prisoner was present at the scene of the offence and participated in the acts of commission—19 W R 16

957. Sub-section (2A)—Magistrate cannot try the case —Sub section (2A) lays down that the Magistrate tendering the pardon must commit the case to the Sessions and is not competent to try it himself Thus, where in a case of robbery, the Magistrate grants a conditional pardon to an approver and is satisfied that there is a *prima facie* case, he has no jurisdiction to dispose of the case himself but is bound under the provisions of this clause to commit the case to the sessions—*Nagakin v Emp*, 4 Bur L J 11 26 Cr L J 829 The Magistrate before whom the suspected person is brought face to face, and who attempts to induce him by promise of pardon to make a full and true disclosure, assumes to a certain extent the function of a police officer and identifies himself with the prosecution, and it is doubtless on that reason that it is considered proper to disqualify him from trying the case—*Queen Empress v Batera*, 1898 P R 3 A Deputy Commissioner trying a case under the special powers conferred by sec 30, does so as a Magistrate, and if he tenders pardon to one of the accused, he cannot try the case himself—*Pabon Singh v Emp*, 10 C W N 847, *Kishar v Emp*, 25 Cr L J 1341 (Nag)

This sub section debars only the Magistrate tendering the pardon from trying the case, but a District Magistrate sanctioning the tender of pardon to an approver is not precluded from trying the case—*Akbar v Crown*, 1919 P R 30

'Examined' —In 1898 P R 3 it was held that the examination referred to in the old sub section (4) referred to an examination made by the pardon-tendering Magistrate on the tender of the pardon and directly resulting from it, and not the examination made by any other Magistrate in the course of the trial But the examination referred to in the new sub-section (2A) is the examination made under sub-section (2) which speaks of an examination made in the Court of the Magistrate taking cognizance of the offence as well as the examination in the subsequent trial, if any

953 Sub-section (3) —The approver shall be, unless he is on

detained until the termination of the trial—8 L B R 357 and nothing can be done against an approver who has not complied with the conditions on which the tender of pardon was made to him until after the case in the Court of Session has been finished then his trial should be commenced *de novo*—23 Bom 493 13 C P L R 123 See notes under sec. 339

The meaning of this sub section is that the approver shall not be set at large until the judicial proceedings pending against the accused person are finished It is immaterial for the purpose of this sub section whether the proceedings are finished by a Magisterial order of discharge (under sec 409) before trial or by a Judge's order of acquittal after trial In the case of the Magisterial discharge the sub section will be satisfied if the approver is detained in custody or is on bail until the order of discharge is made—37 Bom 146

338 At any time after commitment, but before judgment is passed, the Court to which the commitment is made may with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to any such offence tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person

Power to direct tender of pardon
959 *Who can tender pardon* —After the commitment of the case to the Sessions either the Court of Session can itself tender pardon or it can direct the Committing Magistrate or the District Magistrate to tender pardon The Local Government cannot tender a pardon under this or the previous section but it can withdraw the prosecution under sec 494—33 Cal 1353 10 C W N 847

The Sessions Court can direct only the committing Magistrate or the District Magistrate to tender pardon but it cannot direct a Police Officer to do so—6 W R (Cr Let) 5

To whom pardon can be tendered —Pardon can be tendered under this section to an *accused* There is no ground for the suggestion that the words any person in this section do not include a person accused before the Sessions Judge—9 S L R 43 A pardon can be tendered to an accused person provided he is *not convicted* The words supposed offence in this section exclude those who have been actually convicted but a tender of pardon to a person who has pleaded guilty but has not been convicted is not prohibited by this section and the evidence of such person examined as a witness is admissible—7 All 160 Ratanlal 750

When pardon may be tendered —Pardon can be tendered at any time after commitment and before judgment is pronounced but it is extremely improper though not illegal to grant pardon at a late stage of the trial after the close of the prosecution and the defence and after the opinion of the assessors has been given though judgment has not yet been pronounced—1884 A W N 147

339 (1) Where a pardon has been tendered under S 337 or S 338 and any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence not complied with the condition on which the tender was made he may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter

339 (1) Where a pardon has been tendered under S 337 or S 338, and the Public Prosecutor certifies that in his opinion any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence not complied with the condition on which the tender was made such person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter

Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made in which case it shall be for the prosecution to prove that such conditions have not been complied with

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him when the pardon has been forfeited under this section

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him *at such trial*

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court

Change —The italicised words and the proviso have been added by sec 87 of the Criminal Procedure Code Amendment Act (XVIII of 1923)

960 Certificate of Public Prosecutor — We would make a certificate by the Public Prosecutor as the basis of the prosecution of a person who has accepted a tender of pardon —*Report of the Joint Committee* (1922) Under the old law it was the trying Court which had the authority to determine whether the pardon had been forfeited so as to necessitate the trial of the approver—1889 P R 6 1904 P R 31 42 Cal 856 *Emp v Kachri* 7 N L R 65 Under the present law no such determination by the trying Court is necessary but the certificate of the Public Prosecutor is sufficient

The certificate of the Public Prosecutor is an essential requisite under this section and the absence of the certificate vitiates the trial of the approver—*Ali v Crown* 5 Lah 379 (381) 6 Cr L J 237 The certificate of the Public Prosecutor is the sole basis of the prosecution of an approver and therefore an approver cannot be prosecuted merely at the instance of a suggestion by the presiding Judge that he should be so dealt with—*Emp v Maria Basappa* 26 Bom L R 1740 26 Cr L J 469 Where there was no certificate of the Public Prosecutor at the time of the commitment of the approver to the Sessions but the certificate was subsequently filed in the Court of the Sessions Judge after he noticed the absence of the certificate and before the trial proceeded held that the proceedings before the committing Magistrate were merely irregular and not invalid and the trial was in order as the provisions of sec 330 as regards the requirement of the certificate were complied with before the trial began and especially as no objection had been taken either before the committing Magistrate or before the Sessions Court even after the point was brought prominently to notice—*Nga Wa Gyi v Emp* 3 Rang 55 4 Bur L J 23 A I R 195 Rang 219

96r. Forfeiture of pardon.—The approver will be said to have broken the conditions of pardon, if he wilfully conceals anything essential or gives false evidence—8 L B R 357, 30 Bom 6rr. If after accepting the tender of pardon the approver refuses to make any statement, saying that he knows nothing, his pardon will be revoked and he will be committed for trial—29 All. 24. The prosecution may proceed against the approver if he breaks the condition of his pardon by giving a false evidence under section 512 of the Code (in a case where the principal offender has absconded)—46 Bom 120. But the absconding of the approver before the conclusion of cross examination does not amount to a wilful concealment of facts—*Maung Po v K E*, 8 L B R 357. 17 Cr L J 391.

It is a matter of great importance that strictest faith should be kept with the approver and his mere failure to secure the conviction of his accomplices does not justify the withdrawal of pardon—1895 P R 15. But the approver will forfeit his pardon if he screens one of the offenders, although he helps to secure the conviction of the other offenders—*Suraj Bhan v. Crown*, 1918 P R 24. An approver should be allowed to go free if he makes a fair, full and true disclosure of all the circumstances within his knowledge relative to the commission of the crime. When the approver made such a full disclosure, and the whole of the evidence showed that the crimes were in all probability exactly as he said they were, and there was no ground for supposing that he had concealed the name of any person concerned in the crime or had concealed the part which he himself took in the crime, it was held that he had complied with the conditions of the pardon and the fact that there were slight inconsistencies upon immaterial points with a previous statement made by him would not justify a forfeiture of pardon—12 C I R 226. An approver who makes a full and true disclosure of facts both before the Committing Magistrate and the Sessions Court, but in the cross examination resiles from the statement^s made by him in his examination in chief, sufficiently fulfils the conditions of his pardon, and his pardon cannot be forfeited—30 Bom 611. Any trifling discrepancies elicited in cross examination do not justify the forfeiture of pardon—1902 P R 34. But where the approver gave true evidence regarding the offence before the committing Magistrate but resiled from that evidence before the Sessions Judge, held that he must be deemed to have forfeited his pardon—*Local Government v Mulhu*, 11 N L R 59.

No 'withdrawal' of pardon necessary. — The word forfeited has been substituted in the 1895 Code for the word 'withdrawn' occurring in the 1882 Code. Under the present Code no formal withdrawal of a pardon and no formal declaration that the pardon has been forfeited are necessary—42 Cal 856. 42 Cal 756. 39 All 305. 32 Mad 173. 30 Bom. 6. 1918 P R 24. 7 L B R. 1. 7 N L R 65. the forfeiture is incur-

facto by the act of the approver—37 Cal 845 The substitution of the word 'forfeited' for 'withdrawn' indicates that a pardon cannot be withdrawn but can only be forfeited on the ground of the breach of the conditions Under the present law, the question is whether the accused has forfeited his pardon by some act of his own and not whether the Magistrate has validly withdrawn it—25 Bom 675 And no question can arise at all as to its validity, if the pardon has been withdrawn by an unauthorised Magistrate—*Suraj Bhan v Crown*, 1918 P R 24 Under the old law, the pardon remained in force until it was formally withdrawn, under the present law, the result of a failure to observe the conditions is that the approver may be put on his trial without any formal order of withdrawal or cancellation The act terminating the pardon was, under the old law, the withdrawal of pardon by the authority who granted it, under the present Act, it is the forfeiture by the approver—42 Cal 856

Therefore, where an approver was tendered pardon by the District Magistrate but in the Court of Session he did not fulfil the condition of pardon whereupon the Sessions Judge directed the commitment of the approver held that the order of the Sessions Judge was not illegal It was not necessary that the pardon granted by the District Magistrate must be withdrawn by the Magistrate before the approver could be committed to the Sessions The Sessions Judge was competent to order the approver to be committed to the Court of Session when he was of opinion that the approver had forfeited the pardon—*Crown v Kadu* 1904 P R 31 *Chanan v Crown* 1 Lah 218

962 Trial of the Approver —Commitment or trial along with other accused illegal —Sub section (3) of section 337 lays down that the approver shall be detained in custody until the termination of the trial of the other accused persons by the Court of Session The effect of that section read with this section is that action can be taken against an approver who has forfeited his pardon after the trial of the other accused in the Court of Session is finished, and then his trial should be commenced *de novo* If he has forfeited his pardon during the preliminary inquiry he cannot be committed to the Sessions along with the other accused—23 Bom 493 4 Bom L R 825, 24 Mad 321 31 Mad 272, 1907 U B R 4th Qr 7 5 N L R 134 (Contra—42 Cal 856, 20 All 529, 29 All 24, 5 A L J 691 25 Bom 675 in these cases it is held that the commitment of the approver along with the other accused is not illegal)

If the accused has forfeited his pardon during the trial, he cannot be tried at once along with the other accused since he has not been regularly committed to the Sessions but has been sent up as a witness—14 All 336 14 All 502 14 V R 10, 42 Cal 856 *Ratanlal* 119, 1 Lah 218 This is now expressly provided for by the proviso newly added In such a

case the Sessions Judge should send him to a competent Magistrate for a regular commitment—19 W R 43 15 Mad 352 14 All 336 22 Cal 50 The approver should not be deprived of the benefit of a preliminary inquiry where he should have an opportunity of making his defence—3 Mad 351

Where one of the accused at first promised to make a clean breast of all the circumstances and was tendered a pardon conditional on his doing so but before he was treated as an approver and put into the box he however made a statement to the Court that he did not want the pardon and that he wished to be tried and that the pardon might be cancelled whereupon he was tried along with the other accused *held* that as the pardon though accepted for a time was *rejected* by the accused himself (and not *forfeited*) before it actually took effect the case did not fall under this section and the so called pardon was not a bar to the trial of the accused along with the others The pardon referred to in this section is an accepted pardon the acceptance must continue in force till the person pardoned actually gives evidence and it is only then that any question would arise as to whether he has forfeited the pardon by not giving true evidence in the case—*In re Basireddi Narappa* 45 M L J 613

Where the Judge sends up the approver to a Magistrate for commitment the committing Magistrate must in his commitment order give reasons for holding that the approver has forfeited his pardon—10 Bur L T 46 8 L B R 447

Detention in custody—The Sessions Court is not justified as soon as the trial has closed of the offence with respect to which pardon has been tendered to an approver in sending the approver in custody to the Magistrate with a view to taking action against him for breach of the conditions of pardon The approver is entitled to be discharged as soon as the trial closes and action can be taken against him only by way of re-arrest—30 Bom 611 10 Bur L T 46 It is improper to keep the accused in further custody after the termination of the original trial—N L R 50 37 Cal 845

963 Plea of pardon—See the proviso The approver is entitled to plead both before the committing Magistrate and before the Sessions Judge in bar to his trial that he had fulfilled the conditions of the pardon was tendered to him—30 Bom 611 37 All 331 *Chandrasekhar* 1 Lah 218 10 Bur L T 46 The plea should be taken at the commencement of the proceedings before the Magistrate and it is not necessary for the Magistrate to consider whether the pardon was accepted—42 Cal 856 But the approver is entitled to plead the plea before the Sessions Judge although he had not done so before the

mitting Magistrate—37 All 331, 42 Cal 856 Even though the committing Magistrate has decided against the approver, it is open to him to plead his pardon again at the trial before the Sessions Judge—42 Cal 856, 39 All 305, 8 L B R 447

Before an approver can be put on his trial on account of forfeiture of pardon, he must be given an opportunity of meeting with the allegation of the prosecution that he has failed to make a full and true disclosure of the facts within his knowledge, as required by sec 337 The mere expression of opinion by the Sessions Court that the person has not complied with the conditions of the pardon is not sufficient—1889 P R 6, 7 L B R 1 The proper course is to draw up an order setting forth specifically the alleged breach of the condition of pardon, and to call upon the approver to shew cause on a future date why he should not be tried for the offence in respect of which pardon was tendered On the date fixed for the hearing, unless the approver admits the alleged breach of the condition, the Magistrate or Judge should hear the evidence relied upon as establishing the breach and any rebutting evidence which the approver may offer, and should then record a definite finding as to whether there was a breach or not A definite finding arrived at in this manner is essential before the approver can be placed on his trial for the original offence—7 L B R 1 See the new Section 339A

The onus is on the prosecution to prove that the approver has forfeited his pardon—42 Cal 856 25 Bom 673 30 Bom 611 32 Mad 173, 39 All 305 See the proviso

964 Sub-section (3)—*Prosecution for perjury*—When a pardon has been legally tendered to an accomplice and he breaks the condition of his pardon by making a retracted statement at the trial, proper sanction is necessary for the prosecution on each branch of the alternative charge—10 Bom 190 Want of sanction is not a mere irregularity but is an illegality which vitiates the proceedings—1884 P R 42, 27 Cal 137.

Sanction to prosecute should not be given merely on the ground that the approver contradicted himself before the committing Magistrate A witness who is in any way induced to make a false statement in connection with a capital charge should be allowed every possible *locus penitus* *habeat*—*King Emp v Bodha* 11 A L J 964

An approver was granted conditional pardon under sec 337, and then instead of being examined under subsection (2) of sec 337, he was sent by the D S P to the committing Magistrate to have his statement recorded The Magistrate recorded his statement on oath in a miscellaneous proceeding and the approver then made a statement implicating himself and others in a dacoity He was then examined as a witness in the committal proceedings and there he denied all knowledge of the

dacoity The District Magistrate thereupon applied to the High Court for sanction to prosecute him for perjury *Held* that the preliminary examination on oath was an unjustifiable and unnecessary procedure not authorised by law and it cannot provide the material for a prosecution for perjury in case the approver should subsequently resile from his statement No sanction can be granted on such material The proper course would have been to proceed with the trial of the approver for dacoity after obtaining the certificate of the Public Prosecutor—*A E v Nga Bo Gyi* 3 Rang 224 26 Cr L J 1396 A I R 1925 Rang 286

The sanction must be given by the High Court The object is that the propriety of the prosecution of the approver should be considered and determined independently such an independent consideration cannot be expected from the Sessions Judge—1884 P R 42

An application to the High Court for sanction for prosecution of an approver should be made by motion in open Court and not by a letter of reference—74 Cal 49 1893 A W N 1 32 Mad 47 1904 P R 10 *Crown v Raja* 1912 P L R 175 13 Cr L J 451 An action can be taken by the High Court under this subsection against an approver in respect of a statement made by him which is *prima facie* false even though the approver has not been examined as a witness in the case in connection with which he made his statement—*Emp v Raja* 1913 P L R 227 14 Cr L J 61

339A (1) *The Court trying under section 339 a person who has accepted a tender of pardon shall—*

(a) *if the Court is a High Court or Court of Session, before the charge is read out and explained to the accused under section 271 sub section (1) and*

(b) *if the Court is the Court of a Magistrate before the evidence of the witnesses for the prosecution is taken*

ask the accused whether he pleads that he has complied with the conditions on which the tender of the pardon was made

(2) *If the accused does so plead the Court shall record the plea and proceed with the trial and the jury, or the Court with the aid of the assessors or the Magistrate as the case may be shall before judgment is passed in the case find whether or not the accused has complied with the conditions of the pardon, and if it is found that he has so complied the Court shall notwithstanding anything contained in this Code, pass judgment of acquittal*

committing Magistrate—37 All 331, 42 Cal 856. Even though the committing Magistrate has decided against the approver, it is open to him to plead his pardon again at the trial before the Sessions Judge—42 Cal 836, 39 All 305, 8 L. B. R. 447.

Before an approver can be put on his trial on account of forfeiture of pardon he must be given an opportunity of meeting with the allegation of the prosecution that he has failed to make a full and true disclosure of the facts within his knowledge, as required by sec 337. The mere expression of opinion by the Sessions Court that the person has not complied with the conditions of the pardon is not sufficient—1880 P. R. 6, 7 L. B. R. 1. The proper course is to draw up an order setting forth specifically the alleged breach of the condition of pardon, and to call upon the approver to shew cause on a future date why he should not be tried for the offence in respect of which pardon was tendered. On the date fixed for the hearing unless the approver admits the alleged breach of the condition the Magistrate or Judge should hear the evidence shewn upon as establishing the breach and any rebutting evidence which the approver may offer, and should then record a definite finding as to whether there was a breach or not. A definite finding arrived at in this manner is essential before the approver can be placed on his trial for the original offence—71 B. R. 1. See the new Section 339A.

The onus is on the prosecution to prove that the approver has forfeited his pardon—42 Cal 856, 25 Bom (75) 30 Bom 611, 32 Mad 173, 32 All 305. See the proviso.

964 Sub-section (3)—*Prosecution for perjury*—When a pardon has been legally tendered to an accomplice and he breaks the condition of his pardon by making a retracted statement at the trial proper sanction is necessary for the prosecution on each branch of the alternative charge—10 Bom 100. Want of sanction is not a mere irregularity but is an illegality which vitiates the proceedings—1884 P. R. 42, 27 Cal 137.

Sanction to prosecute should not be given merely on the ground that the approver contradicted himself before the committing Magistrate. A witness who is in any way induced to make a false statement in connection with a capital charge should be allowed every possible *locus pœnitentiæ*—*King Emp v. Bolkar* 11 A. L. J. 964.

An approver was granted conditional pardon under sec 337, and then instead of being examined under subsection (2) of sec 337 he was sent by the D. S. P. to the committing Magistrate to have his statement recorded. The Magistrate recorded his statement on oath in a miscellaneous proceeding and the approver then made a statement implicating himself and others in a dacoity. He was then examined as a witness in the criminal proceedings and there he denied all knowledge of the

dacoity The District Magistrate thereupon applied to the High Court for sanction to prosecute him for perjury Held that the preliminary examination on oath was an unjustifiable and unnecessary procedure not authorised by law and it cannot provide the material for a prosecution for perjury, in case the approver should subsequently resile from his statement No sanction can be granted on such material The proper course would have been to proceed with the trial of the approver for dacoity after obtaining the certificate of the Public Prosecutor—*A E v Nga Bo Gy* 3 Rang 224 26 Cr L J 1396 A I R 1923 Rang 286

The sanction must be given by the High Court The object is that the propriety of the prosecution of the approver should be considered and determined independently such an independent consideration cannot be expected from the Sessions Judge—1884 P R 42

An application to the High Court for sanction for prosecution of an approver should be made by motion in open Court and not by a letter of reference—24 Cal 492 1893 A W N 12 32 Mad 47 1904 P R 10 *Crown v Raja*, 1912 P L R 175 13 Cr L J 451 An action can be taken by the High Court under this subsection against an approver in respect of a statement made by him which is *prima facie* false even though the approver has not been examined as a witness in the case in connection with which he made his statement—*Emp v Raja* 1913 P L R 227 14 Cr L J 61

339A (1) *The Court trying under section 339 a person who has accepted a tender of pardon*
Procedure in trial of *shall—*
person under sec 339

(a) *if the Court is a High Court or Court of Session, before the charge is read out and explained to the accused under section 271 sub section (1), and*

(b) *if the Court is the Court of a Magistrate before the evidence of the witnesses for the prosecution is taken,*

ask the accused whether he pleads that he has complied with the conditions on which the tender of the pardon was made

(2) *If the accused does so plead the Court shall record the plea and proceed with the trial, and the jury, or the Court with the aid of the assessors, or the Magistrate, as the case may be, shall, before judgment is passed in the case, find whether or not the accused has complied with the conditions of the pardon, and if it is found that he has so complied, the Court shall, notwithstanding anything contained in this Code, pass judgment of acquittal*

965 This section has been newly added by sec 88 of the Criminal Procedure Code Amendment Act XVIII of 1923

We consider that it is desirable to lay down some procedure with regard to the plea contemplated by the proviso to sub-section (1) of section 339. The Bill contains no indication as to when this plea is to be raised and what is to be the effect of it and difficulties of procedure may obviously arise with reference to sections 275 271 (2) and 272. We therefore propose a new section to be added after section 339 which lays down that when a person to whom a pardon is tendered is being tried under that section he shall at the commencement of the proceedings, be asked whether he raises the plea that he has complied with the conditions on which the pardon was granted and if he does so plead the Court shall record a finding on the point and if it finds that the conditions have been complied with shall acquit the accused. — *Report of the Joint Committee* (1922)

When the approver is put on his trial it is the duty of the trying Court to decide first of all whether the approver has forfeited his pardon before his original offence can be tried—30 Bom 611 37 Mad 173 47 Cal 856 1902 P R 34 11 N L R 59 7 L B R 1 *K E v Po Act* 8 L B R 447 10 Bur L T 46

It is the duty of the Sessions Judge to ask the approver whether he relies on the pardon granted to him and to come to a finding whether the pardon has been forfeited. It is not enough that the committing Magistrate has found that the pardon has been forfeited—16 Cr I J 234 (Mad). The approver should be asked not simply whether he has fulfilled the conditions on which the pardon was granted but he should be asked whether he *pleads* that he has complied with the conditions on which the tender of pardon was made. The terms of this section should be clearly explained to him and it should be made clear to him that he can plead the pardon as a bar to his trial—*Ali v Crown* 5 Lah 379 (381) 26 Cr L J 237

The question as to whether the approver has forfeited his pardon should be left to the jury and should not be decided by the Judge himself. When the Judge decided the question himself and convicted the accused the conviction was set aside as illegal—33 Mad 514

340 Every person accused

Right of accused to be defended of before any Criminal Court may of right be defended by a pleader

340 (1) Any person accus-

ed of an offence against whom proceedings are instituted to be defended and his competency to be a witness

before a Criminal Court, or against whom proceedings are

instituted under this Code in any such Court, may of right be defended by a pleader.

(2) *Any person against whom proceedings are instituted in any such Court under Section 107, Chapter X, Chapter XI, Chapter XII or Chapter XXXVI or under section 552, may offer himself as a witness in such proceedings.*

Change—This section has been re drafted by sec 89 of the Criminal Procedure Code Amendment Act, XVIII of 1923

"The expression *person accused* in section 340 may be read as referring only to persons accused of any offence. it is proposed to make it clear that any person against whom proceedings are instituted under this Code is entitled to be defended by a pleader. It is also laid down that persons against whom proceedings under Chapters X, XI, XII XXXVI, or under Section 552 of the Code are pending do not labour under the ordinary disability of an accused person to be sworn, and that they may be examined as witnesses in such proceedings"—*Statement of Objects and Reasons* (1914)

966. Persons against whom proceedings are instituted under Chapters VIII and X are in the position of 'accused' persons within the meaning of this section and are entitled to be defended by a pleader—23 Cal. 493; *Crown v Ida*, 1900 P R 15, 25 All 375, 4 C W N 797, *Nakhi Lal v. Q E*, 27 Cal 656. The Legislature has now added the words 'person against whom proceedings are instituted' which would expressly include persons proceeded against under Chapters VIII and X, and it will no longer be necessary to enter into the much vexed question as to whether such persons are in the position of *accused* persons.

Where an inquiry under sec 476 is started against any person, the Court should hear the pleader appearing on behalf of such person—*Ram Nihore v K E*, 8 A L J 237.

But a person against whom no process has been issued is neither an 'accused' person nor a 'person against whom any proceedings have been instituted', such a person has no right to attend, much less to be represented by a pleader, during a preliminary inquiry held under section 202 before issue of process. If he chooses to attend he may do so like any other member of the public, but he has no *locus standi* as a party—*Shakh Chand v Mahomed Hanif*, 4 N L R 81 8 Cr L J. 20, 33 Cal. 880

967. Right of accused to be defended by pleader:—The accused has a right to choose his own pleader, and the Court is not entitled to him to appoint another pleader, because the pleader already engaged,

not know how to behave in Court—Ratanlal 861 The Court has no power to forbid a duly qualified pleader to appear for the accused—Ratanlal 25 The accused has a right that the pleader engaged by him must be heard It is not a question of indulgence but of right . It is an elementary principle of law that no order ought to be made to a man's prejudice without hearing him, and his counsel must be heard before a final opinion is formed by the Court The Court has no discretion to refuse to hear the counsel—6 Bom L R 665 The Court cannot ask the pleader to sit down in the middle of the cross examination, though it has power to disallow improper questions put by him—Ratanlal 25 It is the duty of the Magistrate to afford the accused and his friends every opportunity of making his defence and he should not personally interpose in any way between them It is therefore improper for a Magistrate to refuse to allow the pleader engaged by the wife of an accused for his defence to have an interview with him or to appear and sit in Court—1 Bom L R 856 An accused should be given a reasonable opportunity of defending himself When after the commencement of the trial, the application is made asking time to engage a pleader the reasonable course for the Magistrate to adopt would be to proceed with the examination in chief of the prosecution witnesses and then to allow a reasonable time to the accused to appoint a pleader—*Pita v. R E*, 47 All 147. 26 Cr L J 575 If the accused's pleader is not heard the conviction will be set aside—5 M L T 290

But a pleader not otherwise authorised to practise in a Court (e.g. a second grade Advocate) has no right to be heard by the Court But the Magistrate has a discretion to permit him to appear for an accused person This permission should be given sparingly and only in those cases in which the Magistrate considers that it is for the interests of the accused that it should be given—*In re W' Calogredy*, 10 Bur. L T. 117; 18 Cr L J 345

Pleader appointed by Court—The position of a pleader appointed by the Court to defend a prisoner is not the same as that of a pleader whom the accused has authorised to act for him Any admission made by the former are not binding on the accused—2 Bom L R. 751 (cited under sec 271)

Private Pleader—Under sec 4 (r) an accused person cannot claim as of right to be represented by a private person, but he may be represented by such person with the permission of the Court But in permitting or disallowing the appearance of private persons as pleaders, a Magistrate should exercise a discretion in each case—2 Weir 400, and a general order that no person will be allowed to practise as a private pleader is illegal—*In re Nagasami* 31 M L T 458 An order excluding any particular

individual in any particular case would be within the discretion of the Magistrate and therefore legal—2 Weir 401

968 Mukhtars —Under the Code of 1872 the accused had a right to appear and be heard by a Mukhtar—6 Bom 14 But under sec 4 (r) of the Code of 1898 (before it was amended in 1923) a Mukhtar could appear only with the permission of the Court—4 S L R 193 But still it was held to be improper for a Magistrate to shut up the defence of the accused merely because he was represented by a Mukhtar and a general order prohibiting Mukhtars to appear in Sessions Courts was held to be illegal—*Ishan Chandra v Emp* 38 Cal 488 Magistrates should not by the indiscriminate exclusion of persons who are invested by law a distinct professional status in criminal trials deprive parties of legal aid which they can frequently obtain at a moderate cost —*Col G R & C O* p 20 38 Cal 488

Under section 4 clause (r) as now amended by Act XXXV of 1923 Mukhtars have now been placed on the same footing as pleaders and are entitled *as of right* to appear in all criminal Courts without requiring any special permission

969 Subsection (2) —A person against whom proceedings are instituted under sec 488 may give evidence on his own behalf as such person is not an accused person and the proceedings are not criminal proceedings —*Nur Mahomed v Bismella* 16 Cal 781 *Bachai v Jamuna* 25 Cr L J 1091 (Cal) A person against whom proceedings are started under Chapter V may be examined on oath as a witness—*Hironanda v Emp* 9 C W N 983

341 If the accused though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial, and in the case of a Court other than a High Court, if such inquiry results in a commitment or if such trial results in a conviction the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit

Procedure where accused does not understand proceedings

970 Scope of Section —This section is intended to provide for cases where the accused is unable to understand the proceedings through deafness, or dumbness or through ignorance of the language of the country and the want of an interpreter In such cases the High Court will order the detention of the prisoner during His Majesty's pleasure—5 Bom 62, Ratanlal 151

This section is inapplicable where the inability to understand the proceedings arises from unsoundness of mind. In such cases the procedure prescribed by Chapter XXXIV should be followed—5 Bom 262 Ratanlal 832. But if after inquiry under that Chapter, it appears that the prisoner is not a lunatic the Magistrate should proceed under this section—*In re Adala* 11 M L T 24 13 Cr L J 24.

If however the accused is able to understand the proceedings though he is deaf and dumb the provisions of this section do not apply and the case should be dealt with as in the ordinary way—19 W R 37 3 Bom L R 371 1900 A W N 47 4 Bur L T 150 22 W R 35 22 W R 72. In modern practice want of speech and hearing does not imply want of capacity either in the understanding or in memory but only a difficulty in the means of communicating knowledge. The law in India certainly does not expressly provide for a sane deaf mute being exempted from punishment. If his mind is sound his inability to hear and speak will not excuse him—*A L v Nga San Myin* 4 Bur L T 150. If it be shown that the deaf and dumb person had sufficient intelligence to understand the character of his criminal act he is liable to punishment—40 Bom 598.

971 **Duty of Magistrate**—Where the accused is deaf and dumb some means of communication with him should be adopted. The Magistrate should try and get into communication with him with the assistance of his relations. The Magistrate should make enquiry as to whether he has any friends or relatives who are accustomed to communicate with him and the manner in which he is communicated with in the ordinary affairs of his life—8 Bom I R 849 1910 U B R 1st Qr 57 Ratanlal 696 2 Weir 402. Where the Magistrate omitted to attempt to communicate with the deaf and dumb accused the conviction was set aside as the accused was certainly prejudiced by such omission—6 M H C R App 7.

Magistrate cannot pass sentence—The Magistrate can convict the accused and upon conviction can refer the case to the High Court but cannot pass sentence—2 Weir 403 U B R (1910) 1st Qr 57. In 1889 P R 37 where the Magistrate passed sentence upon the accused the High Court set aside the sentence and passed such order as it thought proper.

Summary Trial—Where the accused is a deaf mute it is highly inconvenient to conduct the trial summarily even though the offence is summarily triable—8 Bom I R 849.

972 **Reference to High Court**—Reference can be made under this section to the High Court, if the inquiry or trial results in a committal or conviction—Ratanlal 180. The Judge should proceed to the end of the trial and then refer the case if a conviction follows—2 Weir 403 and should not refer the case in the midst of the trial before any conviction.

or committal takes place—4 Bom L R 825 Where during the course of a trial it appeared that the accused was a deaf and dumb person and the Magistrate therefore referred the case to the High Court expressing his opinion that the prisoner was guilty it was held that the Magistrate ought to have proceeded to the end of the trial by convicting the accused and the mere expression of opinion that the accused was guilty did not amount to a conviction The High Court returned the case to the Magistrate and directed him to proceed with the trial and if the same resulted in a conviction to forward the proceedings again to the High Court—Ratanlal 271 Ratanlal 836

In making a reference under this section the Magistrate should state his view of the conduct of the accused and must take some evidence regarding the previous history and habits of the accused—Ratanlal 696

Orders which High Court may pass—The High Court may treat the proceedings before the Lower Court as amounting to a sufficient trial and pass sentence upon the accused according to the facts established in the case—27 W R 35 or may give him a further opportunity of being heard in the matter of the charge—22 W R 35 22 W R 72 or may direct a re trial if the Magistrate's trial was defective—8 Bom J R 849 The Court may upon a consideration of the tender age of the accused direct him to be made over to his father to be looked after by him—7 N W P H C R 131 The High Court may in a proper case discharge the accused with an admonition—27 W R 35 1885 P R 35 4 Bom L R 296 The High Court may if it is of opinion that the accused was by reason of unsoundness of mind incapable of knowing that what he did was contrary to law and that no benefit will be likely to result to the accused by his being tried by the Court of Session direct him to be kept in jail pending the order of the Local Government—27 Cal 368 The High Court may also treat the accused as a lunatic and report the matter to the Local Government under Sec 471 of the Code—1901 P R 13

In serious cases it is the practice of the High Court to refer the matter to the Local Government In the case of a minor offence the High Court itself can pass an appropriate sentence or discharge the accused—1 Lah 260 Where a deaf and dumb accused was found guilty of attempt to commit suicide and at the trial he made certain signs indicating his guilt the High Court affirmed his conviction and sentenced the accused to one day's simple imprisonment—*Emp v Alashaba*, 25 Bom L R 43

342 (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without

Power to examine
the accused

previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed

(4) No oath shall be administered to the accused

973 Scope—There is a conflict of opinion as to whether this section applies to trials of *summons* cases. According to the Bombay, Calcutta Patna and Lahore High Courts and the Sind J C Court the Magistrate is bound in a summons case to examine the accused under this section—*Emp v Fernandez* 45 Bom 672 22 Bom L R 1040 22 Cr L J 17 *Emp v Golabjan* 46 Bom, 441 23 Bom L R 1203 23 Cr L J 45 *Gul ar v Emp* 49 Cal 1075 *Gulam Rasul v King Emp*, 6 P L J 174 2 P I T 390 22 Cr L J 427 *Raghu v Emp*, 1 P I T 241 21 Cr L J 705 *Parameshwar v Emp* 3 P L T 347 23 Cr L J 440 *Muhammad Baksh v Emp* 4 Lah L J 230 23 Cr L J 154 *Emp v Nahu* 26 Cr L J 1554 (Sind). But according to the Madras High Court this section does not apply to trials in summons cases. The use of the expression "before the accused is called on for his defence" in section 342 itself as well as in section 256 relating to trials in warrant cases and in section 289 relating to trials in sessions cases and the absence of such an expression in the sections relating to trials in summons cases under chapter XX of the Code show that the provisions of section 342 are not intended to apply to summons cases—*Ponnuasamy v Ramasamy* 46 Mad 758 (F B)

This section applies to summary trials of warrant cases and the accused must be examined in such trial—*Mahomed Hussain v Emp*, 41 Cal 743 *Paraneswar Lal v Emp* 3 P L T 347 According to the Sind Court this section applies to summary trials of summons cases, and examination of the accused in such a trial is imperative—*Emp v Nahu* 26 Cr L J 1554 (Sind). See Note 867 under sec 263. But according to the Madras High Court this section does not apply to summary trials of summons cases as there is no distinction between the summary trials of summons cases

and the ordinary trials of summons cases—*Dharma Singh v King Emp*, 46 Mad 766 (F B)

This section does not apply to an inquiry under section 117 because the person called upon to give security is not in the position of an *accused* person within the meaning of section 342. Therefore the omission to examine the person called upon to give security is a mere irregularity curable under section 537 and not an illegality vitiating the conviction—*Benode Behari v Emp* 50 Cal 985. So also a person proceeded against under sec 488 is not looked upon as an accused person and omission to examine him does not vitiate the proceedings—*Bachai v Jamuna* 75 Cr L J 1091 (Cal)

Where an accused is examined by the Court before any evidence for the prosecution has been taken and before the commencement of the preliminary inquiry his examination cannot be said to be under sec 342 because at that stage there was no evidence for the prosecution recorded against him and no circumstances which he could be called upon to explain. The statement must be taken to have been recorded under sec 164—*Balaaula v Crown* 6 Lah 183 26 P L R 331 26 Cr L J 1238

974 Object and mode of examination.—The real object of the examination is to enable a Judge to ascertain from time to time from a prisoner particularly if he is undefended what explanation he may desire to offer regarding any fact stated by a witness or after the close of the case how he can meet what the Judge may consider to be damning evidence against him—6 Cal 96 36 C I J 417 20 Cr L J 12 (Nag). And in order that the accused may explain all the facts appearing in evidence against him it is necessary that his attention should be directed to all the vital parts of the evidence against him specially if he is an ignorant person who cannot be expected to know or understand what particular parts of the evidence are or are likely to be considered by the Court to be against him—*Tani v Emp* 20 Cr L J 12 (Nag). The Court should not only point out to the accused the circumstances appearing in the evidence which requires explanation but it must out of fairness to the accused exercise that power in such a way that the accused may know what points in the opinion of the Court require explanation and failure or refusal on the part of the accused to give the explanation will entitle the Court to draw an inference against him—*K E v Alimuddin* 52 Cal 522 29 C W N 231 26 Cr L J 631

The object of this section is to enable the accused to explain *each and every* circumstance appearing in evidence against him this cannot be done by such a general question as 'what have you to say?' or 'What is defence?' The specific point or points which weigh against the accused must be mentioned for if this is not done he cannot be expected to be able to explain those points—*Maung Hman v. K*

1 Rang 689 *K E v Ahmuddi* 52 Cal 522 41 C L J 101 26 Cr L J 631 The word "generally" does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the questions should relate to the whole case generally and should not be limited to any particular part or parts of it The word generally does not mean that the accused cannot be subjected to a detailed examination by the Court The law intends that the salient points appearing in the evidence against the accused must be pointed out to him in a succinct form and that he should be asked to explain them if he wished to do so—*K E v Ahmuddi* 52 Cal 522 (per Mookerjee J Newbould J *contra*) The question must be framed in such a way as to enable accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed A general question as to whether the accused has anything further to say is not a sufficient compliance with the requirements of this section—*Bhokari v Emp* P L T 445 25 Cr L J 711 A I R 1924 Pat 791, *Udhoo v Emp* 23 Cr I J 417 (Nag) *Durga Ram v Emp* 6 P L T 33 26 Cr L J 716 But another Patna case lays down that where the facts of the case are simple a general question such as "Have you any statement to make" may be sufficient—*Banamali v K E* 6 P L T 39 26 Cr L J 68*

There is a difference in the wording of the first and the second portions of subsection (1) of sec 342, the former being discretionary ("may put questions") and the latter mandatory ("shall question him") If the Court has put questions to the accused under the first part of subsection (1) it would be a sufficient compliance with the provisions of the second portion if the Court gives to the accused an opportunity, by putting to him one general question (e g "Have you got to say anything else?"), to explain the circumstances appearing in the case against him, and in this connection the examination of the accused under the first portion of this subsection may be usefully looked into—*Md Nasiruddin v Emp* 4 Pat 459 61 L T 588 26 Cr L J 954

The examination of the accused under this section is intended to enable the accused to explain any circumstances appearing against him and not to elicit answers calculated to supplement the case for the prosecution and to show that he is guilty—10 Mad 295 The object of the examination is not to drive the accused to make self-incriminating statements—1 M H C R 199 1 C L R 436 nor to make him confess his guilt or assist the prosecution by admitting facts which may go to criminate him—2 C W N 702 15 C L J 323 9 Mad 224 Nor is it competent for the Court to examine the accused for the purpose of filling up gaps in the evidence for the prosecution—*Mohideen Abdul Qadir v Emp* 27 Mad 238 31 Mad 457 42 All 522, *Datt Dyal v Crown*, 4 Lah 55 29 M L J 329 1 Cal 49 28 Cal 689 4 L B R 244, *Mahadeo v Emp*, 8 N L J

190 2 N L R 1 Thus where in a charge of defamation the prosecution is unable to prove that the accused made and published the defamatory matter it is illegal for the Magistrate to examine the accused for the purpose of supplying this defect in the prosecution evidence—27 Mad 238 *Devi Dayal v Crown* 4 Lah 55 So also it is improper to put questions to the accused for the purpose of proving his identity when such identity was not established by the prosecution evidence—3 L B R 208 Where the prosecution has not let in evidence implicating the accused in the offence with which he is charged the Magistrate is not entitled to put questions to him under this section—*Re Abibulla Ratathan* 39 Mad 70 4 Lah 55 9 Mad 224

When a Magistrate is examining a prisoner he should refrain from assuming that the prisoner is guilty of the crime with which he is charged The proper mode is to tell the prisoner that he is charged with a certain offence and to ask him if he has any explanation to give of the charge and whether he wishes to make any statement—Weir 438

In permitting the Court to examine the accused person from time to time the law does not contemplate that the examination of an accused person is to be conducted in the manner of cross examination of an adverse witness by a counsel—6 Cal 96 6 C L R 431 *Lmp v Ahmuddi* 52 Cal 522 (per Newbould J) 1 Pat 630 2 Lah 129 3 P L T 649 5 All 253 10 Cal 140 18 Cr L J 941 (Bur) *Maladeo v Emp* 22 N L R 1 27 Cr L J 66 The Judge or Magistrate is not to establish a Court of Inquisition and to force a prisoner to convict himself by making some incriminating admissions after a series of searching questions the exact effect of which he may not comprehend—6 Cal 96 2 Lah 129 *Mahmuddin v Emp* 4 Pat 488 6 P L T 154 1 C L R 43 6 C L R 431 It is not necessary nor is it desirable to examine the accused in great detail or to force him to disclose his defence so as to enable the prosecution to take advantage of it when the witnesses for the accused are examined—*Id Nasiruddin v Emp* 4 Pat 459 6 P L T 588 It is highly improper to subject the accused to a very embarrassing and cruel series of questions intended rather to puzzle the accused than to elucidate the case or to enable him to furnish an explanation as to the circumstances appearing in evidence against him—6 Bom L R 94 Where an accused is undefended the Magistrate should simply point out to him the elements of the evidence adduced against him which seems in his own interest to demand his explanation where the accused is defended by a lawyer the tribunal should not enter upon a lengthy examination of the accused person which might easily develop into a recounting of the history of the whole case or into what would be far worse some sort of cross examination—*Panchu v Emp* 3 P L T 649

Under this section it is incumbent on the Court to ask the accused

1 Rang 689 A E v *Almuddi* 5th Cal 522 41 C L J 101 26 Cr L J 631 The word generally does not limit the nature of the questioning to one or more questions of a general nature relating to the case but it means that the questions should relate to the whole case generally and should not be limited to any particular part or parts of it The word generally does not mean that the accused cannot be subjected to a detailed examination by the Court The law intends that the salient points appearing in the evidence against the accused must be pointed out to him in a succinct form and that he should be asked to explain them if he wished to do so—A E v *Almuddi* 52 Cal 52nd (per Mookerjee J Newbould J *contra*) The question must be framed in such a way as to enable the accused to know what he is to explain what are the circumstances which are against him and for which an explanation is needed A general question as to whether the accused has anything further to say is not a sufficient compliance with the requirements of this section—*Bhokari v Emp* 5 P I T 445 25 Cr L J 711 A I R 1924 Pat 791 *Udiao v Emp* 25 Cr I J 417 (Nag) *Durga Ram v Emp* 6 P L T 33 26 Cr L J 716 But another Patna case lays down that where the facts of the case are simple a general question such as Have you any statement to make? may be sufficient—*Basanali v A E* 6 P L T 39 26 Cr L J 68

There is a difference in the wording of the first and the second portions of subsection (1) of sec 342 the former being discretionary (*may put questions*) and the latter mandatory (*shall question him*) If the Court has put questions to the accused under the first part of subsection (1) it would be a sufficient compliance with the provisions of the second portion if the Court gives to the accused an opportunity by putting to him one general question (*e g* Have you got to say anything else?) to explain the circumstances appearing in the case against him and in this connection the examination of the accused under the first portion of this subsection may be usefully looked into—*Md Nasiruddin v Emp* 4 Pat 459 6 P L T 588 26 Cr L J 954

The examination of the accused under this section is intended to enable the accused to explain any circumstances appearing against him and not to elicit answers calculated to supplement the case for the prosecution and to show that he is guilty—10 Mad 295 The object of the examination is not to drive the accused to make self-incriminating statements 1 M H C R 199 1 C L R 436 nor to make him confess his guilt or assist the prosecution by admitting facts which may go to criminate him 2 C W N 702 15 C L J 323 9 Mad 224 Nor is it competent for the Court to examine the accused for the purpose of filling up gaps in the evidence for the prosecution—*Mohideen Abdul Qadir v Emp* 27 Mad 238 3 Mad 457 42 All 572 *Devi Dayal v Crown* 4 Lah 55 29 M L J 329 1 Cal 49 28 Cal 689 4 I B R 244 *Mahaleo v Emp* 8 N L J

190 2 N L R 1 Thus where in a charge of defamation the prosecution is unable to prove that the accused made and published the defamatory matter it is illegal for the Magistrate to examine the accused for the purpose of supplying this defect in the prosecution evidence—27 Mad 238 *Devi Dayal v Crown* 4 Lah 55 So also it is improper to put questions to the accused for the purpose of proving his identity when such identity was not established by the prosecution evidence—3 L B R 208 Where the prosecution has not let in evidence implicating the accused in the offence with which he is charged the Magistrate is not entitled to put questions to him under this section—*Re Abibulla Ratthan* 39 Mad 770 4 Lah 55 9 Mad 224

When a Magistrate is examining a prisoner he should refrain from assuming that the prisoner is guilty of the crime with which he is charged The proper mode is to tell the prisoner that he is charged with a certain offence and to ask him if he has any explanation to give of the charge and whether he wishes to make any statement—2 Weir 438

In permitting the Court to examine the accused person from time to time the law does not contemplate that the examination of an accused person is to be conducted in the manner of cross examination of an adverse witness by a counsel—6 Cal 96 6 C L R 431 *Emp v Alimuddi* 57 Cal 522 (per Newbould J) 1 Pat 630 2 Lah 129 3 P L T 649 5 All 253 10 Cal 140 18 Cr L J 941 (Bur) *Maladeo v Emp* 27 N L R 1 27 Cr L J 66 The Judge or Magistrate is not to establish a Court of Inquisition and to force a prisoner to convict himself by making some incriminating admissions after a series of searching questions the exact effect of which he may not comprehend—6 Cal 96 2 Lah 179 *Mahmuddin v Emp* 4 Pat 488 6 P L T 154 1 C L R 43 6 C L R 431 It is not necessary nor is it desirable to examine the accused in great detail or to force him to disclose his defence so as to enable the prosecution to take advantage of it when the witnesses for the accused are examined—*Id Nasiruddin v Emp* 4 Pat 459 (P L T 588 It is highly improper to subject the accused to a very embarrassing and cruel series of questions intended rather to puzzle the accused than to elucidate the case or to enable him to furnish an explanation as to the circumstances appearing in evidence against him—6 Bom L R 94 Where an accused is undefended the Magistrate should simply point out to him the elements of the evidence adduced against him which seems in his own interest to demand his explanation where the accused is defended by a lawyer the tribunal should not enter upon a lengthy examination of the accused person which might easily develop into a recounting of the history of the whole case or into what would be far worse some sort of cross examination—*Panchu v Emp* 3 P L T 649

Under this section it is incumbent on the Court to ask the acc

generally whether he wishes to offer an explanation of any of the evidence which has been given against him, and if the Court does so, that would be a sufficient compliance with this section. This section also gives the Court power to put specific questions to the accused with regard to any of the evidence adduced for the prosecution, but it is entirely in the discretion of the Judge whether he should, after having put the general question, ask such specific questions on particular points in the evidence—*Emp v Narayana*, 26 Bom L R 109 25 Cr L J 1127

Where there are several accused the Magistrate must examine each accused separately if he records the statements of all the accused collectively, the trial is vitiated and must be set aside—*Ghasiti v A E*, 6 Lah 554 27 Cr L J 408

Under this section it is the accused himself who should be asked as to whether he would make any statement. Where at the close of the prosecution case the pleader of the accused persons (and not the accused themselves) was asked if they wished to make any statement and the pleader stated that they would not do so held that this was not a compliance with sec 342, since one of the essential points for which this section provides is that the accused themselves should have an opportunity of making their statements directly to the Court and not through the intervention of a pleader—*Messer Bepari v A E*, 29 C W N 939 26 Cr L J 1332

975 Examination imperative—The first portion of this section as to putting questions to the accused is an enabling provision, but the second portion as to the examination of the accused is imperative. The word shall shows that the provisions of the latter part of this section as to examination of the accused are mandatory and not discretionary only—*Rameshwar v Emp*, 6 P L T 493, 9 Bom L R 356, 10 Bom L R 201, 22 C W N 834, 1918 P R 1, 5 P L J, 430, 1 P L T, 641, 20 Cr L J 12 (Nag). The Sessions Judge is bound to examine the accused even though he has been examined before the committing Magistrate—14 L W 418, 9 Bom L R 730, *Emp v Md Shafi*, 26 Cr L J 1576 (Oudh). Omission to examine the accused is not merely an error in form but goes deeper into the case and vitiates the whole trial—*Emp v Basapa*, 17 Bom L R 892, 45 Bom 672, 23 C W N 609, 28 C W N 119, 2 P L T 519, 6 P L J 147, 3 P L T 317, 4 P L T 231, 6 P L T 493, 36 C L J 417. *Varisai Routhar v A F*, 46 Mad 449 (F B), 50 Cal 518, *Legal Remembrancer v Satish Chandra* 51 Cal 224 (1929). *Emp v Camadia* 27 Bom L R 1405 50 Bom 34. The defect is not cured by Sec 537, that is the non-compliance vitiates the trial even though the accused has not been prejudiced thereby—30 Cal 515, 51 Cal 223. *Ham Charan v Emp* 7 P L T 259, 6 Cr L J 184. *Ghalla v Crown* 1918 P R 1. *Md Baksh v Crown* 4 Lah L J

230 5 P L J 430 1 P L T 641 *Durga Ram v*
 26 Cr L J 116 11 Bur L T 134 U B R (19
 illegality cannot be waived even by the consent of
 pleaders—*Emp v Gamadia* 27 Bom L R 1405

Failure to comply with the mandatory provi-
 vitiates the whole trial and the accused is to be
Emp 38 C L J 173 *Gangadhar v Bhangt* 25 Cr
Emp v Sheopal 10 W N 833 26 Cr L J 633 But
 serious defects in the prosecution case and the chance
 to be remote no useful purpose will be served by it
 for retrial—*Legal Remembrancer v Satish Chandra*
 39 C L J 411

It is not a sufficient compliance with this section
 merely reads over to the accused a statement made
 the committing Magistrate and recorded by that Ma-
 364—*Fatu Sautal v Emperor*, 6 P L J 147

But an insufficient examination of the accused per-
 rily invalidate the trial if the statements made by
 that they were not altogether ignorant of some
 appearing in the evidence against them and endeav-
 of the points—*H E v Ilmuddi* 52 Cal 522
 Cr L J 631

976 When examination may be dispensed with
 tion of the accused is obligatory only in cases where
 on for his defence If a Magistrate discharges an ac-
 a charge the non examination of the accused does not
 108—*Varisai Routhar v King Emp*, 46 Mad 449 16

(2) When the accused has left the case entirely
 legal adviser the Judge need not ask the accused the
 stances appearing in evidence against him—2 W N

(3) Where the accused has been exempted from
 under Sec 205 the Court may also dispense with it
 may examine the pleader instead—6 S L R 217

977 Time for examination —The accused is to
 the evidence for the prosecution has been recorded
 ined before any prosecution evidence has been taken
 there is nothing which he can be asked to explain
 224 1882 A W N 166 5 W L T 216 1883 A 7

The accused is to be examined after the evidence

accused and contrary to law to examine the accused before the examination of all the prosecution witnesses is completed—15 Cr I J 436 (All) 2 P L T 741 27 Cr L J 598 (Pat) Therefore, where the accused was examined after two prosecution witnesses had given evidence and then another prosecution witness was examined afterwards held that the procedure offended against this section and the conviction must be set aside and retrial ordered—*Rameswar v Emp* 2 P L T 741 *Gulani Lal v Emp* 49 Cal 1075 *Ghaza Ali v Crown* 6 Lah I J 618 27 Cr L J 87

After the statement of the accused had been recorded under section 342 a witness for the prosecution was examined. The witness however did not add materially to the evidence which had been already given for the prosecution and which the accused had had an opportunity of explaining. The accused was not again examined after the examination of the witness. Held that although the witness for the prosecution ought to have been examined before the examination of the accused under the imperative provisions of section 342, still as the accused in this particular case was not prejudiced by the error in procedure the High Court applying the provisions of section 537 did not set aside the trial but warned the Magistrate to be careful to avoid the error in future—*Emperor v Bechu Chande* 45 All 124

The examination of the accused after all the prosecution witnesses as well as the witnesses for the defence are examined vitiates the conviction and sentence and the trial must be taken up again from the close of the prosecution case, and the accused must be examined before he has entered upon his defence—*Surendra v Isamuddi* 51 Cal 933 (934) 26 Cr L J 761 *Ram Charan v Emp* 7 P L T 759 26 Cr L J 1289

Although the Magistrate may under the first part of sub-section (1) examine an accused person before the case for the prosecution is concluded still this would not absolve the Magistrate from the obligation imposed upon him by the latter part of sub-section (1) to examine the accused after the witnesses for the prosecution have been examined and before he is called on for his defence—2 P L T 540 2 P L T 455 *Bhokari v Emp* 5 P L T 445 *Harud Ali v Sri Aissen* 29 C W N 118

The accused must be examined after the examination cross examination and re-examination of all the prosecution witnesses are over. It is not enough that the accused has been examined after the examination in chief of the prosecution witnesses and before their cross-examination and re-examination. Until the prosecution witnesses have been cross examined and re-examined it cannot be said what the exact case that the accused will have to meet is and if he is forced to disclose his defence before cross examination it might very well be that the prosecution will

witnesses would be on their guard and the value of the cross examination destroyed. The provision in Sec 342 is for the benefit of the accused and to enable him to obtain the full benefit of the section it is clear that he must be examined after the cross examination and re examination of the prosecution witnesses are over—*Ustajit Singh v A E 6 P L J 644* • P L T 520 22 Cr L J 697 *Kashi Pramanik v Disu Paramanik 27 C W \ 28 Jummon v Emp 50 Cal 308 50 Cal 223 Gulzari Lal v Emp 49 Cal 1075 45 Bom 672 Emp v Nathu Kasturchand 27 Bom L R 105 26 Cr L J 690 Pramatha Nath Mukerjee v Emp, 50 Cal 518 (Servant Defamation Case) Dibakanta v Gour Gopal 50 Cal 939 Local Govt v Maria 20 N L R 174* Therefore where after seven of the prosecution witnesses were examined in chief the Magistrate examined the accused and then two more prosecution witnesses were examined and all the nine prosecution witnesses were cross examined held that there was no substantial compliance with the provisions of this section—*Sailendra v A E 38 C L J 175 Krish nappa v Emp 25 Cr L J 713 (Nag) Md Sadiq v Emp 26 P L R 533 26 Cr L J 1370* Where the prosecution witnesses are first examined in-chief then the accused are examined under this section and afterwards the prosecution witnesses are cross examined the procedure is illegal and the trial is vitiated—38 C L J 181 Such non compliance with the provisions of this section is not an irregularity curable by sec 537—*Ibid 50 Cal 273* But the Madras High Court holds that the words after the witnesses for the prosecution have been examined mean when the prosecution has finished calling evidence and do not include the cross examination and re examination of the prosecution witnesses. Therefore where the accused does not cross examine the prosecution witnesses after their examination in chief and then the Magistrate examines the accused and frames a charge and afterwards at a later stage the accused cross examines the prosecution witnesses and then the prosecution re examines them held that the omission to further examine the accused after the cross examination and re examination of the prosecution witnesses does not vitiate the trial—*Varisai Roather v King Emperor 46 Mad 449 F B (over ruling Modura Muthu Iannian In re 45 Mad 80)* This is also the view of the Rangoon High Court—*Aga Hla v Emp 3 Rang 139 76 Cr L J 1336 (following 46 Mad 449)* This seems to be the view of the Allahabad High Court also See *Lmp v Bechu Chaube 45 All 124* where the witnesses for the prosecution were examined in-chief and on the same day the accused were questioned under sec 342 and afterwards the witnesses for the prosecution were cross examined, the High Court made no objection to this procedure. The Oudh Chief Court also holds that if the accused has been examined before the framing of the charge the omission to re examine him after the frame of charge and the cross-examination of the

prosecution witnesses does not vitiate the trial, if the cross examination of the prosecution witnesses adds nothing on which it is necessary to further examine the accused—*Emp v Brij Behari*, 28 O C 130 12 O L J. 182 2 O W N 327 26 Cr L J 1301, *Khuman v Emp*, 2 O W. N 378 26 Cr L J 1374

Where the accused has been examined after the prosecution has finished its evidence under sec 252, but a new and material matter in support of the prosecution case is elicited in cross examination or re-examination of the prosecution witnesses under sec 256, it is desirable that the accused should again be questioned on the case under sec 342 and asked generally to explain the circumstances. So also if the accused has already been examined before the framing of the charge, and the prosecution calls fresh evidence after the formulation of the charge, the accused must again be examined under sec 342 on the termination of that evidence—*Larisa Rowther v A G*, 40 Mad 449 at p 457 (F B)

The accused was examined by the Magistrate under this section before the charge was framed and after all the witnesses for the prosecution had been examined and cross examined at considerable length. After the charge was framed under sec 254 most of the witnesses were recalled by the accused (under sec 256) for a further lengthy cross examination, at the termination of which the Magistrate proceeded to record the defence evidence without questioning the accused again. Held that although it may often be desirable that the accused should be again examined after the further cross examination of the prosecution witnesses recalled after the framing of the charge, in order to ascertain whether the accused wishes to give any additional explanation still in the present case, since the witnesses for the prosecution had been once cross examined at great length, it would be unnecessary for the Court to examine the accused again after the further cross examination, when no fresh circumstances were discovered after the recall and re cross examination of the prosecution witnesses—*Byrne v Crown*, 4 Lah 61, *In re Thachroth*, 45 M L J 279, *Fazl Karim v Emp*, 26 Cr L J 1418 (Lah)

After the examination in chief of the prosecution witnesses the accused was examined and afterwards the prosecution witnesses were cross examined and re examined and the accused was asked as to whether he had anything to say and then he filed a written statement, held that the omission to examine the accused again after the cross-examination and re examination of the prosecution witnesses did not vitiate the trial, since the accused was asked whether he had anything to say and the filing of the written statement relieved the Magistrate of the necessity of re-examining him orally in reference to the matters elicited in the cross examination and re examination of the prosecution witnesses—*Mohiuddin v Emp*, 4 Pat 488 6 P L R 154 26 Cr L J 811 A I R 1925 Pat 414

Where an accused person has been examined under this section after the close of the prosecution case and the Court examines a person under sec 540 (whether such person be a prosecution witness or another person) not as regards the occurrence of the offence but as to some matter in relation to the title of the lands in respect of which the offence (rioting) was committed it is not necessary to examine the accused again—*Prajog Gope v King Emp* 3 Pat 1015 (1017) 5 P L T 571 25 Cr L J 1276 *Fa l Karim v Emp* 26 Cr L J 1418 (Lah)

This section does not make it obligatory to again examine the accused after a charge has been added to or altered when he has already been examined prior to the addition or alteration of the charge—1 Pat 54

978 Who can examine —Only the Court conducting the trial or inquiry can examine the accused Neither the complainant nor the counsel for the prosecution nor any other person is authorised to put questions to the accused—10 Mad 121

979 Improper questions —(1) It is objectionable to put questions to the accused in regard to the matter which he had previously mentioned in his confession and which he had repudiated as untrue—7 C W N 345 The Magistrate cannot put him any question with the object of trapping him into some sort of admission after he has recoiled from his confession—*Umar Din v Emp* 3 Lah 129

(2) It is improper to examine an accused about a confession which is inadmissible, and if he is examined about such a confession the questions and the answers to them are not admissible in evidence against the accused—4 L B R 244

(3) The object of examination under this section is to enable the accused to explain any circumstances appearing in evidence against him, but where the prosecution has adduced no evidence implicating the accused in the offence with which he is charged the Magistrate has no right to put questions to the accused or to invite him to make a statement and the answers given by him to such questions are inadmissible in evidence against him—39 Mad 770 *Dev Dayal v Crown* 4 Lah 55 9 Mad 274

(4) It is improper to ask questions to supplement the case for the prosecution or to fill up gaps in the evidence for the prosecution See Note 974 under heading Object of Examination

(5) It is improper to put questions to the accused to ascertain what witnesses the accused intends to call at the trial or what evidence they will give or what his defence is—14 All 74 13 All 345 27 Mad 238

(6) It is improper for a Magistrate to put questions to the accused before his conviction in the present trial about his previous convictions either with a view to take them into consideration for the purpose of conviction or with a view to dispense with formal evidence as to the alleged previous convictions and as to the identity of the accused in the even

conviction—*Emp v Alloomiyah* 28 Bom 129 28 Cal 689 But see 4 N L R 163

(7) It is improper to ask questions to the accused in order to elicit answers which may go to incriminate him—C W N 70 9 Mad 24

980 Written statements —Though written statements can be put in and accepted by the Court still they can not be allowed to take the place of the examination of the accused which this section orders to be made—42 Cal 957 1903 1 W N 1 22 Cr L J 276 (Lab) *Raghu v King* 5 P L J 430 *Moinuddin v Emp* 2 P L T 455 3 P L T 322 14 L W 418 *Udhao v Emp* 25 Cr L J 417 (Nag) The object of this section is to elicit answers from the accused in regard to certain matters and the written statements are generally drawn up by the legal advisers or friends of the accused and not by the accused themselves the practice of making such written statements will defeat the object of this section—19 C W N 1043 50 Cal 518 (524) 16 Cr L J 9 (Cal) The promise to file written statements made at the time of the plea does not exempt the Court from its duty of examining the accused under this section—50 Cal 518 But where the written statement filed was full and elaborate and covered all the points raised by the prosecution and no further purpose would have been served by any further questions to the accused and it was not shown that the irregularity had caused him any prejudice the conviction need not be set aside nor retrial ordered—*Ramnath v Emp* 2 P L T 549 *Bhagwat v Emp* 4 Pat 231 6 P L T 73 26 Cr L J 93 Where the accused persons were not examined under this section after the examination of the prosecution witnesses but they filed written statements at that stage and also after the examination of the defence witnesses held that the accused not having been prejudiced and there having been no miscarriage of justice the High Court would not interfere in revision—*Mir Tiawan v Emp* 1 Pat 31

981 Sub Section (2) —*Refusal to answer questions* —The practice of refusing to answer questions in the Sessions Court and of putting written statements is a very pernicious one The refusal to answer questions may be attended with great risk to the accused for the Court may draw from such refusal an inference adverse to the accused—19 C W N 1043

False answers —The immunity from prosecution for perjury is limited to answers to questions put by the Court during the examination The accused cannot escape liability if he makes false statements in an affidavit presented to the Court along with an application for transfer of the case—*Alh Ibrahim v Emp* 26 Cr L J 1369 (Lab) *Ghulam Md v Crown* 3 Lah 46 *Emp v Mir Qadir Hakeem* 6 Lah 34 C P I R 158 But the contrary view has been taken by the Allahabad High Court in *Emp v Bindeshari* 28 All 331 *In re Barkat* 11 All 200 and *Emp v Matar* 33 All 163 where it has been held that the accused cannot be prosecuted

in respect of false or defamatory statements contained in an affidavit presented with an application for transfer. See also 12 Mad 451 where an accused who made a false statement in his petition of appeal was held to be protected by this section since a criminal appeal was a continuation of the criminal case and the appellant would get all the privileges of an accused person.

In a recent case the Allahabad High Court has held however that the immunity conferred by sec 342 (2) does not extend to a written statement filed by the accused and he can be prosecuted in respect of a defamatory matter contained in such statement—*Champa v Pirbhu Lal* 24 A L J 329 2 Cr L J 253. The same view is taken by the Bombay High Court—*Bai Shaila v Umrao* 50 Bom 162 (F B) 28 Bom L R 1.

982 Sub section (3) When an accused person has been examined under this section the answers given by him may be taken into consideration at the trial and proper inferences drawn therefrom and even in a subsequent trial for any other offence they may be used for or against him—6 P L J 41. The meaning of the expression may be taken into consideration is not very clear but it means at all events that the statements made by the accused persons are not to have the force of sworn evidence—1900 A W N 109 and a conviction based on such a confession alone cannot be maintained—15 Bom 66.

In cases of circumstantial evidence the accused's statement must be taken into consideration—*Emp v Abdul* 49 Bom 878 27 Bom L R 1373.

983 Sub section (4) —No oath can be administered to an accused person and therefore he cannot be examined as a witness. Thus where several accused are tried jointly one accused cannot be sworn and therefore cannot be examined as a witness against his other co-accused till he is convicted or discharged—1 Bom 610 2 All 260 45 Cal 720, 10 Bom 190 1906 P R 9 1902 P R 12 U B R (1918) 4th Qr 115. But if they are tried separately the prohibition would not apply and one accused can be examined on oath as a witness against his co-accused—45 Cal 720 22 C W N 405 *Banu Singh v Emp* 33 Cal 1353 (1357) *Emp v Durant* 13 Bom 213 10 All 426 1906 U B R (Evidence) 6 *Joseph v Emp*, 3 Rang 11 3 Bur L J 265. The reason is that where the trial is separate the accused in one case is examined in the other case not as an accused person but as a witness and therefore he can be sworn otherwise no man while he stood charged with a criminal offence could possibly be examined as a witness in any criminal trial whatsoever. This is not the intention of the Legislature—20 All 426.

Where in a joint trial of several accused two of them pleaded guilty and were convicted but the Judge postponed their sentence and then on oath as witnesses against the other accused it was held by "

J that as soon as they were convicted (though not sentenced) they ceased to be accused persons and could be examined on oath as witnesses but Fulton J held that the conviction did not put an end to their trial and therefore they were still accused persons and their examination on oath was illegal—3 Bom L R 437

The provision in sub section (4) that no oath can be administered to the accused has reference only to the statement made by him in answers to questions put to him by the Court under this section. It has no reference to any other act of the accused and therefore the accused can make an affidavit on oath in support of an application for transfer of the case under section 526—*Ghulam Md v Emp* 3 Lah 46 23 Cr L J 399

984 Accused—The word accused in this section means a person over whom the Magistrate or other Court is exercising jurisdiction therefore a person who has been discharged by the Police without being brought before a Magistrate is not an accused person and he can give evidence on oath in a trial of his accomplices—16 Bom 661 4 L B R 36

The term accused means a person under trial a person called upon to show cause under Section 133 is not an accused person within the meaning of this section and oath can be administered to him—2 C L J 149 The parties to a proceeding under sec 145 are not accused persons and they can be examined on oath—*Md Ayub v Sarfara* 26 Cr L J 70 (Oudh) So also a person against whom the Public Prosecutor has withdrawn the case can be administered oath and examined as a witness—18 Bom L R 266 An informer is not an accused person and this section does not prevent oath being administered to him—1887 P R 38

343 Except as provided in Sections 337 and 338, no influence, by means of any promise or other
 No influence to be used to induce disclosures
 wise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge

985 See Sec 24 of the Evidence Act and compare section 163 &c Where the case against an accused is withdrawn and he is examined as a witness any inducement offered to such person should be deemed as offered to him as a witness and not as an accused and does not make his evidence inadmissible though the credit to be attached to such witness is diminished—18 Bom L R 266 For instances of inducement threat and promise see notes under section 163

344 (1) If from the absence of a witness or any other
 Power to postpone or adjourn proceedings
 reasonable cause it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial

the Court may if it thinks fit by order in writing stating the reasons therefor from time to time postpone or adjourn the same on such terms as it thinks fit for such time as it considers reasonable and may by a warrant remand the accused if in custody

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate

Explanation —If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand this is a reasonable cause for a remand

986 Scope of section —This section relates to proceedings in inquiries or trials and has nothing to do with Police investigations and it contemplates a remand to jail not to Police custody—3 Bom 32 The custody mentioned in this section is quite different from the custody under section 167 The power of remand under sec 167 is given to detain prisoners in custody while the police make the investigation and in a proper case to commence the inquiry But the custody under sec 344 is intended for undertrial prisoners—*In re Nagendra Nath* 51 Cal 40 (412)

This section is applicable to cases even before the issue of process under sec 204 and the Magistrate is entitled under sec 344 if there be a reasonable cause for doing so to postpone any inquiry or trial and to postpone the issue of process even if the case be a warrant case—*Ram Saran v Nikhad Narain* 6 P L T 477 76 Cr L J 1179

957 Adjournment —A Court of Justice has inherent jurisdiction to stay proceedings in a case pending before it and this section empowers a Criminal Court to adjourn an inquiry or trial for any reasonable cause—1916 P W R 4 Adjournments should not be made except upon strong and reasonable grounds It is most inexpedient for a sessions trial to be adjourned The trial before a Court of Session should proceed and be dealt with continuously from its inception to its finish Occasions may arise when it is necessary to grant adjournments but such adjournments should be granted only on the strongest possible ground and for the shortest possible period—10 A L J 473 The evidence of witnesses should invariably be recorded as soon as possible after their attendance If from unavoidable causes an adjournment is indispensable there should be

unnecessary delay. Witnesses remaining over from day to-day should, as a rule, be examined at the first sitting of the Court on the following day, and every effort should be made to minimise the inconvenience to which they may be put. After the examination of witnesses has commenced, the trial or preliminary inquiry should be proceeded with until all the witnesses in attendance have been examined, those for the prosecution being first examined and if any witness be detained for a longer period than two days the Magistrate should be careful to record the reason for each detention in the order sheet of the case.—*Cal G R & C O p 30* Where a trial is adjourned to a particular date it is not competent for the Magistrate to accelerate the date of hearing against the wishes of the accused or his pleader. The trial should not be concluded nor judgment pronounced without waiting till that date.—*1898 P R 14*

It is discretionary with the Court to adjourn the inquiry or trial under this section. But this discretion is to be exercised only in cases which come really within the terms of this section. It should be exercised carefully and according to rule, and not arbitrarily. If this power is used improperly and arbitrarily the High Court will interfere under section 15 of the Charter Act.—*17 W R 55 Ram Saran v Nikhad, 6 P L T 477 26 Cr L J 1179* When a Magistrate is of opinion that a party before him is unnecessarily wasting time and protracting the case, he has a discretion to refuse an adjournment for bringing fresh witnesses.—*Ah Sher v Mir Md, 26 Cr L J 958 (Sind)*

The Magistrate should take some evidence before granting adjournment. On an application for adjournment by the prosecution on the ground that it would not be advisable to proceed with the case in the absence of an accused whose appearance had up to the date of the application not been secured the Magistrate should, before granting the application require the production of some evidence. But the omission to do this in a case in which the Magistrate had recorded some evidence before the issue of warrant would not by itself entitle the accused to claim to be discharged.—*40 Cal 152*

The Court which adjourns the inquiry or trial and remands the accused is bound to record clearly the grounds of adjournment and remand.—*6 Mad 63*

988 Grounds of Adjournment.—The Magistrate may adjourn a trial for the purpose of allowing the accused to secure the attendance of his witnesses.—*10 W R 21 11 W R 15* The fact that the accused's advocate has gone to another place where he is detained in a lengthy criminal case is a reasonable ground for adjournment.—*4 Bur L T 213* If the Sessions Judge is of opinion that the prosecution has not laid a basis for the reception of the depositions taken before the committing Magistrate in the absence of the accused he should adjourn the trial under this sec-

tion and under section 540 summon such witnesses as he may deem material—12 C L R 120 A Magistrate is justified in adjourning a case till the disposal of a counter case where a point of law raised in the former case can be conveniently decided after the disposal of the latter case—*Ram Saran v Niskhad* 6 P L T 477 26 Cr L J 1179 Where the counsel for the accused in a capital case applied for permission to cross examine the witnesses on the day following as he was not prepared to cross examine them that day the Court should grant the application—41 Cal 299 According to the provisions of secs 256 and 257 the accused is entitled as a matter of right to ask for an adjournment, after a charge has been framed against him to enable him to adduce evidence in support of his defence—1 C W N 313 If a witness not examined before the committing Magistrate is tendered at the trial as a witness for the prosecution, and the accused objects on the ground that the examination of that witness will be a surprise to him, this may be a good ground for adjournment or postponement—1889 P R 1 Where a Magistrate has once issued process for the attendance of a defence witness he is bound to enforce his attendance and can not refuse an adjournment which is asked for by the accused in order that the witness's attendance may be secured—*Mishir Lal v Emp* 24 Cr L J 370 (Cal) Where it is notified to the Court that an application is intended to be made to the High Court for transfer of the case, the Court is bound to give the party making the application a reasonable time for obtaining the order of the High Court and if necessary, to postpone the hearing—19 Mad 375 The pendency of an appeal against the conviction of the accused in a case is a good ground for adjourning the trial of the same accused in a subsequent case—6 M L T 90 The accused is entitled to have an adjournment of his case so as to enable him to secure the services of a pleader whom he wants to engage for the purpose of cross examining the prosecution-witnesses—1916 P W R 14

What are not good grounds for adjournment—The Magistrate cannot postpone an inquiry for a reason not contemplated by this section, for instance his being busy with executive work—17 W R 55 The fact that the accused wants time to engage an advocate and prepare his defence is not a sufficient cause for adjourning a trial in ordinary cases though in complicated and difficult cases an adjournment may be granted on that ground—1 L B R 270 But see 1916 P W R 14 cited above Where the proceedings have been completed against a prisoner, the decision of case should not be deferred on the ground that the principal offenders not been apprehended—3 W R (Cr Let) 21 Where a are accused of having committed an offence, the is not a reasonable cause for adjourning the inquiry rest who have appeared before the Magistrate—1 L T

of a co accused and the desirability of a joint trial are not sufficient reasons for the further postponement of proceedings—*Blinghurst v Meek* 49 Cal 182

Where two cross cases are filed one on a complaint and the other on a police challan and the complainant in one case is the accused in the other the postponement of the complaint case till after the disposal of the police challan case is not justified by the provisions of this section. The two cases must be tried simultaneously but each case must be dealt with separately and on its own merits and the judgments in both the cases should be pronounced after both the trials are finished—*Sk Batahar v Nobadali* 28 C W N 487 26 Cr L J 65

989 Stay of criminal proceedings pending civil suit.—This section empowers the criminal Court to adjourn an inquiry or trial for 'any reasonable cause' and the institution of a civil suit between the same parties and in respect of the same property is certainly a reasonable cause for which criminal proceedings should be stayed—*Pars Ram v Jalal Din* 1916 P W R 4 See also 18 L W 236 24 Cr L J 640 and *In re Periasami* 20 L W 544 35 M L T 99. It is true that there is no hard and fast rule that a criminal case should be stayed pending the disposal of a civil suit from which the criminal case has arisen or with which it is intimately connected—*Weir* 415 and that the institution of a civil suit is not always a valid ground for adjourning a criminal prosecution although the issues and evidence in the two cases are practically the same—*Mathura v Durga* 2 A L J 747. But each case should be dealt with according to its own particular circumstances and to avoid a regrettable conflict of decisions between the Civil and Criminal Courts, the criminal proceedings should be stayed pending the decision of the civil suit—*Nur Din v Crown* 1916 P W R 8 *Kankajalal v Bhagwan* 23 A L J 956 26 Cr L J 1485. Although a decision of the Civil Court is not technically binding upon the Criminal Court still if the Civil Court decision is in favour of the accused it creates such a doubt in his guilt that it would almost become impossible for the latter Court not to give him its benefit. Therefore it is proper for a Criminal Court to adjourn the proceedings till the decision of the civil suit—*Pars Ram v Jalal Din* 1916 P W R 4. If the object of prosecuting the criminal proceedings while a civil suit in relation to the same matter is pending be in reality to prejudice the trial of the civil suit or to coerce the accused into a compromise of the civil suit on terms to be practically dictated by the complainant, the Magistrate should as a general rule postpone the criminal proceedings till the disposal of the civil suit—*Weir* 415. An order staying a criminal trial, on a complaint of rioting and mischief in which questions of possession will have to go into until a civil suit on a question of title has been disposed of is not a proper order—*Nambia v Sudalai Muthu* 44 M L J 642 A I R (1923) Mad 595

The Magistrate has a discretion in such cases to adjourn or continue the criminal proceedings. If the Magistrate, on a consideration of all the circumstances exercises his discretion and either stays proceedings in the criminal case pending the disposal of the suit, or declines to do so, the High Court as a Court of Revision will not, as a general rule, interfere with the exercise of such discretion—2 Weir 415 1 M H C R 66

990 Costs of adjournment.—The words on such terms as it thinks fit empower the Criminal Courts to allow the costs of an adjournment—1904 P R 20 *Sannasi v. Sivasubramania*, 33 M L J 366, 2 P L W. 218 This section clearly entitles a Court to award costs of adjournment to a party who has been put to unnecessary expenses by an adjournment on the application of the other party. A judicious exercise of this power would have the effect of preventing many useless adjournments—*Mathura Prasad v. Basant*, 28 All 207 Where the accused asks for an adjournment to which he is not entitled, the Court may make an order of adjournment conditionally on his paying the costs of the other side—*Sew Prasad v. Corporation of Calcutta*, 9 C W N 18 But it is improper to direct the accused to pay the costs of adjournment when he applies under Section 526 for a transfer—*Fatta v. Crown*, 1911 P W. R 8

An order for costs will be made only in those cases where the circumstances are exceptional and where for some reason or other the ordinary everyday method of conducting criminal cases must be departed from—42 Bom 254 No order for costs should be made where the adjournment is inevitable and there is no other alternative. Thus, where the accused person being absent, the Court cannot proceed with the case, and is bound to adjourn the hearing, it would be entirely opposed to the spirit of this section if the Magistrate under such circumstances passes orders awarding the costs of adjournment against the accused—*Broune v. Chandra Singh*, 1906 P R 6, *Beedha v. Emp.*, 20 A L J 280

This Section does not apply to proceedings in appeal, and therefore an order requiring the appellant to pay the costs of adjournment is improper and *ultra vires*—*Suraj Bhan v. Crown*, 1919 P R 29

Against whom costs may be awarded—The costs are to be paid by the party applying for the adjournment, where a criminal case is taken up on a Police charge-sheet filed on information given by a private person and such person engages a Vakil and moves the Court for an adjournment owing to the absence of the Vakil, held that an order for costs can be validly made against that person on granting the adjournment prayed for, even though he may not be a complainant under sec. 200, since an informant is a person recognised in the Code as initiating criminal proceedings as much as a complainant acting under Section 190—33 M L J 366 But where the prosecution is wholly conducted by the Police and the adjournment is asked for only for the convenience of the Police, the complainant cannot be

dered to bear the costs of the adjournment—*Emp v Laxman* 24 Bom L R 380 If an adjournment takes place for which the complainant is solely to blame then of course an order can be made that the complainant should pay any costs which may have been incurred by the accused for the adjournment—*Ibid*

991 Remand —Remands to custody should not ordinarily be ordered under this section without first recording some evidence to show that good grounds exist for believing that the accused has committed a non bailable offence—*Ahmed Ali v Emp* 11 N L R 162 if the offence is bailable the accused should be admitted to bail and not remanded to custody—8 C W N 779

When the accused is at first brought before a Magistrate and remand is desired it is not necessary to go fully into the charge it is ordinarily sufficient to show by the evidence of a Police officer that they believe that the accused is concerned in the commission of an offence and on such proof the accused will be remanded to custody If the accused is again brought up after a remand and further remand is asked for some direct evidence of the guilt of the accused should be required to justify the Magistrate in ordering for further remand and with each remand the necessity for the production of evidence of guilt becomes more strong—*Ponnusami v Q*, 6 Mad 69 36 Cal 174 11 N L R 162

An order of remand cannot be passed in the absence of the accused To remand is to re commit to custody The commitment requires the presence of the accused the re commitment also requires his presence—2 Weir 409

Grounds of remand —The Magistrate can remand the accused if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by such remand—36 Cal 166 But a Magistrate is not justified in postponing an inquiry and remanding the accused when there is no evidence at all which could be the foundation of a charge and merely on the expectation that after some time on some inquiry being made some evidence might be obtained—17 W R 55 Where the accused person had already made a confession and had produced an article stolen from a person and there was ample evidence before the Magistrate it was held that the remand of the accused in order to get from him a confessional statement is most improper—7 Weir 414

Remand to police custody —This section does not empower the Magistrate to remand an accused person who is in the custody of the Magistrate to Police custody for the purpose of obtaining information with regard to the offences which the accused may be alleged to have committed—4 Bom L R 878 23 Bom 32

Period of detention —Fifteen days is the longest period for which an

accused person may be remanded at a time by an order of the Magistrate—5 B H C R 31. An accused person has the right to have the evidence against him recorded at as early a period as possible, and the fact that there is or may be a great deal of evidence forthcoming is not a sufficient ground for detention for an inordinate period—*Mansukh v. Q*, 6 Mad 63.

If a Magistrate without reasonable cause delays proceedings with the trials of persons whom he keeps in jail he would be liable, notwithstanding the provisions of Act XVII of 1850 (Protection of Judicial Officers), to an action for damages if the prisoners are eventually acquitted—11 W R 19.

345 (1) The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table.

Offence	Sections of Indian Penal Code applicable	Persons by whom offence may be compounded
Uttering words, etc with deliberate intent to wound the religious feelings of any person	298	The person whose religious feelings are intended to be wounded
Causing hurt	323, 334	The person to whom the hurt is caused.
Wrongfully restraining or confining any person	341, 342	The person restrained or confined
Assault or use of criminal force ..	352, 355, 358	The person assaulted or to whom criminal force is used
Unlawful compulsory labour ..	374	The person compelled to labour
Mischief, when the only loss or damage caused is loss or damage to a private person	426, 427	The person to whom the loss or damage is caused
Criminal trespass	447	The person in possession of the property trespassed upon
House trespass	448	
Criminal breach of contract of service	490, 491, 492	The person with whom the offender has contracted
Adultery	497	The husband of the married woman
Enticing or taking away or detaining with criminal intent a married woman	498	

Offence	Sections of Indian Penal Code applicable	Persons by whom offence may be compounded
Defamation	500	The person defamed
Printing or engraving matter knowing it to be defamatory	501	
Sale of printed or engraved substance containing defamatory matter knowing it to contain such matter	502	
Insult intended to provoke a breach of the peace	504	The person insulted
Criminal intimidation except when the offence is punishable with imprisonment for seven years	506	The person intimidated
Act caused by making a person believe that he will be an object of divine displeasure	508	The person against whom the offence was committed

(2) *The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table*

Offence	Sections of Indian Penal Code applicable	Persons by whom offence may be compounded
Voluntarily causing hurt by dangerous weapons or means	324	The person to whom hurt is caused
Voluntarily causing grievous hurt	325	Ditto
Voluntarily causing grievous hurt on grave and sudden provocation	335	Ditto
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	337	Ditto
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	338	Ditto
Wrongfully confining a person for three days or more	343	The person confined

Offence	Sections of Indian Penal Code applicable	Persons by whom offence may be compounded
Wrongfully confining a person in secret	346	<i>Ditto</i>
Assault or criminal force in attempting wrongfully to confine a person	357	The person assaulted or to whom the force was used
Dishonest misappropriation of property	403	The owner of the property misappropriated
Cheating	417	The person cheated
Cheating a person whose interest the offender was bound by law or by legal contract to protect	418	<i>Ditto</i>
Cheating by personation	419	<i>Ditto</i>
Cheating and dishonestly inducing delivery of property or the making alteration or destruction of a valuable security	420	<i>Ditto</i>
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person	430	The person to whom the loss or damage is caused
House trespass to commit an offence (other than theft) punishable with imprisonment	451	The person in possession of the house trespassed upon
Using a false trade or property mark	482	The person to whom loss or injury is caused by such use
Counterfeiting a trade or property mark used by another	483	The person whose trade or property mark is counterfeited
Knowing selling or exposing or possessing for sale or for trade or manufacturing purpose goods marked with a counterfeit trade or property mark	486	<i>Ditto</i>
Marrying again during the lifetime of a husband or wife	494	The husband or wife of the person so marrying.
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman	509	The woman whom it is intended to insult or whose privacy is intruded upon.

(3) When any offence is compoundable under this section the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner

(4) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or lunatic any person competent to contract on his behalf may *with the permission of the Court* compound such offence

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending no composition for the offence shall be allowed without the leave of the Court to which he is committed, or as the case may be before which the appeal is to be heard

(5A) *A High Court acting in the exercise of its powers of revision under Section 439 may allow any person to compound any offence which he is competent to compound under this section*

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused *with whom the offence has been compounded*

(7) No offence shall be compounded except as provided by this section

Change —In subsection (1) the offence under section 503 I P Code has been added in sub section (2) the offences under Secs 343 346 357 403 417 418 419 420 430 451 482 483 486 494 and 509 I P Code have been added Sub section (5A) has been newly inserted and the italicised words in sub sections (4) and (6) have also been added The changes are of minor character and no reasons have been particularly stated in the Bill

992 Withdrawal and composition —A withdrawal (Sec 48) must be by intimation to the Magistrate holding the trial whereas in many cases composition can be effected without the permission of the Court A withdrawal is permissible in a summons case whereas most of the compoundable cases are warrant cases A withdrawal is the result of act of one party only namely the complainant without the consent of the accused whereas a composition presupposes an arrangement between both parties and implies a consent of the accused—21 Cal 103 20 C W N 109 Permission to withdraw can be given only to the complainant whereas the right to compound an offence does not always belong to the complainant

—14 Mad 379 On the withdrawal of the complaint the Magistrate can award compensation to the accused (1883 P R 24) but compensation cannot be awarded when a case is compounded—1888 P R 19

A Magistrate has the option to permit the complainant to withdraw or not but if the offence is compoundable without the leave of the Court, and a petition of compromise is put in, the Magistrate is bound to give effect to it Whether a petition (*e g.* a petition praying that the case be struck off the file) is one for withdrawal or compromise is to be judged from the fact whether the accused consented to it or not Where it appeared that the accused had never consented to the compromise of the case, the petition was not a petition of compromise under this section, but one of withdrawal and the Magistrate's refusal to permit withdrawal, and the subsequent proceeding resulting in the trial and conviction of the accused were not illegal—30 C W N 1209

A Railway guard abused and assaulted a passenger, whereupon the latter made a complaint to the police, who instituted a case against the accused A few days later, the accused offered an apology to the complainant, who thereupon gave a letter to the accused in which he wrote 'Mr John (the accused) come to me and offered an unconditional apology I beg to withdraw the case against him' This letter was signed, dated and given to the accused, who produced it in Court The trying Magistrate treated the letter as a withdrawal and not as a compromise, and as withdrawal could only be made in Court by intimation to the Magistrate, he treated the withdrawal as invalid and proceeded with the trial and convicted the accused Held that the Magistrate was misled by the word 'withdraw' used in the letter, that the case was one of composition and not of withdrawal, because a withdrawal could be made only by the prosecuting authority (police) in this case, that the offence having been compounded, the Magistrate ought to have acquitted the accused, and that the conviction and sentence must therefore be set aside—*Emp v John*, 45 All 145 (146 148)

993 Requisites of composition.—In order to amount to a composition, the arrangement must be one by which the parties have settled their differences and not a mere arrangement to settle the disputes in future as the result of some action either by themselves or by third parties Therefore where the parties signed a *muchilika* referring their dispute to arbitrators but no arbitration took place and no award was passed, held that the mere signing of the *muchilika* did not amount to a composition of the offence—*Ramalinga v Varadarajulu*, 49 M L J 44 22 L W 390 26 Cr L J 1591 A mere agreement between the parties to refer the case to arbitration is not a final settlement of the dispute and does not amount to a composition Where the parties filed a petition of compromise agreeing to be bound by the decision of arbitrators named therein and asked

an adjournment for settlement of their disputes but after the arbitrators made the award the complainant refused to abide by that award held that there was no composition and the Magistrate could proceed with the trial—*Sriish Chandra v Abani Nath* 42 C L J 139 26 Cr L J 1584

Although a composition also signifies that the person against whom the offence has been committed has received some gratification (whether of a pecuniary character or otherwise) as an inducement for his desiring to abstain from a prosecution (*Murray v Q E* 21 Cal 103), still the passing of such consideration or gratification is not absolutely necessary to effect a valid composition—1896 P R 9 And it is not necessary that the consideration should be of a monetary character—39 Mad 946 An apology is a sufficient consideration in cases of defamation or abuse—*Emp v John*, 45 All 143 (146)

To constitute a valid composition it must appear that the parties were free from influence of any kind and were fully aware of their respective rights—21 Cal 103

The composition may be effected in Court or out of Court The composition contemplated by this section is not limited to acts done in Court—*Mahomed v Pattani* 39 Mad 946 The offences enumerated in sub section (2) can be compounded out of Court and in such cases if a composition is proved the Magistrate must give effect to it and cannot proceed with the trial—*Lmp v Mulo* 6 S L R 284

The offence must be compoundable —Before allowing a composition it is the duty of the Magistrate to find upon the evidence that a compoundable offence has been committed If the evidence discloses a non compoundable offence the Magistrate upon a petition of compromise cannot treat the case as a compoundable one and allow composition—*Ratanlal* 699 4 Bom L R 718 20 Cr L J 552 (Pat) So also, the Magistrate has no jurisdiction to allow composition of a non compoundable offence on the ground that it would be better for the complainant to compromise and that the accused also desires to compromise and that it is probable that the case might in the end turn out to be a compoundable offence—1907 P W R 34

994 When offence can be compounded —Under this section a case may be compounded at any time before the sentence is pronounced therefore a petition of compromise filed by the parties when the judgment was actually being written should be accepted—45 Cal 816

An offence can be compounded even before a charge of the offence is laid in Court by the person injured It can be compounded apart from the question whether a charge or complaint has been laid before the Court or not and there is nothing in this section to suggest that a composition of an offence to be valid must be effected only after the accused is brought before the Court. A composition made to prevent a case coming into Court

is just as much a lawful composition under this section as one made after the case has come into Court. There are certain offences however (sub-section) which can be compounded only with the permission of the Court and the operation of the composition is necessarily suspended in those cases until the Court sanctions it—41 Mad 685

A Magistrate cannot allow composition after the records of the case have been called for by the High Court under sec 435 with a view to transfer the case. When the records of the case were called for by the High Court the case was no longer on the file of the Magistrate and his jurisdiction was suspended. But the parties may compound the offence before the Magistrate to whom the case may be transferred by the High Court—*In re Maruti* 49 Bom 533 27 Bom L R 350 26 Cr L J 996

995 Proof.—Although the provisions of the Contract Act may not apply the proof of the arrangement must be similar to that which the Court requires for the proof of any agreement which is in issue—21 Cal 103. The burden of proving that the offence has been validly compounded lies upon the accused—21 Cal 103

Proof as to factum of composition—Where one party to a compoundable criminal case alleges that the case has been compromised and the other resiles from the compromise and denies the same it is competent to the Court before which the case is pending to take evidence concerning the factum of the alleged compromise and to decide whether a compromise has in fact been arrived at or not—39 Mad 946 41 Mad 685

996 Magistrate when bound to allow composition.—If the offence is compoundable without the permission of the Court and a petition of compromise is put in the Court is bound to allow composition and has no option but to allow the offence to be compounded—1884 A W N 256. He is not at liberty to call upon the parties to adduce further evidence that the case has been compounded—*Emp v Ganakrishna* 16 Bom L R 939. It is his duty to accept the compromise and to dismiss the case and acquit the accused. He is wrong in ordering the petition to be put up on the record—3 C W N 322. Where the complainant and the accused are willing to compromise a composition can not be refused on the ground that the master in whose quarrel the servant (complainant) was injured refuses to give his permission—*Lala v A E* 17 O C 9

If a charge is framed in respect of a compoundable offence and the proper person files a petition of compromise the Magistrate cannot alter the charge into one of a non compoundable offence to prevent composition. He must give effect to the petition and acquit the accused—1914 P R 29. If the offence in respect of which the complaint was made be an offence compoundable without the leave of the Court and a petition of compromise is made the Magistrate is bound to give effect to the petition and acquit the accused even though by mistake he had

a non compoundable offence in the summons served upon the accused—
P L T 602

If the offence is compoundable it may be compromised even though the case has been sent up by the Police—10 Cal 551 See also 45 All 145

997 Who can compound —The offence of hurt can be compounded only by the person to whom the hurt is caused—15 A L J 467 The widow or other relations of such person (that person dying in consequence of the hurt) cannot compound—2 Weir 418 37 All 419 *Crown v Ramzan* 7 S L R 700 Where hurt was caused to three persons and one of them died subsequently the remaining two cannot compromise the offence as regards the deceased—31 All 606 In other words where there are several complainants one complainant can compound the offence committed against himself but not the offence committed against others—*Shib Chandra v Rabbani* 7 C W N 168

The offence of defamation can be compounded only by the person defamed and not by another person aggrieved by the defamation Thus where a charge of defamation for imputing unchastity to a woman is instituted on the complaint of the husband the husband cannot compound the offence—25 Bom 151 In such a case the wife is the only person who can compound the offence and she can do so without the consent or even against the will of her husband But if the defamatory matter was published with the intention of injuring the reputation of both husband and wife and the husband instituted the complaint then no one except the husband could compound—14 Mad 379 An offence under section 498 I P C can be compounded only by the husband of the woman Though a complaint of that offence may be made by any person having the care of the woman during her husband's absence (section 199) still such person cannot compound the offence and an acquittal based upon such composition is illegal—*Mahabat Ali v Emp* 4 Lah L J 488 *Harnam v Sam Das* 24 Cr L J 120 (Lah) *Mir Alam v Emp* 5 Lah L J 183 A charge of criminal trespass can be compounded by the person who is in actual possession of the property trespassed upon and he (and not the juridical possessor) is the person who can bring the complaint in respect of the offence

Otherwise we might have the juridical possessor (e g a trustee) prosecuting for criminal trespass and the actual possessor compounding the offence a result which could never have been contemplated by the Legislature —8 L B R 425

A minor cannot compound an offence—1891 P R 17 but under subsection (4) it can be compounded with the permission of the Court by the person competent to contract on behalf of the minor

998 Permission of Court —In respect of the offences mentioned in subsection (1) no permission of the Court is necessary for compromise and no petition is therefore required to be presented to the Court for its

permission—39 Mad 946 except under the circumstances mentioned in subsection (5)—1883 A W N 245 1886 A W N 167 In respect of offences referred to in subsection (7) the permission of the Court is absolutely necessary and such permission can be granted only by the Court and not by a police officer Granting permission to withdraw is a judicial act and can be exercised only by the Magistrate a Police officer is not competent to entertain an application for the withdrawal of a complaint—Ratanlal 91

In cases falling under sub section (2) it is the duty of the Magistrate to decide whether he will or will not allow a compromise and the responsibility rests entirely with him Unless the offence is so serious that punishment is absolutely necessary the Magistrate would do well to exercise his discretion in allowing a composition Where the Magistrate refused to allow composition without sufficient reason the High Court in revision allowed the compromise—*Sera Singh v Crown* 1912 P W R 7 73 Cr L J 85 In cases falling under subsection (7) if the parties who are nearly related to one another are willing to patch up their quarrels the Magistrate should not refuse to allow composition—*Aminulla v Emp* 26 C W N 536

Under sub section (5) when an appeal is pending in respect of the offence it is the Appellate Court alone which can allow the composition the ruling in 2 All 339 (under the 1872 Code) which held that no offence could be compounded at the Appellate stage is no longer good law When an appeal is pending the permission of the Appellate Court is necessary even in respect of offences which are ordinarily compoundable without the sanction of the Court

Permission by High Court in revision—In *Emp v Ram Piyari* 32 All 153 *Emp v Shiboo* 45 All 17 1904 P L R 252 *Lalla v K E* 17 O C 92 and *Cholai v Emp* 24 Cr L J 590 (Oudh) it has been held that the High Court as a Court of Revision can exercise all the powers of an appellate Court and can grant permission to compound an offence But in 15 A L J 467 37 All 127 11 A L J 13 42 All 474 1918 P R 35 43 Cal 1143 3 P L T 458 18 C W N 1212 and 39 Mad 604 it was laid down that an offence could not be allowed to be compounded when the case came before the High Court in Revision when the High Court was sitting neither as a Court of Original Jurisdiction nor as a Court of Appeal This latter view has now been rendered obsolete by the new subsection (5A) of this section which expressly gives the High Court the power to allow composition in revision

Composition on Retrial—When the accused was charged with and convicted of an offence compoundable without the leave of Court but on appeal the conviction was set aside and a retrial ordered and the complainant then offered to compound the case it was held that it was open

to the parties to compound the case in the same manner in which it could be compounded before conviction by the Magistrate and that no permission of the Court was necessary for the composition—*Unrat v Makhulan* 3 A L J 523

Recording reason—When allowing composition under sub-section (2) the Magistrate should briefly record his reason for granting sanction so that if an appeal is preferred the Appellate Court may be in a position to judge whether the discretion has been properly exercised—L B R 349

999 Compromise cannot be withdrawn—When the parties have filed a petition of compromise they cannot afterwards be allowed to withdraw the petition and to insist upon the case being tried—39 Mad 946 41 Mad 685 3 C W N 322 *Hem Chandra v Girindra* 33 C L J 226 *Ram Richpal v Mata Din* 25 Cr L J 810 (Lah) A composition arrived at between the parties is complete as soon as it is made and the accused is entitled to be acquitted even though one of the parties later on resiles from the compromise—33 C I J 226

1000 Subsection (6)—*Acquittal*—When the petition of composition is put in the Magistrate's sole remaining duty is to record a formal order of acquittal and set the accused person at liberty—1914 P R 29 The Magistrate is bound to acquit the accused he acts illegally if he proceeds with the trial and convicts the accused—2 Weir 418 45 All 145 Any sentence that he may pass subsequently is illegal for the composition of an offence has the effect of an acquittal—1884 A W N 256

The High Court in revision can set aside an order of acquittal passed on a petition of compromise if there has been any material irregularity—7 S L R 200

Compensation can be awarded under Section 250 only when the Magistrate himself acquits the accused after trial But a composition of an offence has in itself the effect of acquittal and no trial is held and therefore no compensation can be awarded where the offence is compounded under this section—1888 P R 19 *Ratanlal* 957 Proceedings under Section 250 are inapplicable to a case where the accused person himself has by an agreement with the prosecutor arrived at a settlement and been a party to the compounding of the offence—10 Bom L R 1056

When an offence is compounded the accused must be acquitted The conviction of the accused after composition is illegal and must be set aside—*Emp v John* 45 All 145 (148) A composition has the effect of an acquittal and not of discharge and is therefore a complete bar to the prosecution of the accused for the same offence—6 S L R 284 1910 P L R 22 The Magistrate cannot after composition institute proceedings against the accused under Section 437 (now 436)—1884 A W N 13 A composition has the effect of barring not only a prosecution for the same

offence but also for a cognate offence based on the same facts—*Ratanlal* 310 or for an offence involved in the former offence which has been compounded—*Sialil Bauraddir v. Shakkh Akbarat Ali* 17 C W N 94^R. But the compounding of an original charge is not a conclusive answer to a charge made against the complainant under Section 211 I P C—11 Cal 70.

Where there are several accused persons the composition of an offence with one of them has not the effect of acquittal of all the accused persons but only of the particular accused with whom the composition took place—*Jaffar v. A. E.* 41 Mad. 334; Bom 346; *Anantia v. Crowe* 5 Lah. 234; 23, Cr. L. J. 679; 1 Lah. 109; *Chandan v. Emp* 19 A. L. J. 374. This is now made clear by the words with whom the offence has been compounded newly added in subsection (6). In Calcutta and Patna cases it was held that if a compoundable offence was committed by a number of persons, and the complainant compounded the offence with only one of them, the effect of such composition was to compound the complaint not only in respect of the persons with whom it was actually compounded, but also in respect of the other persons, and the composition operated as an acquittal of all the accused—*Chander Kumar v. Emp* 7 C W N 105; *Shyam B. Bari v. Sagar* 20 Cr. L. J. 54; 1 P. L. T. 37; 2 P. L. T. 584; *Surya Kumar v. Emp* 4 P. L. T. 107. This view is no longer correct.

Where an accused is charged with two offences and one offence is compounded, the charge for the other offence does not ipso facto lapse and the accused is not necessarily acquitted in respect of that offence—*Emp v. Jaffar* 26 Cr. L. J. 656 (Lah.).

The composition effected under this section would be a complete bar to a civil suit for damages—6 S. L. P. 84.

345 (1) If in the course of an inquiry or a trial before a Magistrate in any district outside the

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president towns the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate in such district, he shall stay proceedings and submit the

case, with a brief report explaining its nature to any Magistrate to whom he is subordinate or to such other Magistrate, having jurisdiction as the District Magistrate directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either case himself, or refer it to any

to the parties to compound the case in the same manner in which it could be compounded before conviction by the Magistrate and that no permission of the Court was necessary for the composition—*Unrat v Mahbub* 3 A L J 523

Recording reason—When allowing composition under sub-section (2) the Magistrate should briefly record his reason for granting sanction so that if an appeal is preferred the Appellate Court may be in a position to judge whether the discretion has been properly exercised—1 L B R 349

999 *Compromise cannot be withdrawn*—When the parties have filed a petition of compromise they cannot afterwards be allowed to withdraw the petition and to insist upon the case being tried—39 Mad 946 41 Mad 685 3 C W N 327 *Hem Chandra v Girindra* 33 C L J 226 *Ram Richpal v Mata Din* 25 Cr L J 810 (Lah) A composition arrived at between the parties is complete as soon as it is made and the accused is entitled to be acquitted even though one of the parties later on resiles from the compromise—33 C L J 276

1000 *Subsection (6)—Acquittal*—When the petition of composition is put in the Magistrate's sole remaining duty is to record a formal order of acquittal and set the accused person at liberty—1914 P R 29 The Magistrate is bound to acquit the accused he acts illegally if he proceeds with the trial and convicts the accused—2 Weir 418 45 All 145 Any sentence that he may pass subsequently is illegal for the composition of an offence has the effect of an acquittal—1884 A W N 256

The High Court in revision can set aside an order of acquittal passed on a petition of compromise if there has been any material irregularity—7 S L R 200

Compensation can be awarded under Section 250 only when the Magistrate himself acquits the accused after trial But a composition of an offence has *in itself* the effect of acquittal and no trial is held and therefore no compensation can be awarded where the offence is compounded under this section—1888 P R 19 *Ratanlal* 957 Proceedings under Section 250 are inapplicable to a case where the accused person himself has by an agreement with the prosecutor arrived at a settlement and been a party to the compounding of the offence—10 Bom L R 1056

When an offence is compounded the accused must be acquitted The conviction of the accused after composition is illegal and must be set aside—*Emp v John* 45 All 145 (148) A composition has the effect of an acquittal and not of *discharge* and is therefore a complete bar to the prosecution of the accused for the same offence—6 S L R 284 1910 P L R 22 The Magistrate cannot after composition institute proceedings against the accused under Section 437 (now 436)—1884 A W N 13 A composition has the effect of barring not only a prosecution for the same

offence but also for a cognate offence based on the same facts—*Ratanlal* 519 or for an offence involved in the former offence which has been compounded—*Shaikh Basiruddin v Shaikh Akhaurat Ali* 17 C W N 948 But the compounding of an original charge is not a conclusive answer to a charge made against the complainant under Section 11 I P C—11 Cal 79

Where there are several accused persons the composition of an offence with one of them has not the effect of acquittal of *all* the accused persons but only of the particular accused with whom the composition took place—*Muthia Vaeh v A E* 41 Mad 31 45 Bom 346 *Anantia v Crown* 5 Lah 739 25 Cr L J 69 1 Lah 109 *Chandni v Emp* 10 A I J 374 This is now made clear by the words with whom the offence has been compounded newly added in subsection (6) In Calcutta and Patna cases it was held that if a compoundable offence was committed by a number of persons and the complainant compounded the offence with only one of them the effect of such composition was to compound the complaint not only in respect of the persons with whom it was actually compounded but also in respect of the other persons and the composition operated as an acquittal of all the accused—*Chander Kumar v Emp* 7 C W N 176 *Shyam Bihari v Sagar* 20 Cr L J 824 1 P L T 32 2 P L T 584 *Surya Kumar v Emp* 4 P L T 107 This view is no longer correct

Where an accused is charged with *two offences* and one offence is compounded the charge for the other offence does not *ipso facto* lapse and the accused is not necessarily acquitted in respect of that offence—*Emp v Jarnali* 26 Cr L J 686 (Lah)

The composition effected under this section would be a complete bar to a civil suit for damages—6 S I R 284

346 (1) If, in the course of an inquiry or a trial before a Magistrate in any district outside the presidency towns the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magis-

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trate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate or to such other Magistrate, having jurisdiction as the District Magistrate directs

(2) The Magistrate to whom the case is submitted may if so empowered, either try the case himself, or refer it to any

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to send the case back to the Subordinate Magistrate for an order of committal because the sub Magistrate's jurisdiction ceases when he submits the case to the superior Magistrate and he cannot therefore re-assume jurisdiction and commit the accused—45 Mad 846 13 Cr I J 710 If the superior Magistrate tries the case himself he must try it *de novo* he cannot convict the accused on the evidence recorded by the Magistrate who submitted the case he must hear the evidence afresh Failure to do so vitiates the whole trial and the fact that the accused did not want the witnesses to be re-called and consented to rely upon the evidence recorded by the submitting Magistrate does not cure the illegality The special provisions of sec 150 do not apply where a case is submitted under this section by a subordinate Magistrate to the superior Magistrate—1903 P L R 91 *Andica v Emp* 19 Cr L J 625 (Pat) 1905 P L R 106 17 I W 41 4 Cr I J 413 The law requires that the Judge by whom the case is to be tried should himself hear all the evidence of the witnesses and form an opinion of their credibility Where a case partly heard by an inferior Magistrate was brought by a superior Magistrate to his own file who then recorded the rest of the evidence and then passed a decision on the whole evidence the conviction was held to be illegal—2 N W P H C R 468 If however the accused is not prejudiced by the evidence not being taken afresh the High Court will refuse to set aside the conviction—1894 A W N 00

But if the superior Magistrate to whom the case is submitted *commits* the case to the Sessions instead of *trying* it he need not take the evidence afresh but can commit the case upon the evidence recorded by the inferior Magistrate—12 C W N 136 *Ratanlal* 472 *Emp v Ram Prosad* 12 N L R 146 18 Cr I J 57

347 (1) If, in any inquiry before a Magistrate or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial he shall * * *

commit the accused under the provisions hereinbefore contained

(2) If such Magistrate is not empowered to commit for trial, he shall proceed under Section 346

1003 Change —The words stop further proceedings and occurring in the old section between the words shall and commit have been omitted by Sec 91 of the Criminal Procedure Code Amen

Act XVIII of 1931. This amendment is designed to bring Section 34 into line with Section 65—*Statement of Objects and Reasons* (1931)

Under the old law there was a conflict of opinion as to the meaning of the words 'stop further proceedings'. In *Ratanlal* 9, 15 Cr L J 404 (Mad) and 36 Cal 48 a very restricted meaning was assigned to these words. The words were interpreted to mean that as soon as the Magistrate considered that the case was one which ought to be tried by the Court of Session he should at once stop all proceedings and then and there pass an order of commitment to the Sessions even though neither the witnesses for the prosecution had been cross-examined nor the defence witnesses examined. In other words the power of a Magistrate to make commitment under this section was not subject to the provisions of Chapter XVIII and the Magistrate could commit even though all the evidence on either side had not been taken—*Ratanlal* 9-5.

But a more reasonable construction has been given to the words in some other cases. Thus in another Madras case and other cases the words 'stop further proceedings' have been interpreted to mean that the Magistrate should stop proceeding with the case as a *trial* and instead commit the case to the Sessions and in thus committing he should adopt the procedure laid down in Chapter XVIII. These words do not enable the Magistrate to shorten the proceedings and then and there pass an order of commitment—36 Mad 31; 6 L B R 19 (F B). *Uttam Singh* 1st S L R 183; 6 Cr L J 148. The words under the provisions hereinbefore contained show that the Magistrate must make his proceedings conform to the provisions of Chapter XVIII and that before he writes and signs a committal order the provisions of that Chapter must be followed and he must not conform to the mere passing of the committal order under section 13—*Emp v Chakras* 5 Indol 6 L B R 19 (F B). It was not intended by this section to enable the Magistrate to deprive the accused of any of the rights conferred on him by Chapter XVIII—15 Cr L J 366 (Mad) and an order of commitment made without taking all such evidence as the accused was prepared to produce before the Magistrate is invalid—6 All 177; 6 All 64. In a recent case the Calcutta High Court has also laid down that though the Magistrate decides to commit the case to the Sessions under sec. 34 he should still follow the procedure of Chapter XVIII and allow the accused to cross-examine the prosecution witnesses (sec. 65) where the application to cross-examine was made before the charge was framed and before the Magistrate decided to commit the case to the Court of Session—*Jyotsna Bai v Emp* 51 Cal 44 (1915); 6 Cr L J 63; A I R 104 Cal 450.

This latter view will now prevail as a result of the present amendment which has deleted the above ambiguous words in order to remove the conflict of opinion.

1004 Procedure —It is not intended by this section that if the Magistrate finds that an order of commitment is to be made under this section proceedings under Chapter XVIII are to be commenced *de novo*—15 Cr L J 366 (Mad) All 910 therefore if the Magistrate has already completed the evidence of the complainant and his witnesses it is not necessary for him to take that evidence afresh Only in respect of the remaining proceedings the provisions of Chapter XVIII should be followed — All 910

Ought to be tried —See notes to section 207 for the meaning of these words This section is couched in general terms and gives the Magistrate very wide powers to commit if he is of opinion that the case is one which ought to be tried by the Court of Session The discretion vested in the Magistrate under this section cannot be limited by the provisions of sec 254 that is there is no suggestion in this section that the only possible reason for a competent Magistrate to commit a case is that he will not be able to pass a sufficiently severe sentence—*A E v Ishakal* 3 Rang 42 26 Cr L J 1389 A I R 1925 Rang 207 *Crown Prosecutor v Bhagnath* 42 Mad 83 But a contrary view has been taken in some cases See Note 695 under sec 207

If in a case some of the accused persons are charged with an offence which ought to be tried by the Court of Session and the case against the other accused is a summons case which the Magistrate can try and adequately punish it is not illegal for the Magistrate to commit *all* the accused to the Sessions—21 Cr L J 791 (Sind)

Before signing judgment —The commitment can be made if the judgment has not been given or signed After signing judgment no Court can alter or review the same—14 Cal 42 7 All 672 See Sec 3 J

Commitment may be made after framing a charge—3 Cal 495

348 (1) Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards is again accused of any offence punishable under either of those Chapters

Trial of persons previously convicted of offences against coinage stamp law or property.

with imprisonment for a term of three years or upwards shall if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused be committed to the Court of Session or High Court, as the case may be unless Magistrate is competent to try the case and is of opinion can himself pass an adequate sentence if the accused is con-

Provided that, if any Magistrate in the district has been invested with powers under section 30, the case may be transferred to him instead of being committed to the Court of Session

(2) *When any person is committed to the Court of Session or High Court under sub-section (1), any other person accused jointly with him in the same inquiry or trial shall be similarly committed, unless the Magistrate discharges such other person under section 209*

Change --The italicised words have been added by Sec 91 of the Criminal Procedure Code Amendment Act XVIII of 1923

If the Magistrate committing the accused — This amendment has been made on the lines of section 200 (1) — *Report of the Select Committee of 1916*

Is competent to try the case — We have introduced this amendment to make it clear that the section does not empower the Magistrate to pass sentence in a case which he is not competent to try — *Report of the Joint Committee of 1912*

In the proviso the words any Magistrate in the district have been substituted for the words the District Magistrate occurring in the old section The amendment is merely verbal

Sub section (2) — This clause provides that when any person is committed to the Court of Session under sec 348 any other person accused jointly whom the Magistrate believes to be guilty shall be similarly committed Identical treatment will thus be accorded to all the accused — *Statement of Objects and Reasons (1914)*

Sections 348 and 349 — If the accused is an old offender the Magistrate should act under this section and not refer the case to a superior Magistrate under section 349—2 Weir 423 That section does not apply to a case where the accused is an old offender—4 L B R 281 If a Magistrate instead of proceeding under this section erroneously sends up a case under section 349 it is open to the District Magistrate to take the case on his own file or to transfer it to some other first class Magistrate—2 Weir 422.

1005 Procedure —The Magistrate must first of all determine either as a preliminary matter or at any rate before framing a charge whether there has been a previous conviction if a previous conviction is proved the Magistrate will then have to consider whether in the circumstances of the case his powers enable him to try and pass adequate sentence If he thinks they do not permit he should not try but commit the case to the Sessions (but he should not discharge the accused) if they do permit he may

try the case himself. If he commits the case to the Sessions, he ought not to find the accused guilty, but should merely frame a charge under section 10 and commit the case for trial under Chapter XVIII—38 Mad 552.

Commitment not imperative. The words "unless convicted" did not exist in the Code of 1882, or in the earlier Codes, and therefore it was imperative on the Magistrate to commit if a previous conviction was proved, and he could not try the case himself—Ratanlal 704. But the 1895 Code gives a discretion to the Magistrate to try the case himself if he is competent to pass adequate sentence—2 Weir 422.

1006 Powers of District Magistrate.—Under the proviso to this section, if the District Magistrate is invested with powers under sec 30, the case may be transferred to him instead of being committed to the Sessions. In such a case the District Magistrate need not try the case *de novo*. He can under section 350 act on the evidence already recorded by the Magistrate who transferred the case. See notes under sub-section (3) of section 350.

If the District Magistrate considers that the case should be committed to the Sessions, he should himself commit and not send back the case to the Subordinate Magistrate with a direction to commit—9 Mad 377. If the District Magistrate commits the case, instead of trying it, he can it seems act upon the evidence recorded by the subordinate Magistrate and need not commence the inquiry *de novo*. See Ratanlal 472 and 12^o C. W. N. 136 cited under sec 346.

349 (1) Whenever a Magistrate of the second or third class, having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused

Procedure when
Magistrate cannot
pass sentence suffi-
ciently severe.

is guilty, and that he ought to receive a

punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under Section 106, he may record the opinion and submit his proceedings, and forward the accused, to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate.

(1A) When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of such accused, he shall forward all accused who are in his opinion guilty to the District Mag or Sub-divisional Magistrate.

(2) The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law

Provided that he shall not inflict a punishment more severe than he is empowered to inflict under Sections 32 and 33

Change —Sub section (1 A) has been added by sec 93 of the Criminal Procedure Code Amendment Act XVIII of 19-3 This is similar to sub section (-) of section 348

1007 Application of section —The provisions of this section are subject to the express provision of sec 348 Therefore where the accused is an old offender a second class Magistrate should commit him to the Sessions under sec 348 and not submit the case to the superior Magistrate under this section—Weir 423 41 B R 282

The procedure prescribed by this section is unsuited to cases tried summarily—4 L B R -77

1008 Reference to Superior Magistrate —*Who can refer*—Only the second or third class Magistrate can refer A first class Magistrate is not competent to submit the case under this section—7 All 414

This section does not authorise any Bench of Magistrates to refer a case for higher punishment—4 L B R -77

Reference discretionary —Whether a case ought to be referred to the superior Magistrate or not is within the discretion of the subordinate Magistrate and the District Magistrate cannot direct the subordinate Magistrate to send up the case under this section If he so directs his order is *ultra vires*—2 Weir 427

To whom case can be referred —The case can be referred to the District Magistrate or the Magistrate to whom the referring Magistrate is subordinate and to no other Magistrate—38 Bom 719

When reference can be made —This section authorises a reference to the superior Magistrate when the subordinate Magistrate considers that the accused should receive a severer sentence than he himself is competent to inflict If the punishment which the subordinate Magistrate proposed was one which he himself could inflict the reference was improper and the Magistrate should himself try the case—1851 A W N 99 When a case was sent to the District Magistrate not because the referring Magistrate was not competent to pass a severe sentence but on the ground that it was advisable that the matter should be dealt with by the District Magistrate it was held that the transfer was neither under sec 349 nor under sec 19-

and therefore the conviction made by the District Magistrate was illegal and must be set aside—1 All 66

Under this section the Magistrate can make a reference to a superior Magistrate if he considers that the accused should receive a severer punishment than he can inflict it does not apply where the Magistrate thinks that the accused should be dealt with under section 562 because an order under sec 562 directing release upon probation of good conduct is not a punishment—*Baba v Emp* 4 Cr L J 738 (Nag)

1009 Powers and duties of referring Magistrate —If the subordinate Magistrate sends the case to the higher Magistrate for severer punishment, he cannot convict the accused the conviction and sentence are reserved for the higher Magistrate The referring Magistrate is required to state his opinion only but he cannot convict—*Ratanlal* 387 *Pyavag Gope v King Emp* 3 Pat 1015 (1017) 5 P L T 571 25 Cr I J 1276 He can frame a charge if he likes and the framing of charge is not illegal—*Emp v Po Yin* 17 Cr I J 91 (Bur) - L B R 85 *Ratanlal* 948

If the subordinate Magistrate sends the case for the purpose of binding down the accused under sec 106 the Magistrate should neither convict nor pass sentence himself The conviction sentence and the order for security are all to be passed by the superior Magistrate—1 Cal 622 35 Cal 1093

Forward the accused —The reason of forwarding the accused is that the accused has a right to be present at the proceedings held before the Magistrate to whom the case is transferred such proceedings being a continuation of the proceedings before the referring Magistrate—7 W R 38 The right exists even though the superior Magistrate does not examine the parties or recall and re examine the witnesses and the accused will be at liberty to contend before that Magistrate that there is no sufficient case made out against him and the Magistrate if he thinks so may discharge or acquit him—7 B H C R 31

Sub section (1A) —It has been held, under the old law that if there are several accused charged before the subordinate Magistrate, the Magistrate can convict some of them and send up the others under section 11 to the superior Magistrate such a procedure is not now any longer the conviction illegal but in such a case it is more advisable to send all the accused to the superior Magistrate instead of convicting some of the accused—2 Weir 428 2 Weir 429 The new sub section 11A makes it imperative on the Magistrate under such circumstances to send all the accused to the superior Magistrate See *A F v Emp* 13 Cr L R 216 26 Cr L J 1363

But if there are several accused and the Magistrate thinks that all of them to be guilty he should not send all the accused to the superior Magistrate but should acquit the accused whom he finds not guilty

that accused alone whom he considers guilty—*Sultan Md v Lmp*, 24 A L J 80, 26 Cr L J 1630.

1010 Sub section (2) —*Powers and duties of the Superior Magistrate* —When a case is referred to a superior Magistrate, the whole case is opened up for him to deal with it according to his own discretion—*Ratanlal* 350 In dealing with the case, he should not confine himself to considering whether the decision of the subordinate Magistrate was plainly and manifestly opposed to the evidence but he should find on the evidence the facts which he considers proved and pass judgment accordingly—*Ratanlal* 636 5 M H C R App 43 If the superior Magistrate convicts the accused for an aggravated form of the offence, he must commence the trial afresh for such offence and cannot act on the evidence already recorded—2 Weir 421, 2 Weir 426 So also, if the offence is one which is beyond the jurisdiction of the subordinate Magistrate to try, the superior Magistrate cannot act upon the evidence already recorded by the subordinate Magistrate—1 Bom L R 27 The Magistrate to whom a case is transferred is competent to pass such judgment sentence or order as he thinks fit' He is free to deal with the case according to his own discretion and he can, if he thinks fit, order a commitment to the Court of Session—*Ratanlal* 945 2 Mad 289, 9 Mad 377 13 Cal 303, 4 Bom 240 He has to make up his mind whether the accused are guilty or not and exercise his own independent judgment in the case and to write a judgment conformable to the requirements of section 367 He cannot simply pass sentence on the accused without writing any judgment—*Karuppa v Lmp*, (1920) M W N 120

The superior Magistrate to whom the case is referred has no power to send back the case to the subordinate Magistrate upon any ground whatsoever He must dispose of it himself by acquitting or convicting the accused or by committing him for trial—26 All 344 *Ratanlal* 943, 6 C L R 276 and even if the case is sent back to the subordinate Magistrate, the latter cannot take up the case, after he has referred the case his jurisdiction over it ceases, and any order passed by him would be illegal—6 C L R 276, 10 Bom 196 If the superior Magistrate thinks that a commitment to the Sessions is necessary, he himself should make the commitment he cannot send back the case to the referring Magistrate with direction to commit the case to the Sessions—9 Mad 377 If however, the reference is defective e g if the referring Magistrate has omitted to record in writing the statement of the accused as required by section 364 the superior Magistrate can return the case with a direction to supply the defect and the subordinate Magistrate in such a case is also competent to come to a fresh and different conclusion as to the guilt of the accused and acquit some of them—2 Weir 426

Moreover, the Magistrate to whom a case is referred cannot refer

the case to another Magistrate for inquiry—6 M H C R App - 4 Mad 23 36 Mad 470 1905 C B R (Cr P C) 33 A case once referred under this section cannot be referred to another Magistrate for inquiry or trial—38 Bom 710 Even if the superior Magistrate thinks that the reference by the inferior Magistrate was incorrect or illegal he can report it for orders under section 438 but himself cannot quash the reference and order retrial by another Magistrate—1900 P R 14

The superior Magistrate can act upon the evidence already recorded by the subordinate Magistrate and is not bound to hold a *de novo* trial under sec 350—2 Weir 4-8 This is now made clear by the amendment made in subsection (2) of sec 350 which lays down that that section does not apply to a transfer of proceedings under section 340 See *A E v Dodo* 18 S L R 216

350 (1) Whenever any Magistrate, after having heard and recorded the whole or any part of the

Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.

evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the

Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial

Provided as follows —

(a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and reheard,

(b) the High Court, or in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial

(2) Nothing in this section applies to cases in which

ceedings have been stayed under S. 346 or in which proceedings have been submitted to a superior Magistrate under section 349

(3) When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein and to be succeeded by the latter within the meaning of sub section (1)

Change.—The italicised words have been added by section 94 of the Criminal Procedure Code Amendment Act XVIII of 1923. The reasons are stated below in their proper places

1011 Object and scope of section.—The general principle is that a case must be decided by the Magistrate who heard the evidence. But if this principle has to be strictly observed it will follow that in every case of transfer the succeeding Magistrate will have to try from the beginning all cases which have been partly heard by his predecessor in office and there will be endless delay in trials. And this section is obviously intended to meet such cases.—6 Cal 370 19 Cr L J 657 (Nag). In view of the frequent changes in the office of Magistrates the Code provides specially that a Magistrate may pronounce judgment on evidence recorded by his predecessor or on evidence partly recorded by his predecessor and partly by himself.—3 Mad 11

This section applies not only where one Magistrate is succeeded by another but also where the second Magistrate is in his turn succeeded by another Magistrate. The third Magistrate can act on evidence recorded by his two predecessors. This section is not confined to a case where there is only a single occurrence of one Magistrate succeeding another.—*Gowindan v. Krishnam* 45 M L J 808

This section gives the succeeding Magistrate jurisdiction to decide the case on evidence recorded by his predecessor but it cannot give him jurisdiction to deliver a judgment written by his predecessor. Where the Magistrate who heard the evidence and tried the case was transferred to another district and from that place he sent a written judgment which was pronounced by his successor at the place where the case was tried held that there was no jurisdiction to do so and the conviction and sentence so passed were illegal and that the accused must be retried.—*Baisnab Charan v. Amin* 41 50 Cal 664 38 C L J 6. 24 Cr L J 489. *Id.* *Rafique v. A. L.* 43 C L J 100 27 Cr L J 406. But the Madras High Court and the Oudh Chief Court hold that the succeeding Magistrate can sign and pronounce the judgment written by his predecessor and thus adopt it as his own.—*In re Sarimull* 4 40 Mad 108 37 M L J 81. *Chandka v. Emp.* 80 C 109 11 O L J 75. *In re Sankara Pillai* 15 M L J 117 7 Cr L J 451

1012 Application of Section —(1) This section applies to an inquiry under Chap VIII therefore where a Magistrate holding an inquiry under section 107 is transferred after the examination of some prosecution witnesses and is succeeded by another the person called upon to shew cause why he should not give security may under proviso (a) insist upon the re summoning and re examination of those witnesses—4 C L R 452 43 Mad 511

(2) This section is applicable to proceedings under section 145 Where in the course of such proceedings one Magistrate is transferred the succeeding Magistrate can act upon the evidence already recorded—13 C W N 420 37 Cal 812 *Sondi Singh v Gobind Singh*, 5 P L T 237 25 Cr L J 81 *Syed Sadek v Sachindra*, 37 C L J 128 24 Cr L J 569

(3) This section applies to inquiries preliminary to commitments The succeeding Magistrate can commit the case to the Sessions on evidence recorded by his predecessor in office—31 Mad 40 36 All 315

(4) This section would enable a Magistrate to try a case in which his predecessor has issued a process and granted adjournment but has recorded no evidence—*Ratanlal* 65

(5) This section does not apply to cases tried by Benches of Magistrates—3 Cal 194 18 Mad 394 20 Cal 870 2 Lah 237, 22 Cr L J 511 9 Bur L T 203 Even the new section 350A does not apply where one Magistrate of a Bench is replaced by another that section contemplates cases wherein all the Magistrates constituting the Bench have heard the proceedings throughout See notes under that section

(6) This section applies only to Magistrates but not to Sessions Judges A Sessions Judge is not competent to pronounce judgment on evidence recorded by his predecessor, or on evidence partly recorded by his predecessor and partly by himself—21 W R 47 1864 W R 32 8 C L J 59, 3 Mad 112 7 C P L R 1 35 All 63 Even the consent of the accused would not enable the Sessions Judge to do so and validate such procedure—26 Bom 50 1890 P R 1 23 W R 59

(7) This section refers to cases where one Magistrate is succeeded by another Magistrate, and does not apply where the Magistrate remains the same and his official designation is merely changed Thus where a Head Assistant Magistrate having almost completed the trial of a criminal case, was appointed to the office of a Deputy Magistrate in another place in the same District and the case was brought on to his file to the latter place by order of the District Magistrate he could proceed to try the case from the point at which he had arrived as Head Assistant Magistrate prior to his transfer to the post of Deputy Magistrate and the accused cannot demand under proviso (a) that the trial must be commenced *de novo*—22 Mad 47

(8) This section does not apply where the District Magistrate holds further inquiry into a case under section 437 (now 436). In such a case he must hold the inquiry *de novo* and cannot rely on the evidence recorded by the Magistrate who previously tried the case—6 All 367, 7 Bur L R 198.

1013 Succeeded —A liberal construction should be put upon the provisions of section 350. Where on the death of a Magistrate empowered under section 30 the District Magistrate being the only remaining Magistrate in the district having powers under that section, took upon his file a case which was being tried by the deceased it was held that the District Magistrate must be regarded as having succeeded the deceased Magistrate within the meaning of this section—*Gorelal v. Emp.* 19 Cr L J 705 (Nag.). When a case is transferred from one Magistrate to another the former Magistrate is said to be succeeded by the latter. See subsection (3) and notes thereunder.

1014 Recommence the inquiry or trial —If the succeeding Magistrate chooses to recommence the trial he must recommence by resuming and re-examining the witnesses. But he cannot go to any stage previous to that. He cannot dismiss the complaint under section 203—7 C P L R 36 or refer the case to the Police under section 6 for inquiry and report—9 Mad 38.

If a charge has already been framed by the preceding Magistrate the succeeding Magistrate cannot cancel the charge—38 Mad 385, 1903 P R 14, L W 1244. The principle is that if the proceedings before the preceding Magistrate have developed into the stage of a trial by the frame of a charge the succeeding Magistrate cannot go beyond the stage of trial and transform the trial proceedings into an inquiry by cancellation of the charge—38 Mad 385. And since the succeeding Magistrate cannot cancel the charge an order subsequently passed letting off the accused is one of acquittal and not one of discharge—*Simhadri v. Sitarani* 2 L W 1244, 38 Mad 385.

If a trial is commenced *de novo* by the succeeding Magistrate he must observe all the procedure of the trial and cannot omit any part of the procedure. Where in a *de novo* trial the Magistrate omitted to examine the prosecution witnesses (who had already been examined by the preceding Magistrate) but allowed them to be cross-examined by the defence it was held that the trial was not in due compliance with this section and ought to be set aside—12 C W N 138. A *de novo* trial means the trial from the beginning of the case. The object of granting a *de novo* trial is to enable the Magistrate who hears the case to see the way in which the witnesses give evidence before him to mark their demeanour and thereby to be in a position to judge of their credibility. This object is lost if the witnesses are not examined ab initio but are only allowed to be cross-examined by the

accused. Such a procedure is not a *de novo* trial and the conviction of the accused must be set aside—*Narayana v. Bojanna* 49 M L J 473 26 Cr L J 1596. Similarly, where the Magistrate holding the *de novo* trial merely read over to the accused the deposition of the prosecution witnesses (recorded by the preceding Magistrate) though he allowed them to be cross examined the procedure was held to be illegal—9 L B R 92 *Mangal Singh v. Crown* 1919 P W R 16 22 Cr L J 119 (Fah).

Transfer of Magistrate to his original place—Before the conclusion of the trial the trying Magistrate was transferred. Thereupon the case was transferred to the file of a superior Magistrate who began to try it *de novo*. Afterwards the original Magistrate was re-transferred to his original place and the superior Magistrate transferred the case to him with a direction to proceed from where he had originally left it. It was held that the inferior Magistrate must try the case *de novo* and could not proceed from where he had originally left the case because all that had taken place before the inferior Magistrate originally had been superseded—*Daroga Choudhury v. Emp.*, 20 Cr L J 638 (Pat) *Jago Singh v. Emp.* 20 Cr L J 920 (Pat) 3 All 563.

Transfer of case to the transferred Magistrate—A Magistrate was transferred after he had finished the major portion of the trial of a case. The succeeding Magistrate granted a *de novo* trial. But the District Magistrate was of opinion that as only a small amount of work remained to be done in the case it could be best done by the Magistrate who had tried the case and so he (Dt. Magistrate) transferred the case to the original Magistrate. Held that even the original Magistrate to whom the case was thus transferred could not take up the case from the point at which he had left it but that he must start the case *de novo* because as soon as he was transferred all the proceedings which had previously taken place before him were wiped out—*Sardar Khan Sahib v. Atanulla* 47 M L J 926 26 Cr L J 510.

1015 Proviso (a)—*Right of Accused*—Under the proviso (a) the accused has a right to demand that the witnesses or any of them shall be resummoned or reheard. The policy of the law is that an accused should be able to claim a right not to be convicted by a Magistrate who has not himself heard the whole evidence—3 Lah 115. The accused can exercise his right under the proviso (a) in case of a *trial* only where a preliminary inquiry before commitment is transferred before frame of charge the accused is not as of right entitled to an inquiry *de novo*—3 Mad 18 1903 P R 14. Proceedings in a warrant case before a charge is framed are merely an inquiry and not a *trial* and if a case is transferred at that stage, the accused cannot demand a fresh examination of witnesses to be made by the succeeding Magistrate—*Ramanathan v. King Emp.* 46 Mad 719. But the accused is not altogether without a remedy because as

soon as the charge is framed by the succeeding Magistrate he can under sec 56 recall all the prosecution witnesses whose evidence has been taken and thus he has a right equivalent to that of demanding a *de novo* trial—*Palaniandy v Emperor* 32 Mad 218 (219). But according to the Calcutta High Court a trial commences as soon as the case is called on with the Magistrate on the Bench the accused on the dock and the representatives of the prosecution and for the defence are present in Court for the hearing of the case. The proper time for the accused to ask for resummoning and rehearing of the witnesses is as soon as the trial commences before the second Magistrate—*Gomar Sirdar v Q E* 25 Cal 863. In trials of summons cases and in summary trials the time when the accused is to demand that the witnesses shall be resummoned and reheard is when the second Magistrate commences his proceedings—*Sahib Din v Crown* 3 Lah 115.

According to the Calcutta High Court this proviso applies only to a trial and does not apply to an inquiry under section 145 consequently a Magistrate has power to proceed with the inquiry of a case under sec. 145 where a portion of the evidence has been recorded by his predecessor and he is not bound to start the proceeding *de novo* on the application of the accused—*Syed Sadek v Sachindra* 37 C L J 128. *Sandi Singh v Govind* 5 P L T 237 25 Cr L J 39. But a Full Bench of the Madras High Court has laid down that the proviso (a) applies to an inquiry under sec 117 because such inquiry according to sub section (2) of sec 117 is made in the manner prescribed for conducting trials in summons or warrant cases and in fact has all the features of a trial—*Venkata Chinnaya v King Emp* 43 Mad 511 (F B). This is also the view of the Oudh Court—*Basu Nath v Emp* 27 O C 323 25 Cr L J 1380.

The accused person must himself claim or waive the right. Where a case was transferred from one Magistrate to another and during the arguments on the transfer application the pleader for the accused stated his intention not to have a *de novo* trial in the Court to which the case was transferred and subsequently the accused demanded a trial *de novo* it was held that there was no waiver of the right under this section and that there must be a *de novo* trial—19 Cr L J 657 (Nag).

The Magistrate is not bound to ascertain from the accused whether he wishes to exercise the right conferred by this proviso. This section confers the right on the accused to demand and does not prescribe that the Magistrate shall ask the accused whether he will exercise the right or not—*Nga Po v H F U B R* (1912) 151. The Magistrate is not bound to have the accused brought before him to ascertain whether he wishes to exercise this right—1384 P R 6. An omission on the part of the Magistrate to ask the accused whether he wants evidence to be reheard is a mere irregularity curable by sec 537. In (1916) U B R 201

Or 108 and 1 B R 87 however it has been held that it is necessary for the Magistrate to acquaint the accused with the fact that he is entitled to have the witnesses re-called and re-examined. Though the law does not absolutely require this to be done the procedure should be followed as a matter of practice—1 B R 87

But there is no doubt that if the accused wants the evidence to be reheard the Magistrate must recommence the trial—9 I B R 97 and the refusal by the Magistrate to do so would be an illegality not curable by sec 537—1903 P R 3 5 Cal 863

An accused person cannot demand a *de novo* trial on the transfer of a trying Magistrate merely on the ground that that Magistrate had not heard his counsel—*Chandika Prasad v. A. E.* 28 O C 109 25 Cr L J 1075

Where the accused claims under this section to have the witnesses re-examined by the succeeding Magistrate the witnesses should be summoned without the payment of any fees—*Fliss v. Ezekiel* 8 Bur L T 43

1016 Proviso (b) —A District Magistrate can under proviso (b) set aside a conviction passed by a first class Magistrate in the district though no appeal lies from his order to the District Magistrate—9 Bom 100 12 Cal 473 7 All 853 8 Mad 18

1017 Subsection (2) —The procedure laid down in this section does not apply to proceedings stayed under sec 346—1905 P L R 91 Thus where a Magistrate trying a case was of opinion that the accused deserved a severer punishment than he could inflict and stayed the proceedings and submitted the case to the District Magistrate under sec 346 it was held that the District Magistrate could not convict the accused on the evidence recorded by the referring Magistrate even though the accused did not want the evidence to be reheard—1905 P R 25 19 Cr L J 625 (Pat) In such a case the accused has no power to waive his right to a trial *de novo* and the failure to hold a trial *de novo* is an illegality which vitiates the whole trial and is not merely an irregularity covered by sec 537—19 Cr L J 625 (Pat)

This subsection as now amended further lays down that the procedure of this section does not apply to sec 349. Even prior to this amendment it was held that the superior Magistrate to whom a case had been transferred under section 349 could act upon the evidence already recorded by the subordinate Magistrate and was not bound to hold a *de novo* trial—2 Weir 428 This is now made clear by the present amendment. See *A. E. v. Dodo* 18 S L R 216 26 Cr I J 1363

1018 Subsection (3)—*Transfer of proceedings* —Subsection (1) applies where the Magistrate is transferred from one place to another the case remaining in the same Court. But does that subsection apply where a case is transferred from one Magistrate to another under section 57

the Magistrates remaining in the same post? In other words does that subsection apply to transfer of *cases* as well or is it confined only to transfer of *Magistrates* only? There was some difference of opinion under the old section as to this question. In the following cases it has been held that this section covers cases where proceedings are transferred by section 58 from the Court of one Magistrate to that of another because as soon as a case is transferred from one Magistrate to another the former ceases to exercise jurisdiction in the case within the meaning of this section—35 Cal 457 39 Cal 781 37 Mad 218 1916 U B R 2nd Or 108 71 C W N 755 40 All 307 36 All 315 20 Cr L J 41 (Mag) 20 Cr L J 196 1 Bur L T 25 Cr L J 8 (Pat) 1 P I T 679 But the contrary view was taken in the following cases—1889 A W N 130 17 C W N 140 1 L B R 301 17 All 66 14 All 346 1 N I R 187

To remove this conflict of opinion subsection (3) has been added adopting the former view. There has been some difference of opinion as to the position when cases are transferred from one Magistrate to another otherwise than from a predecessor to a successor in office. The amendment provides that the Magistrate from whom the case is transferred shall be deemed to cease to have jurisdiction within the meaning of this section—*Statement of Objects and Reasons* (1914)

350A *No order or judgment of a Bench of Magistrates shall be in aid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under Sections 15 and 16 and the Magistrates constituting the same have been present on the Bench throughout the proceedings*

Changes in constitution of Benches

This section has been added by Sec. 93 of the Criminal Procedure Code Amendment Act VIII of 1933.

In the Bill of 1931 it was intended to add the following subsection to section 350—

(4) The provisions of this section shall apply so far as may be to proceedings before any Bench of Magistrate constituted under section 15 wherever the Magistrates sitting together in any proceeding are not the same as those who were sitting together at the last hearing thereof.

In other words it was intended to lay down that if during the hearing of a trial any Magistrate of a Bench was absent and was replaced by another such a change would not affect the proceeding and the trial need not be commenced *de novo* the new Magistrate would be able to act on the evidence already recorded. But this clause did not meet with the approval of the Joint Committee who observed:—We think however that the

new sub section (4) which has been introduced in the Bill to deal with the case of Benches goes somewhat too far and we have substituted for it a new section after section 350 which in our opinion gives effect to the law as laid down by the High Courts. Briefly it provides that a judgment of a Bench shall be valid when the Bench is duly constituted at the time of passing the judgment and the judgment is passed by Magistrates *all of whom have heard the proceedings throughout* — *Report of the Joint Committee (1922)*

1019 Hearing by one Bench decision by another — A case must be decided by the same Bench which heard the evidence and arguments. Where the evidence for the prosecution was taken before two Honorary Magistrates and on a subsequent day the evidence for the defence was taken and judgment delivered by a Bench consisting of one of those Magistrates and another the High Court set aside the decision and ordered a new trial—20 Cal 870 12 Cal 558 38 Mad 304 3 Cal 194 41 All 116 U B R (1918) 4th Or 118 7 Lab 237

1020 Absence of some of the Magistrates — Where a trial was begun before a Bench of seven Magistrates and when the judgment was pronounced only five out of the seven were present it was held that the mere circumstance that two out of the seven Magistrates were absent on the day on which the accused was convicted did not affect the legality of the conviction as the other five Magistrates attended the trial from beginning to end—21 Mad 246 1914 M W N 867 Where two Magistrates who decided a case sat throughout the trial and constituted as quorum of the Bench the trial will not be vitiated by the mere fact that two other Magistrates who were not necessary to the quorum and who were present at the time of the commencement of the inquiry were not on the Bench at the time of the decision of the case—3 N L R 67 But where in the course of the trial by a Bench consisting of a stipendiary and two honorary Magistrates one of the honorary Magistrates was absent and important evidence was recorded in his absence but on the following day he resumed his seat and joined with the other Magistrates in signing the order for the conviction of the accused it was held that the conviction was bad—13 C L R 12 So also where in a trial before a Bench of Magistrates one of the members constituting the Bench was absent on the date when witnesses were examined it was held that the conviction of the accused was bad and that there must be a retrial—36 M L J 362 The trial of an accused by a Bench of Magistrates one of whom did not hear the entire evidence is bad in law and a conviction by such Bench cannot be sustained—1912 P L R 1 22 Cr L J 511 23 Bom L R 833 It is wrong that a Magistrate who has been absent during a part of the trial should express an opinion on evidence which he has not heard and possibly influence his fellow

Magistrates who were in a better position than he was to decide the case—23 Bom L R 833 Only those persons who have heard the whole of the evidence can decide the case—8 L B R 463 So also where a case was heard by a Bench consisting of two Magistrates who formed the quorum but on the day on which judgment was pronounced one of the members was replaced by another who had not heard the evidence and judgment was pronounced convicting the accused it was held that as one of the members on the occasion when judgment was pronounced did not hear the evidence it was difficult to say that the accused were not prejudiced and consequently the trial was illegal—41 All 116 In order that the conviction should be legal it must be by a quorum of Magistrates required under the rules each of whom has heard the whole evidence—13 S L R 166 Where a case was tried by a Bench of Magistrates one of whom recorded the evidence while the other was sitting close by and going on with another case held that as the hearing took place practically before only one of the Honorary Magistrates the order must be set aside and the case tried *de novo*—*Sullan v Shamser* 25 O C 18 23 Cr L J 696

Want of quorum —Where a Bench of Magistrates established by the Local Government is under the notification establishing it to consist of not less than two members one member of the Bench cannot alone adjudicate upon a case—1907 A W N 148 Similarly a trial by two members of a Bench which according to rules must consist of not less than three members is bad in law—16 Mad 410 Thus where a Bench of three Magistrates constituted under the rules commenced a trial and heard the prosecution evidence but afterwards one member of the Bench was absent and the remaining two Magistrates went on with the trial heard the defence evidence and convicted the accused held that the trial having been in contravention of the rules was void The trial ought to have been adjourned till the absent member was present or it should have been held afresh before a different set of Magistrates—44 Bom 400

351 (1) Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which from the evidence may appear to have been committed, and may be proceeded against as though he had been arrested or summoned

(2) When the detention takes place in the course of an

inquiry under Chapter XVIII or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses reheard

1021 This section applies even though a trial has actually been begun In 14 W R 20, it was held that this section could not be applied where the trial was actually being proceeded with, because such a course deprived the prisoner of the opportunity of preparing his defence and subjected him to be tried on evidence which was taken before he was put into the position of a prisoner This ruling is no longer good law, because subsection (2) provides for the difficulty presented in that ruling and requires the proceedings to be commenced afresh

This is a self contained section and the cognisance which a Magistrate takes under this section in respect of an offence is independent of the provisions of Sec 190 (c) Consequently the provisions of section 191 are also inapplicable where a Magistrate takes cognisance under this section —5 N L R 113 As to taking cognisance against a witness in a case, see notes under section 190 (c)

352. The place in which any Criminal Court is held for the purpose of inquiring into or trying Courts to be open. any offence shall be deemed an open Court to which the public generally may have access, so far as the same can conveniently contain them

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to or be or remain in, the room or building used by the Court.

1022 Court to be open — *Jail trial* — This section does not necessarily make a trial in a jail invalid where there is nothing to show that admittance was refused to any one who desired it or that the prisoners were unable to communicate with their friends or counsel But it is undesirable to hold trials in a jail because it is difficult to get counsel to appear in jail — *Sahas Singh v Crown*, 1917 P W R 21

The evidence of a Ghosha woman should be taken behind a purdah at a private place where she can come, in the presence of the accused only, the Judge taking such precaution as he can to secure her identity —2 Weir 432

Exclusion of police Officers — A police officer who has investigated

into a case should not be allowed to be present before a Magistrate when he records a confession made by the accused—1885 A W N 221

This section gives power to the Court of ordering that any particular person shall not remain in the room used by the Court. It makes no exception in the case of a Police officer. When the accused person objects to the presence of a Police officer or other person the Magistrate has to decide whether the accused's fear of prejudice to his case is reasonable considering the intelligence and susceptibilities of the class to which he belongs and not merely whether the presence is convenient or helpful to the Court or the prosecution. It is not advisable that a Police officer interested in the case proceeding before the Magistrate should receive exceptional treatment as a seat on a dais as it is calculated to breed suspicion in the mind of the accused as to the independence of the Magistrate—*Nathu Singh v Emp* 8 N L J 95 26 Cr L J 1130

CHAPTER XXV.

OF THE MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS

353 Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII, and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader

Evidence to be taken in presence of accused.

1023 Scope of section.—This section lays down that all evidence shall be taken in the presence of the accused and it includes both the evidence for the prosecution as well as for the defence. Where, after all the prosecution witnesses were examined the accused absconded, and the witnesses named by him were examined in his absence and he was convicted the conviction was held to be illegal—*Nga Po Shain v K E*, U B R (1912) 4th Q 152

If the witnesses are not examined in the presence of the accused, the trial is invalid and the conviction will be set aside—2 N W P H C R 49. An order is wholly illegal if it is based on evidence which is recorded behind the back of a party at a time when he was not a party to the proceeding at all—*Narayan v Chandrabhaga Bai*, 26 Cr L J 1289 (Nag). When a *pardanashin* lady was examined in a passage screened from the direct view of the Court and her voice could be perfectly heard in the Court and by the accused and he made no objection it was held that the evidence was virtually heard in the presence of the accused—1887 P R 41. But *pardanashin* ladies should not be generally summoned to appear in Court to give evidence but may be examined on commission—4 Cal 20, 12 All 69 5 All 92.

Two trials were held of two sets of accused who were the opposite parties in a fight in each case the accused wanted the evidence for the prosecution in the cross-case to be treated as defence evidence, and the Sessions Judge did so. Held that in such case the defence evidence, being one given by the prosecution in the other case, was obviously one given in the absence of the accused. This was a violation of the provisions of this section and was not only irregular but illegal—*Illu v Crown* 4 Lah 376, *Muhammad v Emp* 25 Cr L J 351 (Lah). If a commitment is made on evidence taken in the absence of the accused the commitment is void, and the subsequent trial must be set aside—*Khanan v Crown* 1913 P L R 260. Where the evidence of witnesses taken in the absence of the prisoner at a former trial was read out to them and put in as evidence at the present trial it was held that the proceeding was irregular and prejudicial to the prisoner, and that such witnesses should have been sub-

into a case should not be allowed to be present before a Magistrate when he records a confession made by the accused—1885 A W N 221

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to a fresh oral examination in the presence of the prisoner—12 W R 3
See also 9 All 609, Ratanlal 24 1 Bur S R 399

The Magistrate should not only take the evidence in the presence of the accused but his record must show on the face of it that he has done so. The Magistrate should by the use of a few apt words on the face of the deposition make it apparent that he had taken the evidence in the presence of the accused—10 Att 174

When his personal attendance is dispensed with—See Sec 205. The presence of an accused person may be dispensed with on ground of his ill health—*Emp v King* 14 Bom L R 236. A respectable *pardanashin* woman should not ordinarily be compelled to appear in person in the first instance unless and until there is a strong likelihood of the charge being proved—1909 P W R 5, 45 Mad 359 and where her presence is dispensed with, the evidence may be recorded in the presence of her pleader—1908 P W R 20 45 Mad 359

354. In inquiries and trials (other than summary trials)

Manner of recording evidence outside presidency-towns under this Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner

355 (1) In summons cases tried before a Magistrate

other than a Presidency Magistrate, and in cases of the offences mentioned in sub section (1) of Section 260, clauses (b) to (m) both inclusive, when tried by

Record in summons cases and in trials of certain offences by first and second class Magistrates a Magistrate of the first or second class, and in all proceedings under Section 514 (if not in the course of a trial), the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record

1024 Scope of section:—In summons cases, the deposition may be recorded in the form of a memorandum, but it is not necessary that the recorded deposition should be read over to the accused and an omission to do so cannot be regarded as a fatal defect—2 Weir 433

In cases other than those mentioned in this section, the evidence cannot be recorded in the form of a mere memorandum, if it is so recorded, the conviction will be set aside—2 Weir 432

In cases referred to in section 260, if they are tried summarily, the substance of the evidence must be embodied in the judgment, as well as the particulars mentioned in section 264. If those cases are tried regularly, instead of summarily, the procedure of this section is to be followed—3 L. B. R. 3

In proceedings under Chapter XXXVI (maintenance proceedings) the evidence ought not to be recorded as in summary trials, but in the manner provided by this section—20 Cal 351

There is no provision as to the language in which the memorandum is to be recorded. But there is also no provision which renders it illegal for an Indian second class Magistrate to record the memorandum in English. Such a procedure is a mere irregularity which does not vitiate the trial, unless a failure of justice has been occasioned thereby—19 Mad 269

Under Sub-section (2) the Magistrate must sign the record, if he omits to do so the illegality vitiates the trial—3 P. L. T. 322

356 (1) In all other trials before Courts of Session and Magistrates (other than Presidency Magistrates), and in all inquiries under Chapters XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the Magistrate or Sessions Judge

(2) When the evidence of such witness is given in English, Evidence given in the Magistrate or Sessions Judge may English take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record

(- A) *When the evidence of such witness is given in any other language, not being English, than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or English shall form part of the record*

(3) In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such

Memorandum when evidence not taken down by the Magistrate or Judge himself

witness deposes, and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it

Change—Sub section (2A) has been added by section 96 of the Criminal Procedure Code Amendment Act XVIII of 1923. The reason is thus stated: 'Section 356 does not provide for evidence being taken down in any other language than that of the Court or, if the language of the Court is not English in English. The result is a certain loss of accuracy when ever evidence is given in a third language, as it has to be translated into and taken down in the language of the Court or in English. The object of the amendment is to secure greater accuracy and to avoid waste of time in translation.—Statement of Objects and Reasons (1921)

The words 'or cause it to be taken down by the superintendent in sub-section (2A) did not exist in the Bill or Report but were added during the Debate in the Legislative Assembly to meet the case of a Magistrate or Judge who does not know the language in which the evidence is given. In such cases it will be necessary for the Magistrate or Judge to have the statement recorded in the language in which the evidence is given'—*Legislative Assembly Debates* 27th February 1923 page 2035

1025 Record of Evidence—The provisions of this section are imperative, and omission to record the evidence in the mode prescribed by this section is a material irregularity sufficient to set aside the proceedings—19 Cr L J 235 (Pat), 1891 A W N 145. Where a Magistrate made no vernacular record of the evidence of the complainant and his witnesses, the procedure was held to be illegal—1890 A W N 164. *Udit Naran v Emp*, 17 A L J 1146

The provisions of sub-section (1) are imperative and the entire evidence must be recorded fully either by the Magistrate himself, or by somebody else under the direction of the Magistrate. In the latter case (i.e., where the evidence is recorded by any person other than a Magistrate), the Magistrate should under sub-section (3) make a memorandum of the evidence. But sub-section (3) does not override the provisions of sub-section (1), but is merely supplementary to it. In other words the fact that the Magistrate is making a memorandum of the evidence does not do away with the necessity of the evidence being fully recorded by some other officer of the Court. Where a Magistrate in a proceeding, under section 145, neither recorded the evidence fully in his own hand, nor caused it to be recorded fully by any

body else, but simply made a memorandum of the evidence, purporting to act under subsection (3), it was held that the provisions of subsection (1) not being complied with, the whole proceedings of the Magistrate must be set aside—42 Cal 381

Where there is a discrepancy in a material part of the evidence of the principal prosecution witnesses between the record in the vernacular in which that witness gave evidence and the record in English, the accused is entitled to the benefit of the doubt created thereby. Generally speaking, the evidence as recorded in the vernacular in which the witness deposed is entitled to a greater weight and is more reliable than the record made in the English language, but where the Magistrate who made the English record was an experienced Magistrate fully conversant with the vernacular in which the witness gave his evidence the English record is also reliable, but all the same, the accused is entitled to the benefit of any doubt caused by the discrepancy between the two records—*Sadhu Singh v Crown* 24 Cr L J 624 (Lah)

357 (1) The Local Government may direct that in any Language of record of district or part of a district, or in proceedings before any Court of Session, evidence or before any Magistrate or class of Magistrates, the evidence of each witness shall, in the cases referred to in Section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so and shall cause the evidence to be taken down in writing from his dictation in open Court

(2) The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record

Provided that the Local Government may direct the Sessions Judge or Magistrate to take down the evidence in the English language, or in the language of the Court, although such language is not his mother tongue

1026 The authority conferred on an officer by this section is personal to that officer and remains in force only so long as he remains in the particular district in which it has been conferred—5 M H C R App 9. Therefore, where a Magistrate empowered to record the deposition in his own handwriting while in district B did the same when he was transferred to another district, under the belief that the authority previously given to him still remained in force and committed the accused for trial, it was held that the Magistrate's proceeding was irregular but since the accused was not prejudiced thereby, his commitment was not set aside—2 Weir 434

The plea of the accused need not be recorded in the words of the very language in which it is made, when it is a foreign language, the for

must be in the language in which it is interpreted to the Court—5 Cal 826

358 In cases of the kind mentioned in Section 355, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in Section 356, or, if within the local limits of the jurisdiction of such Magistrate the Local Government has made the order referred to in Section 357, in the manner provided in the same section

1027 The ordinary and proper and convenient way of recording evidence is to take it down in the first person exactly as spoken by the witness—11 W. R. 36 The Judge should in taking down evidence adhere as far as possible to the words actually used either in the question or in the answer given by the witness. The provisions of law will not be complied with by recording a more or less accurate paraphrase of the evidence given by a witness—11 Bur. L. R. 8 The Judge is not bound to make a verbatim record of any particular questions and answers. It is left to the discretion of the Judge if either side specially requests him to do so—11 Bur. L. R. 8

359 (1) Evidence taken under Section 356 or Section 357 shall not ordinarily be taken down in the form of question and answer but in the form of a narrative

(2) The Magistrate or Sessions Judge may, in his discretion take down or cause to be taken down, any particular question and answer

360 (1) As the evidence of each witness taken under Section 356 or Section 357 is completed, it shall be read over to him in the presence of the accused if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks necessary

(3) If the evidence is taken down in a language different from that in which it has been given and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands

1028 Object and Scope of Section—The object of this section is to give an opportunity to the witnesses to explain or correct the statements made by them—4 P L W 44 19 Cr L J 169 This section is enacted for the protection of witnesses it provides that a witness in order to satisfy himself that the evidence which has been taken down is correct may have it interpreted to him if he desires it in a language which he understands—C L R 393

This section applies to evidence recorded under section 356 or 357, but not to evidence recorded under section 355 Where the evidence is recorded in the form of a memorandum under section 355 it is not incumbent on the Magistrate to read over the memorandum of the deposition to the witness—4 P L W 44 19 Cr L J 169 and omission to do so is not fatal to the conviction—2 Weir 433 When a case is tried summarily, it is not necessary that the evidence of witnesses should be read over to them—23 Cr L J 120 (Pat)

In an inquiry under sec 107 the evidence must be recorded as in a summons case (see sec 117) i.e. it must be recorded in the manner prescribed in section 355 and not as laid down in sec 356 or sec 357 Sec 360 does not apply to a case in which the evidence is recorded under sec 355 and hence in an inquiry under sec 107 it is not necessary that the deposition should be read over to the witness in the presence of the accused—*Legal Remembrancer v Jafar* 52 Cal 668 A I R 1925 Cal 940

But in an inquiry in a good behaviour case the provisions of section 360 will apply and failure to comply with those provisions would vitiate the inquiry or trial—*Sanatan v Emp* 52 Cal 632 41 C L J 352 A I R (1925) Cal 720 *Azizab Khan v Emp* 52 Cal 470 26 Cr L J 1233

This section applies to the evidence of witnesses and not to the examination of the accused—12 W R 44

This section applies to proceedings under section 145 and the evidence of each witness must be read over to him in the presence of the accused the term 'accused' being applicable to persons proceeded against under Chapter XII Even if the term accused does not apply to such persons still this section would cover the proceedings under Chapter XII, because, section 356 (which is referred to in this section) expressly mentions Chapter XII—*Ram Narain v Dhonrai* 3 P L T 291 23 Cr L J 125, *Irwin Kumar v Puti* 52 Cal 437 29 C W N 474 26 Cr L J 914 But a Full Bench of the Calcutta High Court has recently laid down that the parties to the proceedings under section 145 are not 'accused persons' and that therefore the provisions of sec 360 apply to proceedings under sec 145 only to this extent that the evidence of each witness must be read over to that witness and the attendance of the parties at the reading over is not necessary—*Narendra v Sabarath* 52 Cal 721 (F B) 29 C W N 701 41 C L J 479 26 Cr L J 1194 This decision practically overrules the case of *Ishan Chandra v Hirday* 29 C W N 475 26 Cr L J 915 where it was held that the word 'accused' not being applicable to the parties in a proceeding under Ch XII, section 360 had no application at all to such a proceeding and it was necessary to read over the deposition to the witnesses

In a later Patna case, it has been held that even an omission to read over the evidence to the witness is a mere irregularity which does not vitiate an order under sec 145—*Sandi Smgh v Sri Govind*, 5 P L T 237 25 Cr L J 89

1029 Deposition must be read over to witness—If the deposition is recorded in a language which the witness does not understand, it must be interpreted to the witness in the language which he understands. If the deposition is read over to the witness in a language which is neither understood by the accused nor by the witness, it is an illegality which materially prejudices the accused—8 W R 63. But if the witnesses did not require their depositions to be interpreted to them in their own language, the reading over the depositions to them in a language which they did not understand would not afford any ground for the accused to have his conviction set aside—7 C L R 393

The provisions of this section are obligatory and not merely directory. It is incumbent on the Judge to read over the deposition to each witness, even though such a procedure should occupy considerable time—42 Cal 957, 36 Cal 955. And a departure from such a practice might lead to considerable embarrassment and place a serious impediment in the administration of justice—36 Cal 955. The object of this section is to ensure the accuracy of the record and omission to comply with the provisions of this section is an illegality which vitiates the trial irrespective of whether the accused have been prejudiced or not and is not a mere irregularity curable by section 537 of the Code—*Haronath v Sonai Mia* 28 C W N 119 38 C L J 281 25 Cr L J 289 *Hiralal v Emp* 28 C W N 968 5 Cal 159 (Contra—*Mohiuddin v Emp* 4 Pat 488 6 P L T 154 26 Cr L J 811 4 Bur L J 213 3 Rang 612). It is not a sufficient compliance with this section if the Magistrate merely hands over the recorded deposition to the witness to read it for himself, and the witness reads it himself, because the section requires that the deposition must be read over in the presence i.e. in the hearing of the accused, in order that the accused should have an opportunity of correcting any mistake in it—42 Cal 240, *Sahorati v Emp* 26 Cr L J 951 (Cal) *Id Jasur v Emp*, 52 Cal 431 29 C W N 650. It is not a sufficient compliance with this section if the deposition is read by a witness himself, and then afterwards it is explained by the Judge to the accused in the absence of the witness—*Jessarat v Emp*, 29 C W N 526 26 Cr L J 1009. But the Patna High Court holds that even though a deposition is not read over to the witness according to the provisions of this section, but is read by the witness himself, still the deposition is legal evidence. In other words, non-compliance with this provision of the section does not vitiate the trial—*Jagwa Dhannuk v A E* 5 Pat 63 A I R 1926 Pat 232.

This section lays down that the evidence of each witness shall be read over to him as it is completed and this procedure should be strictly followed. It is not a sufficient compliance with this section to read out each sentence of the statement of a witness as it is being recorded—*Madhawa v Emp*, 22 Cr L J 669 (Lah). So also, it is not proper for the Magistrate to examine a number of witnesses and ask them to

be in a room and then have the depositions read over to them at the end of the day's work. Such a procedure is not merely an irregularity but an illegality vitiating the trial—*In re Kuppa Mudaher* 49 M L J 421 26 Cr L J 1597 A I R 1925 Mad 1206 *Ibdul Bari v K E* 42 C L J 585 27 Cr L J 375 A I R 1926 Cal 157 *Shamserali v Emp*, 53 Cal 129 A I R 1926 Cal 563

The deposition must be read over to the witness in the presence of the accused so as to give the accused an opportunity to challenge the correctness of the record—*Ramesh war v Emp* 6 P I T 493 26 Cr L J 927 A conviction based upon evidence not read over in the presence of the accused is illegal and must be set aside—2 Weir 435 It is improper to have the deposition of the witness read over to him by a clerk in the verandah of the Court house though both the witness and the clerk were in view of the accused. Such a deposition cannot be admitted in evidence—*Agro San v A F U B R* (1912) 1st Or 123 If the accused is in attendance the deposition must be read over in the presence of the accused and not in the presence of his pleader. It is only when the accused appears by a pleader that the reading over of the evidence in the presence of the pleader is sufficient—*Kasim Ali v Sarada Kripa* 30 C W N 336 Where the accused appears by pleader the deposition of a witness may be read over in the presence of a pleader of one of several accused—36 Cal 808

There is nothing in the section to indicate the exact time when the deposition should be read over and if the deposition is read over at the close of the cross examination it fulfil the requirements and objects of the section 4 I L W 44 19 Cr L J 169

While the evidence of a witness is being read over to the accused it is highly improper for the Court to proceed with the evidence of the next witness. Such a procedure is a violation of the provision of this section and vitiates the inquiry or trial—*Mank v A E* 41 C L J 393 26 Cr L J 1207 *Idiladdi v A F* 26 Cr L J 1016 (Cal) 2 Weir 435 *Dargahi v Emp* 5 Cal 439 A I R 1925 Cal 831 The Rangoon High Court holds that such a procedure does not vitiate the trial but is a mere irregularity curable by sec 53—*Abdul Rahman v A E* 4 Bur L J 213 A I R 1926 Rang 53

When a deposition is not read over to a witness in the presence of the accused according to the provisions of Subsection (1) the witness cannot be prosecuted for perjury—6 Cal 762 36 Cal 925 12 C W N 845 3 P I T 291 *Brahmadea v Emp* 2 P L T 380 11 Bur L T 202 28 Mad 308 42 Mad 561 42 Cal 240 *Contra—Tunya v Emp* 12 Bur L T 167 where it is held that a witness can be prosecuted for perjury in spite of the fact that his deposition has not been read over to him in the presence of the accused the deposition should not be treated as a nullity merely because of the irregularity it can be proved by other evidence e g., by evidence that the witness admitted it to be correct when it was read over to him and by the evidence of the Judge or Magistrate who recorded it. So also it has been held in 8 M L N 117 and 21 M L J 411, that evidence not read over to the w

the presence of the accused may not be used as evidence against the accused but may be the basis of a prosecution of the witness for perjury

Under this section, the Magistrate is not required to record a *memo randum* at the end of each deposition that the deposition was read over in the presence of the accused, though it is much better to do so in order to prevent complaints as to his not having done so—*Rameshwar v Emp* 6 P L T 493 26 Cr L J 927 *Bhagwat Singh v Emp* 4 Pat. 231 6 P L T 73 26 Cr L J 932 But the absence of such a memorandum does not prove that the deposition was not read over—4 Pat 231

1030 Deposition may be corrected:—Before a deposition is closed, a witness should be given an opportunity of explaining and correcting any contradictions which it may contain, and the statement which the witness finally declares to be the true one must be taken to be that which he intended to make—*Ratanlal* 54 An honest witness who wishes to alter or correct a statement he has once made should be allowed to do so and should not be deterred from doing so by the fear of a criminal charge—10 Cal 937

If the Court instead of allowing the correction to be made, proceeds to make a memorandum according to sub section (2), such memorandum must be appended to the deposition and care should be taken that the practice and the form prescribed by law are exactly adhered to—13 W R 17

361 (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him

Interpretation of evidence to accused or his pleader.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary

1031 This Section relates to the oral evidence of witnesses As to documentary evidence, though an accused has a right to have all or any part of the document used in his trial translated or interpreted to him yet it is not necessary to interpret formal documents such as Government Gazettes at length, that would be merely wasting time It would be enough if the prisoner were made to understand what they were and for what purpose they were used—15 W R 25

If the accused appears by a pleader who understands the language in which the evidence is given by the witness, the omission to interpret the evidence to the accused is not a material defect—24 W R 50

362 (1) In every case in which a Presidency Magistrate imposes a fine exceeding two hundred rupees or imprisonment for a term exceeding six months he shall either take down the evidence of the witnesses with his own hand or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

Record of evidence in Presidency Magistrate's Courts

362 (1) In every case tried by a Presidency Magistrate in which an appeal lies, such Magistrate shall either take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

Record of evidence in Presidency Magistrate's Courts

(2) Evidence so taken down shall ordinarily be recorded in the form of a narrative but the Magistrate may in his discretion take down or cause to be taken down any particular question or answer.

(2A) In every case referred to in sub section (1) the Magistrate shall make a memorandum of the substance of the examination of the accused. Such memorandum shall be signed by the Magistrate with his own hand and shall form part of the record.

(3) Sentences passed under Section 35 on the same occasion shall for the purposes of this section be considered as one sentence unless they are sentences of imprisonment ordered to run concurrently.

(4) In cases other than those specified in sub Section (1), it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge.

Change—Sub section (1) has been amended as shown in parallel columns. The italicised words in sub section (3) have been inserted and sub sections (2A) and (4) have been newly added by the Criminal Procedure Code Amendment Act XVIII of 1923. The reasons are stated below.

1032 Scope—*Summary trials*—The provisions as to summary trials do not apply to trials before Presidency Magistrates. A case must be tried by them in the manner laid down in Chapter

subject to the provisions of this section as to the recording of evidence—
Ratanlal 539

Reference under Sec 123 (2)—In cases where the Presidency Magistrate makes a reference to the High Court under Sec 123 (2), he must duly record the evidence, but it is not necessary that he should record it as fully as a Mofussil Magistrate—13 C W N 318

Sub section (1):—"We think that the opening words of sub section (1) of section 362 require amendment. As the section stands, it seems to imply that a Presidency Magistrate, before he commences his inquiry, must make up his mind as to the maximum limit of the sentence which he will impose. We think that the sub section would read better as amended by us, compare the wording of section 264"—*Report of the Select Committee of 1916*

But even this amendment does not improve the position, because in order to ascertain whether an appeal will lie from his sentence, the Presidency Magistrate will have to make up his mind whether he will pass a sentence of over six months' imprisonment or a fine exceeding two hundred rupees (Sec 411). The Joint Committee in confirming the above amendment has also admitted it—

"We are inclined to agree with those critics who point out that the re draft proposed in sub section (1) of section 362 does not get rid of the difficulty that a Magistrate has to make up his mind as to the sentence he will impose before he begins trying the case. We do not see how this difficulty can be got rid of but we think that the amendment proposed has the advantage of bringing the language of this section into conformity with the language of sections 263 and 264 and we would, therefore retain this sub-clause

"In order to meet difficulties that have arisen, we have introduced a sub section (2 A) laying down that Presidency Magistrates, in cases subject to appeal, shall make a memorandum of the substance of the examination of the accused, and we have introduced a new clause making a consequential amendment in sub sec (4) of sec 364

"The non official members, who constituted a majority in the Committee, expressed their dissatisfaction with the distinctions drawn in the Code between Presidency Magistrates and other Magistrates, and in particular with regard to this clause would have liked to see Presidency Magistrates required, in warrant cases at all events, to keep as full a record as any other Magistrates. But the Committee as a whole held that there was some force in the contention put forward by numerous High Court Judges that no change should be made in the Code affecting to any extent the special powers of Presidency Magistrates until a much fuller inquiry had been made into the question of their status powers and procedure. We desire to take this opportunity of placing on record our hope that it may be possible to appoint a small committee to undertake this investigation.—*Report of the Joint Committee (1922)*

Where a Presidency Magistrate sentences an accused person to imprisonment for more than 6 months, he is bound to record the evidence

of witnesses, even though the sentence is imposed for the purpose of the detention of the accused in a reformatory—*Emp v Md Roshan* 26 Bom L R 1232 26 Cr L J 454

1033 Sub section (2):—Mode of recording evidence.—Evidence should be recorded in the form of direct narration. Where a Presidency Magistrate, in contravention of the provisions of this section, recorded the evidence of some more or less formal witnesses in the form of an indirect narration, it was held that such irregularities in the mode of recording evidence, where no failure of justice had been occasioned thereby were cured by sec 537, and the trial was not on that account vitiated—*In re Gulab Chand* 18 Cr L J 336 (Mad)

It is the duty of the Magistrate, in recording evidence under this section, to take a note of all the material facts whether they appear in the course of the examination-in-chief or in the course of the cross examination—46 Cal 411

Sub section (3):—‘Unless concurrently’—“It is provided that when sentences in excess of one are passed which are ordered to run concurrently it is the heaviest sentence which determines the applicability of section 362”—*Statement of Objects and Reasons* (1914)

1034 Sub section (4)—‘It is intended by this sub section to remove the uncertainty which at present exists regarding the duties of a Presidency Magistrate in recording evidence and framing a charge in petty cases’—*Statement of Objects and Reasons* (1914)

Sub-section (1) provides that the evidence must be fully recorded in cases where the Presidency Magistrate passes appealable sentences and there is no obligation on the Magistrate to record evidence in non appealable cases—31 Cal 983 33 Cal 1036 In a Bombay case it has been held that although the Magistrate has a discretion in cases not falling under this section to take down the evidence or not still this discretion should be exercised judicially in a reasonable spirit and not arbitrarily and there should be a record of the evidence so that the High Court in Revision may judge of the propriety or legality of the order passed by him—10 Bom L R 201 The new sub section (4) now totally dispenses with the necessity of recording evidence in non appealable cases

363 When a Sessions Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination

1035 The object of this section is to give to the Appellate Court some aid in estimating the value of the evidence recorded by the Magistrate—12 W R 51 Though in criminal cases the Appellate Court should be guided by the remarks made under this section as to the demeanour of witnesses, yet it is bound to independently consider the facts of the case—1898 P R 6 But where a Sessions Judge of experience had in the most emphatic manner stated that the demeanour of the wit

was evasive, that they inspired him with no confidence, and that no man could be convicted on their testimony, the Appellate Court before accepting their testimony must be assured in the most positive and convincing manner that there was no ground for the Sessions Judge's criticism. Where the evidence is all oral, and its credibility is a mere matter of opinion, the opinion of the Court which heard the witnesses and noticed their demeanour must be treated as almost conclusive—*Emp v Bishen Singh* 1914 P L R 125

It is always unsafe for a Judge or a Magistrate to pronounce an opinion as to the credibility of a witness, until the whole of the evidence has been taken—2 Weir 435

364. (1) Whenever the accused is examined by any Magistrate, or by any Court other than how recorded a High Court established by Royal Charter or the Chief Court of Oudh, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full in the language in which he is examined, or if that is not practicable, in the language of the Court or in English, and such record shall be shown or read to him, or if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound * * * * * as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, -if he is sufficiently acquainted with the latter language, and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the

examination of an accused person under Section 263, or in the course of a trial held by a Presidency Magistrate

Change:—The words "Chief Court of Oudh" have been added by the Oudh Courts Act XXXI of 1925. The italicised words at the end of sub-section (4) have been added by the Criminal Procedure Code Second Amendment Act XXXVII of 1923. The object of this amendment is "to make it clear that in cases where an appeal lies the Presidency Magistrate shall take down a memorandum of the examination of the accused person as already provided in the new sub-section (2A) of section 362, and that in non appealable cases no record of the examination of the accused need be made"—*Statement of Objects and Reasons* (Gazette of India, 1923, Part V, page 242). This amendment has been made in deference to the opinion of Shah J in 46 Bom 441 (at pp 447—448) in which his Lordship remarked that the provisions of section 364 should be relaxed so far as Presidency Magistrates are concerned.

The words "unless he is a Presidency Magistrate" which occurred in sub-section (3) have been omitted by the same Amendment Act.

1036 Scope and application of section—The examination of an accused person under this section is intended for the purpose referred to in sec 342 *vi* to enable the accused to explain any circumstances appearing in the evidence against him but not to fasten the guilt on him—to Mad 293. The rules laid down in this section are applicable to the examination of the accused under section 342 of the Code—4 Bom 1 R 461 1 Bur 1 R 320.

This section applies only to examination of the accused during inquiries and trials and not during investigations which are governed by sec 164—to B H C R 166. But still the rules laid down in this section are equally applicable to confessions taken under sec 164 in the course of an investigation—1 Bom 219 1883 1 W N 243. See sec 164 (2).

This section applies to the record of statement made by an accused. A person against whom no process has been issued is not in the position of an accused person and if such person is examined in an inquiry under sec 202 his statement cannot be regarded as having been recorded under this section—32 Cal 1083.

This section does not apply where there has been no examination of the accused. The Magistrate only examines the accused when he thinks it necessary for the purpose of enabling him to explain any circumstance appearing in the evidence against him. The examination of an accused prior to commitment is in the discretion of the Magistrate. If the Magistrate does not examine the accused or if the accused is unwilling to submit to an examination, it is sufficient for the Magistrate to make a note of the fact and record it as a reason for not examining the accused—*Crown v Dosu* 11 S L R 52.

1037 Record of question and answer.—Every question and every answer must be recorded *verbatim* no matter whether relevant or irrelevant—15 W R (Cr Let) 3. Where the examination has not been recorded in full so as to include the questions and answers, as .

by this section, it is not admissible in evidence without further proof—2 B H C R 395, 2 B H C R 397, 2 B H C R 398

Where the Judge asked the accused persons as to whether they would make any statement or not and they replied in the negative, the Judge should record what the exact questions were that were put to the accused. Where in such a case there was *no record* made of the questions and answers and the only indication of it was to be found in the order sheet wherein the Judge made the following remark "The accused declined to make any statement in this Court and on being asked whether they would adduce evidence they replied in the negative," held that the provisions of section 364 were violated, and the trial having been vitiated by such omission, the accused should be retried—*Emp v Nani Mandal*, 52 Cal 403 41 C L J 50 26 Cr L J 761, *Sarat Chandra v Emp*, 52 Cal 446 26 Cr L J 1244 A I R 1925 Cal 821, *Messer Bepari v A E*, 29 C W N 939 26 Cr L J 1032

It is not necessary for the Magistrate to state in the body of the examination that the statement comprised every question put to the accused and every answer given by him, and that he had liberty to add to or explain his answers. Attestation at the foot of the examination is sufficient—15 W R 68

Where the confession of the accused was recorded in a simple narrative form instead of in the form of questions and answers as required by this section, and there was nothing to show that the accused was prejudiced thereby it was held that the irregularity did not affect the admissibility of the statement in evidence and was cured by sec 533—*Emp v Deo Dat* 45 All 166, *Emp v Anta* 1892 A W N 60, 8 Cal 616, 14 Cal 539. Although it is of great importance to record the questions put to the accused (because sometimes a statement made in answer to a question put may have a different meaning if considered without such question) still if the omission to record the questions does not affect the sense and meaning of the prisoner's statement, the omission will not make the statement inadmissible in evidence—12 C L R 120, 8 Cal 618 (Foot-note)

Record need not be in Magistrate's handwriting—There is nothing in this Code which necessitates a Magistrate to take down the examination of the accused in his own hand. It is enough if he appends a certificate that the examination was conducted in his presence and contains accurately all that was said by the accused—20 W R 50

1038 Language:—See Note 516 under sec 164. The law requires that ordinarily the statement of the accused must be recorded in the language in which it was made, the object being to represent the very words and expressions used so as to ensure accuracy and prevent misrepresentation and misconstruction of what was said—*Q E v Sagal* 21 Cal 642, *Emp v Nani Mandal* 52 Cal 403 41 C L J 50 26 Cr L J 761. This rule of law ought not to be deviated from unless it is shown that it was impracticable to write the statement in the language in which it was made. If the answers were not taken down in the

language in which they were given, the irregularity cannot be cured by sec. 533—15 Cal 595, 17 Cal 862, 10 O C 112 Where the accused was examined by the Magistrate in *Marathi* and gave his answers in *Marathi*, the statements should be recorded in *Marathi*. It is illegal to record them in English—Ratanlal 633, 21 Bom 495 If however it is not practicable to record the statement in the language in which it is made, the law directs that the statement shall be recorded in the language of the Court or in English—21 Cal 642 Thus, where the confession of the accused person made in Bengali was recorded by the Magistrate in English, because he could not write Bengali well and there was no mohurrer with him at the time, it was held that there was no illegality—22 Cal 817 Where the Magistrate recorded the confession of the accused on a holiday, and since he could not get the service of any one to write Hindustani, he recorded the confession in English, translated it in Urdu to the accused who admitted it to be correct, held that the confession was properly recorded in accordance with the provisions of this section—*Emp v. Bachanna*, 1891 A W N 55 Where a confession made in Hindustani was recorded by a Muhammadan Magistrate in Bengali, the language of the Court, the High Court held that it could not be presumed that the Magistrate must have had sufficient acquaintance with Urdu so as to be able to record the statement in that language, and that in the absence of any evidence it should be presumed that the Magistrate found it impracticable to record the statement in Urdu—18 Cal 549 So also, in *Emp v. Deo Dat*, 45 All 166, *Emp v. Anta*, 1892 A W N 60, *Ratti Ram v. Emp*, 1899 P R 7, and 16 C P L R 122, although it was practicable for the Magistrate to record the statement in the language in which it was made, still an English record was held to be good, if it was translated to the accused in his own language, and no prejudice was caused to him, the irregularity being cured by sec. 533

If the confession of the accused is made in a foreign language, unknown to the Court or Magistrate, the Code does not require that it should be recorded in that language. In such a case, the record of the confession should be in the language in which it is conveyed to the Court by the interpreter—5 Cal 826 Where a statement was made by the accused in Manipuri and communicated to the Magistrate by an interpreter in Bengali, and the Magistrate recorded it in English, and there was also a record in Manipuri, but the two records differed, it was held that the record in Manipuri should be regarded as the proper record and the only evidence in the case—21 Cal 642

1039 'Record to be shewn to accused' etc :—Before a statement can be admitted in evidence, it is necessary to see that such statement has been deliberately made and recorded, and that after being recorded, it has been *shown or read over* to the accused so that he might be assured that his words have been correctly taken down—7 W R 49 An omission to read over and interpret to the accused the statement recorded by the committing Magistrate and to record any explanation or statement, the accused may make at the time, is an irregularity that vitiates trial. Merely recording in the judgment that the statement or

nation of the accused was put in and read out to him is not a compliance with the requirements of the section—*Fatu Santal v R E*, 5 P L J 147 Where there was nothing to show that the record of the confessional statement made by the accused before the committing Magistrate was shown or read over to the accused, such statement cannot be used as evidence against him—*Emp v Deuan Kahar*, 4 P L T 186 This section requires that the record shall be shown or read over to the accused, and if he does not understand the language in which it is written, it must be interpreted in a language which he understands Where a Magistrate showed or read a confession recorded in English to the accused who did not understand English, the provisions of this section were not complied with—4 N W P H C R 16

1040 Sub section (2)—Record must be signed—The record of confession must be signed by the accused A record which does not bear the signature of the accused is not admissible in evidence until the defect is cured in the manner provided by sec 533—1883 A W N. 243 Where the signature or mark of the accused was not taken to the record of the statement made by him to a Magistrate, the defect can be cured by examining the Magistrate as a witness to prove that the statement recorded was duly made—1896 A W N 161, 23 Bom 221, 11 B H C R 237 Where the signature of the accused was not taken by the committing Magistrate and no objection was raised before the Sessions Court by his pleader on the ground of absence of signature, and no prejudice was caused to the accused it was held that under the circumstances of the case, the irregularity was not a sufficient ground for reversing the judgment—11 B H C R 237 The record must be signed by the accused himself in his own handwriting it cannot be signed by another person for the accused If so signed, it is inadmissible in evidence—11 B H C R 44 but now see section 533

If the accused is unable to write his mark (2 Weir 137) or thumb impression (45 All 166) is a sufficient compliance with the requirements of this section But if he can write his thumb impression is not sufficient—32 Cal 550

The signature of the accused must be taken in the presence of the Magistrate To take it in an adjoining room in the presence of a clerk and not in the immediate presence of the Magistrate is not a proper compliance with the provisions of this section—*Ratanlal* 687

Refusal to sign—Sub-section (2) involves only the Magistrate offering the record for the accused's signature, but it does not empower the Magistrate to require the accused to sign Therefore an accused who refuses to sign the record of statement does not commit an offence punishable under Sec 180 I P C That section of the Penal Code applies only when the Magistrate is legally empowered to require the accused to sign the statement—3 I B R 199, 4 Bom 15 But it has been laid down by the Allahabad High Court that the language of this section makes it compulsory upon the accused to sign the statement, the Magistrate is a public servant legally competent to require the accused to sign the

statement, and if the accused refuses to do so, he commits an offence under Sec 180 I P C—39 All 399 So also, per *Melville J* in 4 Bom 15

Signature of Magistrate—The affixing of an unreadable signature to the statement of the accused is not a proper compliance with this section—15 W. R. 63

1041 Certificate—The absence of the certificate in the recorded examination of the accused is not necessarily fatal to its admissibility—7 B H C R 50 Where a Magistrate omitted to certify a confession as required by sec 364 and did not record the whole of the questions put to the accused the High Court declined to interfere where no prejudice resulted to the accused—2 Weir 436 A defect in the certificate to be attached by a Magistrate to the examination of the accused can be cured only by taking evidence that the accused duly made the statement recorded, either by examining the Magistrate or some other person who was present when the statement was recorded It can not be cured by examining a witness to prove that it was taken down in the handwriting of the Magistrate himself—8 C P L R 6 3 C W N 387, 2 B H C R 397, 22 Mad 15, 23 Bom 221 1909 P R 2 It cannot be cured by the addition of the certificate at the discretion of the District Magistrate after an appeal is disposed of—7 B H C R 50

This section does not prescribe any particular form of the certificate When a confession bore a certificate of the Magistrate containing the words taken by me but did not say that the confession was made in his hearing it was held that the certificate substantially complied with the requirements of this section—5 Cal 958

The certificate need not be in the handwriting of the Magistrate it is sufficient if it is signed by the Magistrate—8 W R 55

1042 Non compliance with the section—The rules laid down in this section should be strictly followed—1884 A W N 243 Magistrates should in all cases be careful to observe all the provisions of section 164 and this section for although various defects can be cured the value of the confession may be very much diminished by non-compliance with the strict letter of the law—1899 P R 7

Non-compliance with the formalities of this section may be remedied by Sec 533 by oral evidence (of the Magistrate who recorded it) that the accused duly made the statement recorded—23 Bom 221, 18 Cal 549 Where the confession though signed by the accused was not recorded in the manner prescribed by this section and there was no certificate showing that the record contained in full the statement made by the accused, it was admitted in evidence in spite of these defects, and held to be proved by its production—*Ahmed Din v Emp* 1881 P R 20, 1881 P R 21

But section 533 does not apply and cannot make a confession admissible where no attempt has been made to conform to the provisions of this section—9 Mad 274 Thus where *no record* whatever has been made of a confession such confession cannot be proved merely by oral evidence Section 533 deals with errors in the record and does not apply where

no record whatever has been made of such a confession—35 All 260
See also 52 Cal 403 cited in Note 1037 ante

365 Every High Court established by
Record of evi- dence in High Royal Charter
Court may from time
to time by general rule, pre-
scribe the manner in which
evidence shall be taken down
in cases coming before the
Court, and the Judges of such
Court shall take down the
evidence or the substance
thereof in accordance with the
rule (if any) so prescribed

365 Every High Court established by
Record of evi- dence in High Royal Charter,
Court and the Chief
Court of Oudh shall from
time to time, by general rule,
prescribe the manner in which
evidence shall be taken down
in cases coming before the
Court, and the evidence shall
be taken down in accordance
with such rule

Change—This section has been amended by section 99 of the Criminal Pro Code Amendment Act XVIII of 1923. The word *shall* would make it compulsory upon High Courts to prescribe by rules the manner in which evidence should be taken down. The section will not of course limit the discretion of the High Court as to what form the rules should take.—*Report of the Select Committee of 1916*

We do not think it necessary that the Judges of the Court should take down the evidence themselves. But we are of opinion that there should certainly be some record.—*Report of the Joint Committee (1922)*

The words *and the Chief Court of Oudh* have been added by the Oudh Courts Act XXXII of 1925

CHAPTER XXVI

OF THE JUDGMENT

366 (1) The judgment in every trial in any Criminal
Mode of delivering Court of original jurisdiction shall be
judgment pronounced, or the substance of such
judgment shall be explained,—

(a) in open Court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders, and

(b) in the language of the Court, or in some other language which the accused or his pleader understands

Provided that the whole judgment shall be read out by the presiding Judge, if he is requested so to do either by the prosecution or the defence.

(2) The accused shall, if in custody, be brought up, or, if not in custody, be required by the Court to attend to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted, in either of which cases it may be delivered in the presence of his pleader

(3) No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve or defect in serving, on the parties or their pleaders or any of them, the notice of such day and place

(4) Nothing in this section shall be construed to limit in any way the extent of the provisions of Section 537

The requirements of Sections 366 and 367 are not mere matters of form. The provisions of these sections are based upon good and substantial grounds of public policy, and whether they are or not, the Sessions Judges must obey them and not be a law to themselves—14 All 248

1043 Judgment—Judgment means the expression of opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments—21 Cal 121 An order of dismissal of a complaint under section 203 is not a judgment—29 Mad 126 An order dismissing a case for default of appearance of the complainant is not a judgment—5 N L R 76 10 C L J 80 Judgment means a judgment of conviction or acquittal but not an order of discharge under section 209 or 253—28 Cal 652, 29 Cal 726 31 Mad 543 9 Bom L R 250 On the other hand, if the Magistrate after taking some evidence, however incomplete the evidence may be, enters into the merits of the complaint and makes an order of discharge, such an order is a judgment—28 Cal 652 The final order of acquittal on a petition of composition is not a judgment—1914 P R 29 because such an order is made without any consideration of the evidence

The judgment referred to in this section is a judgment passed in a trial the section does not therefore apply to final orders made in sanction proceedings under section 195—6 Bom L R 897 (Sanction proceedings, however, are now abolished)

1044 Delivery of Judgment—The delivery of judgment and the passing of sentence is an integral part of the criminal trial and must be done by the Judge himself It is not a mere formality, and a deliberate breach of this express provision of law is not a mere irregularity curable

by Section 537 Where on the date fixed for delivery of the judgment, the Judge being ill, he signed and dated his judgment and sent it to be translated to the accused by the interpreter, the Judge himself not being present in Court, and the judgment was so translated by the interpreter, it was an illegality and a retrial must be ordered—*Rambit v Emp*, 24 Cr L J 584 1 Bur L J 122 But the Allahabad High Court takes a more liberal view and holds that where a Magistrate wrote out a judgment, signed and dated it, but owing to physical incapacity had it read out by another Magistrate, it was at the most an irregularity which was covered by sec 537—*Nur Md Khan v Emp*, 21 A L J 137 24 Cr L J 173 A judgment which is not delivered is no judgment Where a Judge after writing his judgment but before delivering it, dies or leaves the Bench, his written judgment cannot be considered as a judgment, but it is merely an opinion—13 W R (Civil) 209 A judgment though written and signed, is inoperative until it is pronounced, and must be taken merely as an expression of opinion—*Ramdhan v A E*, 11 A L J 745

The judgment must be delivered in open Court—21 Cal 121

The judgment must be pronounced by the Judge or Magistrate who held the trial The duty of signing and delivering the judgment cannot be delegated by the presiding officer to another person Where a Magistrate, after holding trial in one district went away to another district and thence sent his judgment to the Magistrate of the former district to be delivered, and the District Magistrate delivered it, the trial was set aside and retrial ordered—1889 A W N 181, *Baisnab Charan v Amn Ali*, 50 Cal 664 38 C L J 202 24 Cr L J 489 But the Madras High Court and the Oudh Chief Court are of opinion that the delivery of the judgment by the successor of the Magistrate who wrote it is not illegal—*In re Sankara Pillai* 18 M L J 197 7 Cr L J 459, *Chandika v Emp*, 28 O C 109 11 O L J 725 See also 40 Mad 108, where it has been held that the succeeding Magistrate can date, sign and pronounce a judgment written by his predecessor, and thus adopt it as his own

The judgment must be pronounced in the presence of the accused Where the accused having absconded, the Magistrate passed sentence in his absence, and upon his re arrest pronounced the judgment again, it was held that the Magistrate should not have pronounced his previous judgment in the absence of the accused—*Ratanlal* 325, *Crown v Sardar*, 1917 P R 36 If, however, the judgment is one of acquittal or of fine only, it may be passed in the absence of the accused, under sub-section (2)—*Crown v Jamal Khatun* 6 S L R 206

The judgment in a criminal case must be passed without undue delay, as delay is not only unjust to the accused, as it prevents them from appealing at once, but is opposed to the principles of law—5 C P L R 24 In a trial by jury, it is not necessary, under section 367, to record a judgment, but only the heads of charges to the jury should be recorded, and these should be written out as soon as possible after the charge to the jury has been actually delivered, when the facts of the case are fresh in the mind of the Judge—36 Cal 281 In this case the charge to the

jury was written 3 weeks after, and the High Court severely remarked upon the delay.

It is not necessary that the whole of the judgment should be read. It is sufficient if the substance of the judgment is delivered. Omission to read a portion in the judgment is a mere irregularity covered by section 537—2 Weir 711, 38 Mad 498

1045 Conviction or acquittal before judgment:—The judgment must always be written and delivered before sentence is passed. It is illegal to pronounce a sentence at the termination of the trial and to postpone the writing of the judgment to a future occasion—*Punjab Circ* p 239. In as much as the sentence in a case of conviction, and the direction to set the accused at liberty in the case of acquittal, can only follow on the decision and cannot precede it, and in as much as the decision must be contained in the written judgment, it must necessarily follow that the sentence is illegal if there is no written judgment when it is passed—14 All 242. Where the judgment was delivered after the order of acquittal was passed, the acquittal was set aside and a retrial ordered—1892 A W N 157. Where the judgment was written and delivered some days after the prisoners were convicted and sentenced, it was held that this was a violation of the express provisions of this section and was more than a mere irregularity, and the conviction and sentence must be set aside—27 Mad 237.

In some cases, however, it has been held that such an irregularity does not vitiate the whole proceedings unless there has been a failure of justice, such irregularity will be cured by Section 537—23 Cal 502, *Crown v Moriokhan* 5 S L R 131, 13 Bom L R 635, 21 Cal 121, 38 Mad 498, 45 Mad 913 (F B). *Ita Md v Emp*, 25 Cr L J 705 (Lah). Sec 497 (4) now provides for acquittal of the accused before judgment on taking a bond from him for appearance on the day of judgment.

Where a Magistrate died after pronouncing the sentence but before writing the judgment the High Court reversed the conviction and sentence and ordered a retrial—1 Bom L R 160. But in 2 Weir 438 it has been held that a conviction on a trial regularly held will not be set aside merely because the Magistrate had been unavoidably prevented from recording a judgment.

Loss of judgment—This section only imposes the condition that the judgment must be pronounced in open Court and imposes a few other conditions but such conditions do not include the condition that the record should not have been lost. In cases where the judgment has been lost, the appropriate course for a Judge is to re write the judgment from memory and from the materials on record, and place it on record—38 Mad 498.

367. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court or from the dictation of such

Language of judgment
Contents of judgment

presiding officer in the language of the Court, or in English, and shall contain the point or points for determination,

decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it, and *where it is not written by the presiding officer with his own hand every page of such judgment shall be signed by him*

(2) It shall specify the offence (if any) of which, and the section of the Indian Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced.

(3) When the conviction is under the Indian Penal Code, and it is doubtful under which of two parts of the same section of that Code the offence falls, the Court shall distinctly express the same and pass judgment in the alternative

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed

Provided that, in trials by jury the Court need not write a judgment but the Court of Session shall record the heads of the charge to the jury

(6) *For the purposes of this section, an order under Section 118 or Section 123, sub-section (3), shall be deemed to be a judgment.*

1046 Change.—The italicised words in sub-section (1) and the new sub-section (6) have been added by Section 100 of the Criminal Procedure Code Amendment Act, XVIII of 1923

Under the old Section it was held that the judgment must be written by the Magistrate himself, he could not get it written by a clerk—Ratanlal 545, 6 Mad 396, and that if the judgment was written at the dictation of the Magistrate, and the Magistrate merely signed it, the procedure was illegal—4 C L J 415 The present Amendment in sub-section (1) will now allow such procedure

Language—Under this section, the judgment of a Criminal Court should be written in the language of the Court or in English Where an Honorary Magistrate wrote his judgment in Urdu instead of Hind, the language of the Court, it was held to be irregular, but such irregularity was cured by Section 537—4 C L J 232

1047 Contents of judgment.—The judgment must be self-contained and nothing should be left out. If any material finding is left out in the judgment the defect cannot be cured by the Magistrate's subsequent explanation to the Appellate Court—7 C L J 238. A judgment should contain sufficient particulars to enable a Court of Appeal to know what facts were found and how—Ratanlal 833. The judgment should show that the Court had considered the evidence and had found in a case of conviction that the facts proved to the satisfaction of the Court brought an offence home to the accused person whom the Court convicted—19 All 506. Where a judgment, though not a long and elaborate one, affords a clear indication that the Court duly considered the evidence it is a good judgment—1 C W N 169. But if the judgment is so meagre that it is impossible to form an opinion as to the merits of the case or to say whether there has been a miscarriage of justice or not the judgment must be set aside—5 C L J 452.

Where an Appellate Court finds that the Magistrate has not written a judgment in conformity with the provisions of Section 367, the correct procedure is to accept the appeal and to remand the case for hearing *de novo*. The Appellate Court cannot retain the appeal on its file and ask for a judgment which the Magistrate has failed to record—(1920) M W N 120.

Points for determination.—Every judgment of a Criminal Court must contain a clear statement of the points for determination—Bom II C Cr Cir p 38. The attention of all Criminal Courts is invited to this necessity of very strictly observing the provisions of the latter portions of clause (1) of section 367 which declares that the judgment must contain the points for determination the decision thereon and the reasons for the decision—Cal G R & C O p 36. Where the Sessions Judge convicted the accused without stating the facts of the case or the points for determination or even the section under which the accused was convicted, the judgment was set aside—9 C W N xxiii. The accused person is entitled to have an independent judgment of the trying Court and such judgment must be prepared in accordance with and must contain the particulars required by, section 367. Otherwise it is no judgment at all. Where a second class Magistrate thinking that a severer punishment should be inflicted on the accused than what he was authorised to award, recorded his opinion and forwarded the proceeding to the Sub-divisional Magistrate, and the latter in convicting the accused wrote the following judgment "I agree with the finding arrived at by the learned trying Magistrate and convict all the accused for the offence of unlawful assembly as stated in the charge", held that this was not a judgment at all—20 Cr L J 444 (Pat). Where the Magistrate has given strong and legal reasons for his decision, his omission to refer to the minute details of the case does not vitiate his judgment—Durga Singh v Emp 24 Cr L J 181 (Pat). Where the judgment showed that the Judge had appreciated the points which the prosecution had to establish, and that he had clearly in view the points for determination, viz. the credibility of the evidence of the witnesses for the prosecution, and he expressed his opinion on that point, it was held

decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it, *and where it is not written by the presiding officer with his own hand every page of such judgment shall be signed by him*

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(3) When the conviction is under the Indian Penal Code, *and it is doubtful under which of two*
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and not satirical. A judgment should not admit irrelevant matter to the record, but should confine itself to a consideration of the issues before the Court, together with a fair and legitimate comment on any errors or irregularities that may be disclosed in the course of the trial—*Emp v Thomas Pellako* 5 Bur L T 20. A judgment should not contain remarks about the accused to the effect that he was a person of wealth and influence and had prevented truth from appearing unless such conduct of the prisoner is established by evidence—8 W R 13. The judgment should not contain any damaging remarks regarding a witness in a criminal trial—1910 P W R 2, or regarding the conduct of a counsel, when such counsel's conduct was not at all objectionable—15 Cr L J 420 (Oudh), or regarding a person who is not a party or witness in the proceeding—*Benarsi Das v Crown* 6 Lah 166. 26 Gr L J 1326. The High Court has power to expunge such objectionable remarks from the lower Court's judgment, see Note 1214 under sec 439.

Specification of offence—See subsection (2). The offence of which the accused is convicted must be specified in the judgment with the same precision as in the charge—5 L B R 21. 35 Cal 718.

Sentence—Under this section the sentence is a part of the judgment, and when an accused person is convicted it is incumbent upon the Court to pass a formal sentence of even a single day's imprisonment or any other punishment to make the record legally complete—1884 A W N 218. In estimating the sentence to be passed the defence put forward by the accused should not be treated as a matter of aggravation—1883 A W N 10.

As to the legality of passing sentence before judgment, see notes under sec 366.

1048 Signing—This section requires that the judgment must be signed. But if the judgment is entirely in the hand of the Magistrate, it does not become inoperative by reason of the fact that he forgot to sign and date it. The irregularity does not affect the merits of the case, and is cured by sec 537—*Ram Singh v Emp* 47 All 284. 23 A L J 8. 26 Cr L J 688.

The signature should be made with a pen and not with a stamp. There are obvious reasons why judicial documents should be authenticated in such a manner that their authenticity may admit of proof. But the affixing of a signature with a stamp would be no more than a mere irregularity—6 Mad 396. But mere initialling is not signing—O S C 192.

The signature of the Magistrate must be appended to the judgment at the time of pronouncing it in open Court—*Ratanlal* 429, 40 Mad 108.

The dating and signing of the judgment must be done by the presiding officer of the Court. It cannot be delegated to any body else—1889 A W N 181. Where a Magistrate who has tried a case and written out the judgment is succeeded by another before he has actually pronounced the same, it is not obligatory on the succeeding Magistrate to pronounce the same, and much less can he be compelled to do so, though he may, if he chooses, date, sign and pronounce it, in which case he will be adopt-

ing it as his own—40 Mad 108 *Quære*, whether it will be legal for the succeeding Magistrate to date, sign and pronounce the judgment written by his predecessor, when the accused demands a *de novo* trial (under sec. 350)?—40 Mad 108

Sub-section (3).—*Judgment in the alternative*—The 'doubt' in sub-section (3) is the same as that referred to in sec. 236, i.e., a doubt as to the application of law to the facts proved and not a doubt as to whether the accused had committed any offence. See notes under sec. 236. Where the judgment did not state in express terms that the Court was in doubt as to the question under which of two sections the offence fell, it was held that this was at most an irregularity and did not vitiate the judgment—2 Weir 440

Sub section (4).—*Judgment of acquittal*—Under sub section (4) if the judgment is one of acquittal the accused is entitled to be discharged from custody immediately on the judgment of acquittal being pronounced, and his further detention becomes unlawful. No formal warrant of release addressed by the Court to the Superintendent of the Jail is necessary, it is for the jail authorities (in whose custody the accused had remained) to satisfy themselves of the result of the trial—5 M H C R. App 2

1049 **Sub-section (5).—*Judgment in capital cases***—Judges are bound to pass a capital sentence in a case of murder when they believe the evidence, and they must not shrink from doing their duty—7 W R 33. It is highly improper that a Sessions Judge should pass a sentence of death and at the same time in his reference to the High Court recommend for mercy—M H C Pro 244 1866. A person convicted of murder should ordinarily be sentenced to death. To justify the passing of a sentence of transportation for life there should be really extenuating circumstances, and not a mere absence of aggravating circumstances—18 Cr L J 113 (Bur), *Mt Shwe v Emp* 2 Bur L J 277, *Crown v Ngatha*, 1 L B R 216 (F B), *Mt She v A E*, 25 Cr L J 1121 (Rang). The fact that the crime was committed without premeditation in the heat of passion upon a sudden quarrel is not an extenuating circumstance—18 Cr L J 113.

Where the Judge convicts the accused of murder and passes on him the alternative sentence of transportation for life, he should state his reasons for not passing the capital sentence—1864 W R 27. The fact that the accused is a woman is not a sufficient ground for passing a sentence of transportation instead of one of death—*Emp v Nibbia* 1888 A W N 134, *Mt She v K E*, 25 Cr L J 1121 (Rang). The fact that the body of the murdered man has not been found is not a sufficient ground—3 All 322, 1882 A W N 160, 1883 A W N 112, *Contra*—11 W R 20. The fact that the accused is a pregnant woman is not a sufficient ground for commutation of sentence—15 W R 66, in such a case the execution is deferred till after delivery—See sec 382. A sentence of death was commuted to transportation for life, where, owing to an aperture in the neck of the accused communicating with the larynx, it was likely that if he were hanged a complete severance of the head from the body would

enue—2 C I R 215 Where the Sessions Judge feels reasonable doubt whether a sentence of death would be the proper penalty the doubt, like all other doubts, should be given in favour of the accused, and a sentence of transportation should be passed. In such a case, it is highly improper for the Sessions Judge to pass a sentence of death and to leave the responsibility to the High Court of commuting the sentence, if necessary—3 L R R 111

1050 Heads of charge to the jury:—Under this section, the Judge is not required to write out in *extenso* the charge which he addresses to the jury. He is to record merely the heads of the charge, because it is impossible for the Judge to write down everything he says to the jury—*Kamuddi v Emp* 51 Cal 79 (82). The heads of charge to the jury need not be a verbatim reproduction of the Judge's observations to the jury, nor is it necessary that the charge should be written out before it is delivered. But whether they are written out before delivery or taken down verbatim they should be placed on record by the Judge as soon as he may find it possible to do so and whilst what he said is fresh in his recollection. The record need not be meticulous or lengthy, but it must give accurately the substance of what the Judge said to the jury so that the High Court may if occasion arises be able to ascertain from this record whether the law and the facts relative to the case were fairly and properly put to the jurors. Where the Judge's record of his charge to the jury is simply this: Sections 141 to 149 and 299 to 304 read over and explain. I hold that such a short summary was not a sufficient compliance with the law—*Rupin Singh v A F* 4 Pat 626 27 Cr L J 49. The heads of the charge mean that the Judge must truthfully record the line upon which he addressed the jury, both on the evidence and on the law, and the object of these heads of charge is to inform the High Court, should occasion arise of what direction he gave in law to the jury and the nature of the summing up of the evidence not only for the prosecution but also for the defence. The heads of charge are not intended to be an exhaustive detail of every particular which the Judge may have addressed to the jury but they should contain in an intelligible form and with sufficient fulness the points of law and direction given by the Judge to the jury and the record should represent with absolute accuracy the substance of the charge by the Judge to the jury—*Farrish v A E* 1 P I J 31 36 Cal 281 *Emp v Ikramuddin* 39 All 248, 35 C I J 437 *Ahmednuddin v Emp* 42 C I J 504, *Rahamath v Emp* 26 Cr L J 1151 (Cal). The heads of the charge should contain such statement as will enable the Appellate Court to decide whether the evidence has been properly laid before the jury or whether there has been any misdirection in the charge—23 W R 32 *Emp v Bai Nath* 1903 A W N 232, 25 Cal 730 10 Bom L R 565 *Panchu v Emp*, 34 Cal 698, 39 All 348.

Although under sec 367, only the heads of the charge to the jury are required to be recorded, still as the law allows an appeal on grounds of misdirection, it is not only desirable but necessary that the charge should be recorded with sufficient fulness to enable the Appellate Court to see

that all points of law were clearly explained to the jury—34 Cal 608 26 C W N 996 2 Weir 383. The Judge should also record in his charge what evidence he reads out to the jury—Ratanlal 917. It is not sufficient for the Judge to state in his record of the heads of the charge that he referred to certain sections of the Penal Code and explained to the jury the law with regard to the offence. He should set out in the record the directions which he gave to them in respect of the law, in order that the High Court may not have to speculate as to what the Judge said but may be in a position to judge whether the elements constituting the particular offence in question had been properly and fairly explained to the jury—47 Cal 795. The Judge's comments on the evidence of identification should be recorded in a form which will enable the appellate Court to know what was actually said—35 C L J 437.

Where a joint trial is held of several offences some of which are triable by jury and others with the aid of assessors and in respect of the latter offences the jurors become assessors it is the duty of the Sessions Judge to pronounce a judgment containing the particulars specified in this section in respect of the latter offences. A reference to the charge to the jury is not a sufficient compliance with the requirements of this section—Ratanlal 426.

1051 Appellate Judgment — It should be observed that section 424 of the Code extends the provisions of section 367 to the judgments of the Lower Appellate Courts and it is essential that the judgment of such Courts should comply with the provisions of this section—"Cal G R & C O p 36. An appellate judgment like the judgment of the Court of the first instance must fulfil the conditions laid down in this section, that is the judgment must state the points for determination, the decision thereon and the reasons for the decision—17 Bom L R 1085 2 Lah 508 7 P L T, 616. *Kali Charan v Geli Beua* 2 P L T 228 21 Cr L J 221. Where the Appellate Court merely rejected the appeal without specifying these points the appeal was ordered to be reheard—1876 P R 6.

Besides specifying these points the Appellate Court has to decide two more points viz (1) is the objection raised in the memorandum of appeal a valid objection? and if not, (2) is there any ground apparent on the record for interference in appeal? A judgment which does not decide these points is not a valid judgment—8 N L R 84.

It is the duty of the Sessions Judge in disposing of an appeal to record a judgment according to law. Any deficiency in that judgment cannot be made up for by a reference to the judgment of the Magistrate. It is his duty to go into the evidence and try the appeal in a proper manner. Where the Sessions Judge in appeal stated no facts and gave no reasons in his judgment for the conclusion arrived at by him the appeal must be reheard—C W N 30, 9 C W N 1111.

An appellate judgment must be quite independent and stand by itself. It ought not to be read in connection with or as supplementary to the judgment of the Court of first instance—35 Cal 138, 2 P L T 616. *Solhu v Krishna Ram* 25 Cr L J 113 (Lah) 20 Cr L J 444 (Pat) 20 Cr L J 645 (Pat). *Bach v Emp* 1 Rang 101. Even when confirm

ing the judgment of the trial Court the Appellate Court should take its own view of the evidence after perusing the record. The judgment of the Court of appeal should be such that the High Court as a Court of Revision might on looking into the judgment be in a position to judge for itself what the case was and how far the Court of appeal had considered the evidence as bearing on the guilt or innocence of the accused, before it affirmed the judgment of the trial Court—*Iqbalulla v Emp* 39 C L J 117 25 Cr L J 1041

The judgment of the Appellate Court in dealing with the case of several accused convicted in a joint trial must show on the face of it that the case of each accused has been taken into consideration, and should state reasons as far as may be necessary, to show that the Appellate Court has devoted judicial attention to the case of each accused—35 Cal 138 *Thakshina murli v Emp* 1918 M W N 129 19 Cr L J 60 *Iru dra v A E* 20 C W N 1296 *In re Bapu Vaidu* 2 I W 958 16 Cr L J 735 *In re Cherukall* 16 Cr L J 496 (Mad) *In re Chinnu Manikam* 48 M L J 504 26 Cr L J 1089 24 O C 230 25 Cr L J 113 (Lah)

The Appellate Court must record reasons for confirming reversing or modifying the sentences or orders of the Magistrate unless the reasons are set out the High Court cannot revise the proceedings of the Appellate Court—5 M H C R App 12 Where the Appellate Judge merely says that he adopts the reasons given by the trial Court to support the grounds of his decision or merely states that he is satisfied that the judgment of the trial Court is substantially right the judgment is erroneous in form—*Dasoj v Emp* 20 Cr L J 645 (Pat) *Daishnab Charai v Emp* 24 Cr L J 311 (Cal)

An Appellate Court is not required to write a long and elaborate judgment but it is clearly its duty not only to examine the evidence but also to write a judgment affording a clear indication that the appeal has been properly tried and that the points urged by the Appellant have been duly considered and decided. An Appellate Court which writes a judgment which the High Court is unable to follow without reference to the judgment of the trial Court obviously fails in the discharge of the duty imposed upon it by law—*Dalip Singh v Crown* 2 I W 308 (310) 23 Cr L J 9

The judgment of the Appellate Court must show that it has duly considered the evidence of both sides and the pleas raised in appeal, with a judicial mind—*Bena v Emp* 18 Cr L J 689 (Oudh) if it does not consider the evidence for the defence nor even alludes to it it is defective—7 M L T 182 1912 M W N 881 18 Cr L J 689 Even though the Counsel for the appellant does not refer to the defence evidence, it is the duty of the Appellate Court to look into that evidence and after dealing with it come to its own decision—40 Cal 376 Where a District Magistrate disposed of an appeal in a case under section 110 in which a large mass of evidence had been produced on both sides, by a short judgment a few lines dealing with some general observations upon the whole evidence which was put before him and without proper consideration thereof held that the judgment was not in accordance with law

v. *Emp* 19 A I J 921 A District Magistrate should not dispose of an appeal from an order requiring a person to furnish security otherwise than by a judgment showing on the face of it that he has applied his mind to a consideration of the evidence on the record and of the pleas raised by the appellant both in the Court below and in the memorandum of appeal—38 All 393 But the Appellate Court is not bound to give its opinion as to the character of the evidence in prolix detail—1864 W R 6, 19 All 506 Where in the judgment of the first Court, evidence was set at great length and reasons fully explained, the judgment of the Appellate Court which confirms the judgment of the trial Court does not become defective in law by reason of the fact that it does not set out again in detail the whole of the evidence and reasons for believing the witnesses, if it appears from the judgment that the Appellate Court appreciated the arguments adduced against the credibility of the prosecution witnesses—*Kusluddin v. Emp*, 20 Cr I J 238 (Cal) But although as a general rule, it is not incumbent on the Appellate Court when confirming a decision of the Lower Court to set forth its reasons in full, still if there is anything peculiar in the circumstances of the case, the Appellate Court should notice it—8 B II C R 101 But it is not a sufficient compliance with the requirements of this section if the District Magistrate hearing the appeal and confirming the order of the lower Court gives no reasons for his decision but merely says that he has considered the evidence carefully and thinks that it is sufficiently strong to justify the order—*Sau Dun v. Aug Emp*, 2 Rang 641 or if the Appellate Court states no reasons whatsoever and confirms the judgment of the Lower Court in these general terms 'I see no reason for distrusting the finding of the Lower Court—13 Cal 110, 1888 A W N 280, 1886 A W N 89 or 'after reading the evidence and hearing the counsel I am of opinion that the Lower Court has decided the case rightly, I find no ground for interference appeal is dismissed'—23 Cal 420, 22 Cal 241 20 Cal 353 19 All 506 or 'the prosecution evidence is sufficient for the conviction I decline to interfere'—*Weir* (3rd Edn) 1030, or 'I have perused the judgment of the Lower Court, and I agree with the findings arrived at by the learned trying Magistrate and convict all the accused for the offence of rioting as stated in the charge'—20 Cr L J 444 (Patna)

Where the judgment of the Appellate Court was in the nature of a stereotyped one, which might answer for any case, it was not one in accordance with this section or section 424—1 C W N 169

Even when an Appellate Court rejects an appeal summarily under section 421, it is advisable to state shortly in its order the reason or reasons which has influenced it in coming to the conclusion that there is no sufficient ground for interference in the case—17 All 241 13 A L R 169 Although in rejecting an appeal under section 421, the Appellate Court is not bound to write a judgment and give reasons for its decision—20 Bom 540, 21 Cal 92 13 A I R 169, 25 Mad 534, still the recording of reasons is necessary in view of the possibility of such orders being challenged by an application for revision—17 All 241 36 All 466 See notes under sec 421

Even where the Appellate Court dismisses the appeal because no one appears to argue the appeal, the Court is bound to read and consider the evidence and dispose of the appeal by writing a judgment in accordance with the provisions of this section—11 C W N 555v.

Defective Appellate Judgments—It is difficult to lay down any rule with precision as to what judgment of an Appellate Court complies, and what judgment does not comply, with the requirements of this Code. It cannot be held that merely because the form of judgment does not exactly comply with all the requirements of this section and of section 424, it is not a valid judgment. The omissions in the judgment must be substantial in order to invalidate it—19 All 506. Though the judgment of the Appellate Court is not in proper form, the High Court should not interfere with an order of acquittal unless there has been a miscarriage of justice—5 C 1 J 542. Where the Appellate judgment shows that the Judge had appreciated and had in view all the points, the High Court should not interfere in revision merely because the form of judgment does not exactly comply with all the requirements of this section—20 Cal 353. But where the Appellate Court which dismissed the appeal not summarily but after notice to the parties, omitted to write the judgment altogether such an omission was not a mere irregularity curable by sec 537 but a grave illegality—17 Bom L R 1063.

1052 Sub-section (6).—We think it desirable to lay down that orders under sections 118 and 123 (3) should be deemed to be judgments for the purposes of the section.—*Report of the Joint Committee (1922)*. This sub-section supersedes *In re Ramasamy Chetty* 27 Mad 510 (512) where it was held that an order passed in security proceedings was not a judgment.

In *Benkatachinnaya v King Emp* 43 Mad 510 it was contended for the Crown that the word 'inquiry' in section 117 did not mean a trial, but Aylmer J, in overruling this contention observed as follows (at pp 524, 525)—'If the word is to be given the narrow interpretation contended for the Crown such provisions as those in Chapter XXVI regarding judgments will not apply to security cases. That is to say the Magistrate in ordering security under section 118 would be under no legal obligation, *inter alia* to record a judgment setting forth his reasons (section 367) or to give the accused a copy of it without delay (section 371). So far as I can see, apart from the operation of section 117 the Magistrate might simply record an order requiring the execution of a bond without recording any reasons or discussing the evidence. I do not think this could have been intended, especially as care has been taken to provide for an appeal against an order for security (*vide* section 406) and for the interference of Chief Presidency or District Magistrates (section 123). The present sub-section gives legislative recognition to the above remarks of Aylmer J.

368 (1) When any person is sentenced to death—

Sentence of death sentence shall direct that he be
by the neck till he is dead

(2) No sentence of transportation shall specify the place to which the person sentenced is to be transported

369 No Court, other than the High Court, when it has signed its judgment, shall alter or review the same, except as provided in Sections 395 and 484 or to correct a clerical error

Court not to alter judgment

369 *Save as otherwise provided by this Code or by any other law for the time being in force, or in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court, when it has signed its judgment, shall alter or review the same, except * * to correct a clerical error*

Court not to alter judgment

Change—This section has been amended by section 101 of the Criminal Procedure Code Amendment Act XVIII of 1923

The wording of the old section admitted of the interpretation that High Courts had unlimited powers of altering or reviewing their judgment (though such interpretation was never made in any of the decided cases). The present section as now amended lays down that the High Court has no power to alter or review its judgment except as provided by the Letters Patent. The references to sections 395 and 484 have been omitted because there are cases other than those referred to in these two sections in which a review of judgment is possible e.g., section 414. See the *Report of the Joint Committee of 1921*.

1053 Scope of section:—Although this section refers in express terms to judgments under Chapter XXVI of the Code still it is clear that the principle laid down herein applies also to final orders which are in the nature of judgments—22 Bom 949. An order which is passed on full inquiry and after hearing both sides is in the nature of a judgment, and such an order cannot be altered after it is once passed and signed. Thus an order of a District Magistrate, passed after full inquiry, refusing to deliver to the Political Superintendent of a Foreign State, a property seized in execution of a search warrant, cannot be altered by the Magistrate himself. The only course open to the Magistrate is to make a reference to the High Court, and have his own order cancelled—22 Bom 141. An order under Chapter XII is in the nature of a judgment. A Magistrate having passed an order under section 146 can not cancel the order and pass an order under Section 147 instead—16 O C 192. *Lachmi v. Brij* 11 C R L J 225 (Pat). An order in sanction proceedings (now abolished) comes under this section and a Sessions Judge refusing to revoke a sanction has no jurisdiction to review his order and cancel it—23 Bom 50 (1911) 2 M W N 431. A final order is final

tenance proceedings (Sec 488) is in effect a judgment and the Magistrate cannot review a final order passed in such a proceeding—*Nandi v Manmata* 21 C W N 344

But this section does not apply to an order of dismissal of complaint under section 203. Such an order is not a judgment within the meaning of this section—9 Mad 126 and the Magistrate can rehear the complaint—29 Mad 126 1 N I R 18. So also an order directing issue of process under sec 204 is not a judgment and a Magistrate can on a reconsideration of that order cancel the issue of process and order an inquiry under sec 202—*Lalit Mohan v Nand Lal* 27 C W N 651

An order dismissing a summons case for default of appearance under section 247 is in the nature of a judgment and a Magistrate cannot revive the case once dismissed for default—4 C W N 26. But it is competent for a Magistrate to rehear a warrant case in which he has discharged the accused person under Section 253 or 259—29 Cal 726 28 Cal 652 7 C W N 527 28 Mad 310

So also it is open to the Appellate Court to rehear an appeal which has been summarily dismissed by itself for default of appearance of the pleader—7 M H C R App 29. *Contra*—4 Bom 101

1054 Alteration of judgment—No Judge or Magistrate can add to or alter or review his proceedings or judgments in any case after they are signed and published—10 C W N 1062 23 W R 43 23 Bom 50 1916 P R 25 *Narayan v Chaidrabhaga* 26 Cr L J 1289 (Nag). It is especially irregular when made in the absence of the accused and without notice to him—10 C W N 1062 12 Bom L R 521 19 Cr L J 223 (Pat). Where a Magistrate after signing and pronouncing judgment in open Court on the same day enhanced the sentence at the request of the accused in order to make his order appealable it was held that though the Magistrate acted with the best of motives yet the alteration of the sentence was illegal—1883 1 W N 16. Where the accused was charged with theft (379 I P C) and also under section 302 (previous conviction) and 379 I P C and the Sessions Judge at first tried the accused on the first charge alone and convicted and sentenced him and then next inquired into the further charge of previous conviction it was held that the subsequent proceedings with reference to the previous convictions were not valid because after the judgment including the sentence was pronounced in the trial on the first charge there was no power to review or alter the same under this section—42 Bom 202. Even where the accused obtains a judgment of acquittal under Section 24 by means of a fraud on the Court (e.g. by preventing the complainant from appearing when the case was called on by wrongfully arresting and detaining him on a false charge) the Code does not permit the Court to cancel the judgment of acquittal on proof of fraud and to restore the case to the file—38 Mad 1028. A Magistrate after passing the sentence and signing it cannot even alter the date from which the sentence is to run—*Ratanlal* 804. It is also most unwarrantable on the part of the Judge to add a note to his judgment by which he tries to throw doubts on the conclusion at which he had arrived.

2 All 33 Where an illegal sentence of flogging in addition to imprisonment was passed by the Magistrate and the illegality was discovered before execution but after the sentence had been pronounced and signed, it was held that such sentence could be altered only by the High Court, and not by the Magistrate himself—Weir (3rd Edn) 983 Where a Sessions Judge or a Magistrate once sentences an offender to pay a fine but omits through oversight to pass a sentence of imprisonment in default of payment of fine it is not open to him to pass the order subsequently. The proper course in such a case is to submit the proceedings to the High Court and to ask that Court in its revisional jurisdiction to inflict imprisonment in default of payment of fine—*In re Dhondt Nathaji* 23 Bom L R 846 A Sessions Judge has no power to alter or set aside a conviction and sentence once signed by him even on the ground that the sentence passed by him was illegal—23 W R 49 Where a Sessions Judge rejected a criminal appeal on the ground that it was barred by limitation but subsequently on the representation by the prisoner he admitted the appeal and after hearing it acquitted the accused, it was held that the Sessions Judge had no power to re-admit the appeal—19 Bom 732, 6 Bom L R 360 It is not open to a Sessions Judge, after he has once accepted the verdict of the jury and has postponed the case for passing sentence to reconsider his order and refer the case to the High Court under section 307, but he must pass sentence on the person awaiting sentence on the verdict. It is not open to him to reconsider his order any more than it would be for a jury to reconsider their verdict once given and recorded—4 C W N 683 Even if on appeal is summarily rejected under Sec 421 for default of appearance, the order of dismissal is not open to review—*Empress v Mahomed Iashin* 4 Bom 101 But in a Madras case it was held that if an appeal was summarily rejected under Sec 421 for non-appearance of the appellant's pleader, the Court could restore the appeal to the file and rehear it, if sufficient cause was shown for the pleader's non-appearance—7 M H C R App 29

But where a Sessions Judge on appeal in annulling a conviction omits to order a retrial, he is not precluded by this section from passing such an order subsequently. Such an order does not amount to an alteration of judgment—3 Mad 48 A Magistrate who makes an order under section 145 without any direction as to costs has power to order the same subsequently under section 148 (3) and such later order is not an alteration or review of his judgment in the original case within the meaning of this section—47 CIL 974 So also where a Magistrate disposing of a criminal appeal accidentally omits to pass an order under sec 520 it will be open to him or to his successor to pass the order afterwards. Such an order does not amount to an alteration of the judgment—*In re Subbia Vaidu* 43 M L J 87

Further inquiry.—An order for further inquiry does not amount to a review of the order of dismissal or discharge. The terms of this section must be read as controlled by section 437 (now 431). That section does not limit the power of a District Magistrate to make further inquiry into a case in which an order of dismissal or discharge may have been passed

by a subordinate Magistrate and there is no bar to a District Magistrate making further inquiry into a case in which such order may have been passed by himself—28 Cal 102 But where a District Magistrate has already dealt with a case in revision and decided that there was no cause for interfering with the order of discharge, he cannot subsequently order further inquiry, because such an order would be an order reviewing the earlier one and is prohibited by this section—*Agar Thau v Emp*, 5 Bur L T 37

Proper procedure—When a mistake has been made in the judgment (e.g., when an appeal has been erroneously dismissed as time barred, or when an illegal sentence has been passed) it is not open to the Judge or Magistrate to alter or review his judgment or order but the only course open to him is to submit the case to the High Court—6 Bom 1 R 360 1 Bur S R 354 23 W R 49 *Weir* (3rd Edn) 983 22 Bom 949 23 Bom L R 840

1055 No power of High Court to alter its judgment:—See notes under 'Change' above. The law is now the same as it practically was before. Curiously enough in spite of the words 'other than a High Court' occurring in the old section the High Court held that it had practically no power to alter or review its own judgment, under the old law. There being no provision in the Letters Patent or the Government of India Act authorising the High Court to exercise the power of review, the words 'other than a High Court' could not be read as conferring on the High Court that power by implication—*In re Amhammad* 46 Mad 382 (389). It has even been remarked in *In re Gibbons* 14 Cal 42 (47) that so far as the High Court was concerned there was no substantive enactment in this section it did not confer any power on the High Court, nor did it take away any of the powers which existed in that Court before the passing of this section.

The Legislature has not conferred in express words upon the High Court the power of reviewing its judgment in all criminal cases as it has done in all civil cases. The provisions of the old section so far as they affect a High Court merely apply to questions of law which arise in its original criminal jurisdiction and which are reserved and subsequently disposed of under the provisions of section 434 and the corresponding sections of the Letters Patent—, All 672. The words 'other than a High Court' do not give the Division Bench of the High Court power to review its judgment passed by it in a criminal appeal. The words are to be accounted for by the power of review given to the High Court under section 434 on points specially reserved by the Judge presiding at the High Court Sessions—*Ritmal* 791 46 Mad 182 (404). In other words, the High Court cannot entertain an application to review a judgment passed by it on appeal in a criminal case—5 W R 61, *Ratnial* 791, 1909 P R 1 *Emp v Ake* 45 All 143 (145). *In re Irumuga* 50 M L J 51 27 Cr L J 184. The Code of Criminal Procedure was passed after the Code of Civil Procedure. The latter contains a section authorising review of judgment, but the former contains no corresponding section. From this it may be reasonably inferred that the

did not intend to confer in criminal cases the power similar to that which they had given in civil cases—5 W R 61 (63) As soon as the appellate judgment is pronounced and signed by the Judges, the High Court is *functus officio* and neither the Court itself nor any Bench of it has any power to revise the decision or interfere with it in any way—14 Cal 42 7 All 672, *In re Kunhammad* 46 Mad 382 (401) *Paras Ram v Emp* 1 O W N 891 26 Cr L J 543 Even if a single Judge of the High Court has passed an order dismissing an appeal, a Division Bench of the High Court cannot review that order by rehearing the appeal—46 Mad 382 (404) If the Division Bench of the High Court passes an erroneous order in appeal, the only remedy is to make a petition (under Ch XXIX) to the Local Government the authority with whom rests the discretion either of executing the law or of commuting or setting aside the sentence—*Ratanlal* 791 *Emp v Kale* 45 All 143 (145) So also a Division Bench cannot review an order which has been passed by them in revision—*Q E v Fox* 10 Bom 176 (FB) 38 All 134, *Q E v Durgacharan* 7 All 672 1905 L B R (Cr P C) 35, *Naul Kishore v Emp* 20 Cr L J 447 (Pat) *Ratanlal* 458 A single Judge of the High Court has no power to alter or revise an order passed by him in revision—*In re Soma Vaidu* 47 Mad 428 (431) The High Court will not review its order passed in appeal or revision even on the ground of discovery of fresh evidence because such evidence ought to have been produced at the trial—*Ratanlal* 458 *Emp v Kale* 45 All 143 (145) So also, if a revision case is dismissed by the High Court for default of payment of printing charges it is not competent for the High Court to rehear the case or entertain a fresh application for revision—44 M L J 27 Even if a revision petition is dismissed for default of appearance of the practitioner who filed it the High Court is not competent to restore the petition to its file—*In re Ranga Rao* 23 M L J 371 But in another recent case of the Madras High Court as well as in cases of the other High Courts it has been held that when a criminal appeal or revision petition is dismissed by the High Court for default of appearance, there is no decision on the merits, and therefore there is no proper disposal of the case according to law There being no provision in the Code for dismissing an appeal or revision petition for default of appearance, the order of dismissal is no 'judgment' at all, and the High Court is not debarred from rehearing the appeal or revision petition—*Kunhammad Hapi* *In re* 46 Mad 382 at pp 407, 403 (dissenting from 23 M L J 371 and 4 Bom 101), *Rajab Ali v Emp* 46 Cal 61 (63) 20 Cr L J 265 *Kishen Singh v Girdhari* 23 Cr L J 750 (Lah) Similarly, if an order is passed in the absence of the accused without giving him an opportunity of being heard in accordance with the provisions of sub-section (2) of sec 439 as for instance where by mistake a case is posted on a day anterior to that fixed in the notice to the accused, the order is null and void, and the High Court is to proceed with the matter afresh after proper notice to the accused—*In re Soma Vaidu* 47 Mad 428 (434) 46 M L J 456 34 M L J 218 27 Cr L J 370. *Rajab Ali v Emp* 46 Cal 61 (63) If an appeal is dismissed by a High Court Judge under sec 421 without the appellant or his pleader being given reasonable oppor-

tunity of being heard in support of the same the order is passed without jurisdiction and the Court has power to make an order that the appeal should be reheard after giving the appellant or his pleader a reasonable opportunity of being heard—*Id Sadiq v Croon* 7 Lah L J 108 26 Cr L J 1169 A I R 1925 Lah 355

Under the present section as now amended, the power of the High Court is as limited as it was before the amendment "In view of the cases reported in the Indian Law Reports, 7 All 672, 10 Bom 176 (F B), and 14 Cal 4 (F B), it is proposed to make it clear that section 369 confers no power on the High Court to alter or review its own judgment after it has been signed"—*Statement of Objects and Reasons* (1921) Even sec 561A does not confer on the High Court the power to review its own judgment—*Nar Mohd v Hara Singh* 26 P I R 616 27 Cr L J 23 *Sadiq v Emp* 7 Lah L J 108 26 Cr L J 1169

As soon as the judgment is signed, it becomes final and the Court is *functus officio*. The mere fact that there has been no formal order issued by the High Court or communicated to the Lower Court in pursuance of the judgment does not enable the High Court to review its judgment. A judgment must be taken to mean and refer to the judicial act of the Court in finally disposing of the case and must therefore indicate only the order of the Court when it is read out and signed by the Judge, and cannot be meant to refer to the formal order on the judgment subsequently drawn up and issued merely as a clerical act by the ministerial officers of the Court—*In re Irumuga* 50 M L J 51 27 Cr L J 184 A I R 1926 Mad 420

The High Court, like the Lower Courts, can review its judgment before it is signed—38 Cal 828 *Bibhut v Das* 10 M L J 711 The Allahabad High Court can review its judgment after it is signed but before it is sealed because the judgment of that High Court is not complete until it is sealed, and till then it may be altered by the Judge concerned—21 All 177, 38 All 334, 27 All 92

370 Instead of recording a judgment in manner hereinbefore provided, a Presidency Magistrate shall record the following particulars —

Pres'dency Magistrate's judgment.

- (a) the serial number of the case,
- (b) the date of the commission of the offence;
- (c) the name of the complainant (if any);
- (d) the name of the accused
the case of an European
parentage and residence;
- (e) the offence complained of
- (f) the plea of the accused
any),

did not intend to confer in criminal cases the power similar to that which they had given in civil cases—5 W R 61 (63) As soon as the appellate judgment is pronounced and signed by the Judges, the High Court is *functus officio* and neither the Court itself nor any Bench of it has any power to revise the decision or interfere with it in any way—14 Cal 42, 7 All 672, *In re Kunhanmad* 46 Mad 382 (401) *Paras Ram v Emp* 1 O W N 891 26 Cr L J 543 Even if a single Judge of the High Court has passed an order dismissing an appeal, a Division Bench of the High Court cannot review that order by rehearing the appeal—46 Mad 382 (404) If the Division Bench of the High Court passes an erroneous order in appeal, the only remedy is to make a petition (under Ch XXIX) to the Local Government, the authority with whom rests the discretion either of executing the law or of commuting or setting aside the sentence—*Ratanlal* 791, *Emp v Kale* 45 All 143 (145) So also, a Division Bench cannot review an order which has been passed by them in revision—*Q E v Fox*, 10 Bom 176 (F B), 38 All 134, *Q E v Durgacharan* 7 All 672 1905 U B R (Cr P C) 35, *And Ashore v Emp* 20 Cr L J 447 (Pat), *Ratanlal* 458 A single Judge of the High Court has no power to alter or revise an order passed by him in revision—*In re Soma Naidu* 47 Mad 428 (431) The High Court will not review its order passed in appeal or revision, even on the ground of discovery of fresh evidence, because such evidence ought to have been produced at the trial—*Ratanlal* 458 *Emp v Kale* 45 All 143 (145) So also, if a revision case is dismissed by the High Court for default of payment of printing charges, it is not competent for the High Court to rehear the case or entertain a fresh application for revision—44 M L J 27 Even if a revision petition is dismissed for default of appearance of the practitioner who filed it the High Court is not competent to restore the petition to its file—*In re Ranga Rao* 23 M L J 371 But in another recent case of the Madras High Court, as well as in cases of the other High Courts it has been held that when a criminal appeal or revision petition is dismissed by the High Court for default of appearance, there is no decision on the merits, and therefore there is no proper disposal of the case according to law There being no provision in the Code for dismissing an appeal or revision petition for default of appearance, the order of dismissal is no judgment at all and the High Court is not debarred from rehearing the appeal or revision petition—*Kunhammad Haji In re* 46 Mad 382 at pp 40, 403, (dissenting from 23 M L J 371 and 4 Bom 101), *Rajab Ali v Emp* 46 Cal 60 (63) 20 Cr L J 265, *Akshen Singh v Girdhari* 23 Cr L J 750 (Lah) Similarly, if an order is passed in the absence of the accused without giving him an opportunity of being heard in accordance with the provisions of sub-section (2) of sec 439 as for instance where by mistake a case is posted on a day anterior to that fixed in the notice to the accused, the order is null and void and the High Court is to proceed with the matter afresh after proper notice to the accused—*In re Soma Naidu* 47 Mad 428 (434), 46 M L J 456 34 M L T 218 26 Cr L J 370, *Rajab Ali v Emp* 46 Cal 60 (63) If an appeal is dismissed by a High Court Judge under sec 421 without the appellant or his pleader being given reasonable oppor-

unity of being heard in support of the same the order is passed without jurisdiction and the Court has power to make an order that the appeal should be reheard after giving the appellant or his pleader a reasonable opportunity of being heard—*Id Sadiq v Crown* 7 Lah I J 108 26 Cr L J 1169 A I R 1925 Lah 355

Under the present section as now amended, the power of the High Court is as limited as it was before the amendment. In view of the cases reported in the Indian Law Reports, 7 All 672 10 Bom 176 (F B) and 14 Cal 42 (I B) it is proposed to make it clear that section 369 confers no power on the High Court to alter or review its own judgment after it has been signed—*Statement of Objects and Reasons* (1921) Even sec 361A does not confer on the High Court the power to review its own judgment—*Ya ar Mohd v Hara Singh* 26 P I R 616 27 Cr L J 23 *Sadiq v Emp* 7 Lah I J 108 26 Cr L J 1169

As soon as the judgment is signed, it becomes final and the Court is *functus officio*. The mere fact that there has been no formal order issued by the High Court or communicated to the Lower Court in pursuance of the judgment does not enable the High Court to review its judgment. A judgment must be taken to mean and refer to the judicial act of the Court in finally disposing of the case and must therefore indicate only the order of the Court when it is read out and signed by the Judge and cannot be meant to refer to the formal order or the judgment subsequently drawn up and issued merely as a clerical act by the ministerial officers of the Court—*In re Innunga* 50 M L J 51 27 Cr L J 184 A I R 1926 Mad 420

The High Court like the Lower Courts can review its judgment before it is signed—38 Cal 828 *Bibhut v Dasi Moni* 7 C W N vii The Allahabad High Court can review its judgment after it is signed but before it is sealed because the judgment of that High Court is not complete until it is sealed and till then it may be altered by the Judge concerned—21 All 177 38 All 134 27 All 92

370 Instead of recording a judgment in manner here inbefore provided, a President Magis

Pres'd-ney Magistrate's judgment shall record the following particulars —

- (a) the serial number of the case,
- (b) the date of the commission of the offence,
- (c) the name of the complainant (if any),
- (d) the name of the accused person, and (except in the case of an European British subject) his parentage and residence,
- (e) the offence complained of or proved,
- (f) the plea of the accused and

any),

- (g) the final order,
- (h) the date of such order, and
- (i) in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees, or both, a brief statement of the reasons for the conviction

1056 Scope of section:—This section does not apply to proceedings under sections 2 (i) and 3 of the Workman's Breach of Contract Act (XIII of 1839). Those proceedings are not *Criminal proceedings* and no offence can be said to have been committed under those sections. A Presidency Magistrate is not therefore bound to frame a record in such proceedings in accordance with the provisions of this Section—27 Cal 131.

1057 Clause (i)—reasons for conviction:—The meaning of this clause is that where the offence is sufficiently grave to involve a fine of Rs 200 or imprisonment as the substantive sentence, the Magistrate is bound to record his reasons (46 Mad 253) so as to enable the party to bring the matter up to the High Court, but in petty cases, which can be met by a fine of few rupees, the decision of the Magistrate may be recorded shortly—14 Cal 174. This section requires that in cases in which the accused is sentenced to imprisonment, a Presidency Magistrate shall record a brief statement of the reasons for the conviction. It is not sufficient for him to record that the offence is proved, for that may be necessarily implied from the fact that he has convicted the accused. The law requires something further as the reasons for the conviction—27 Cal 461. So also, a mere statement to the effect 'I believe the evidence for the prosecution and the evidence of the complainant and I convict the accused' is not a statement of reasons—*Emp v Shankar* 17 Bom L R 890. The Magistrate should state his reasons in such a manner as to enable the High Court to judge of the sufficiency of the materials before the Magistrate to support the conviction—13 Cal 272, 31 Cal 983, 8 C W N 587. Where there was not on the record any summary of the evidence nor such a statement of facts and reasons for conviction as would enable the High Court to say whether the materials were sufficient to support the conviction, it was held that the conviction should be set aside—8 C W N 587, 13 Cal 272, 31 Cal 983. Even, in a non appealable case, the Presidency Magistrate should state his reasons so as to enable the High Court in revision to judge the sufficiency of materials before the Magistrate to support the conviction—13 Cal 272. A Presidency Magistrate (is also an Honorary Presidency Magistrate) who tries and convicts an accused in a summary trial is bound to give reasons for the conviction—*In re Taradaramulu* 31 M L T, 400. *In re Thurman* 20 L W 330, 25 C L J 1084. But the omission to record the reasons in a summary trial is a mere irregularity, and the High Court will not interfere in revision if the accused has not been prejudiced—*In re Thurman* (Supra).

The imprisonment referred to in this clause is substantive imprisonment. A sentence of imprisonment in default of payment of fine is not a sentence of imprisonment within the meaning of this clause—14 Cal 174.

If the Magistrate omits to record the reasons the defect is not cured by section 441 which permits a Presidency Magistrate to submit with the record (when called for under section 435) a statement setting forth the grounds of his decision. Section 441 does not abrogate the terms of section 370 but it merely allows the Presidency Magistrate to supplement the reasons which have been already recorded under section 370. *In re Derwish Hussain* 46 Mad 253. But if the statement submitted under section 441 discloses sufficient grounds for the decision the defect in not recording reasons under sec 370 may be excused under section 537. If a substantial failure of justice has occurred—*Ibid*.

371 (1) On the application of the accused judgment or when the

Copy of judgment, etc., to be given to accused on application

translation in his own practicable, or in the Court, shall be given

delay. Such copy shall in any case other than this case, be given free of cost.

(2) In trials by jury in a Court of Session the heads of the charge to the jury shall on the request of the accused, be given to him without delay and free of cost.

(3) When the accused is sentenced to death

Case of person sentenced to death. Judge, such Judge shall give him of the period within which he wishes to appeal his appeal should be preferred.

The application for copy of judgment need not be accompanied by a fee. Ratanlal 364.

372 The original judgment shall be filed with the

Judgment when to be translated. Record of proceedings, original is recorded in the language from that of the Court and the accused shall be given a translation thereof into the language of the Court. This shall be added to such record.

373 In cases tried by the Court of Session

Court of Session to send copy of finding and sentence to District Magistrate. shall forward a copy of the finding and sentence (if any) to the District Magistrate within the local jurisdiction the trial was held in.

CHAPTER XXVII

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION

374 When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court

Sentence of death to be submitted by Court of Session

When the record of a case in which a sentence of death has been passed is submitted to the High Court under section 374, all the Police Diaries connected with the case should be simultaneously forwarded—*Gal G R & C O p 39*

375 (1) If when such proceedings are submitted the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session

Power to direct further inquiry to be made or additional evidence to be taken

(2) Such inquiry shall not be made nor shall such evidence be taken in the presence of jurors or assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court

1058 Under this section the High Court can take additional evidence itself. In 25 Bom 168, the High Court admitted in evidence a confession rejected by the Sessions Judge. In 1911 P W R 16 the High Court (then Chief Court) admitted further evidence and inspected the building where the offence was alleged to have been committed.

The High Court when recording further evidence under this section can dispense with the presence of the accused, especially where the additional evidence is recorded by itself—24 Mad 523

The High Court acting under this section is not entitled with a view to make its opinion still more conclusive with reference to the discrepancies in the testimony of the witnesses on which the Trial Judge has properly dwelt, to test that testimony still further by reading the earlier

statements of those witnesses made to the police and entered in the police diary in other words to treat as evidence what could be used at events only for the purpose of discrediting those witnesses—44 (876 (P C))

376 In any case submitted under Section 374, when

tried with the aid of assessors or
Power of High Court to confirm sentence or annul conviction
 jury, the High Court—

- (a) may confirm the sentence, or pass any other sentence warranted by law, or
- (b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge or
- (c) may acquit the accused person

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or if an appeal is presented within such period until such appeal is disposed of

1059 Power of High Court—Though a High Court has power to substitute its own finding for the unanimous verdict of the jury at a trial for murder when the sentence comes on for confirmation before the High Court still as a matter of practice the High Court will generally allow the verdict to be attacked arbitrarily. It is necessary that the convict must show *prima facie* that the verdict is unsupported by evidence. The High Court will not permit the same latitude in the criticism of the evidence before the jury that it allows in an ordinary appeal from a trial with assessors—*Gul v Emp* 15 S I R 103 (F B). The High Court will undoubtedly interfere with the verdict if it is perverse or if evidence has been improperly admitted or excluded or if there is a misdirection by the Judge—*Ibid*

High Court may go into facts and law—When a case is submitted under section 374 the whole case is reopened before the High Court and the High Court is bound to go into the facts as well as the law although the conviction is by the verdict of the jury—19 W R 57 C W N 49 *Emp v Daji* 17 Bom L R 102 and the High Court's power under this section is not limited as in appeal—2 C W N

In a case referred to the High Court under section 374 for confirmation of a death sentence it is the practice of the High Court to be satisfied on the facts of the case as well as the law that the conviction is right before it proceeds to confirm the sentence—*Ratanlal* 710. Though a jury have unanimously convicted an accused for murder it is the duty of the High Court on a reference under sec 374 to be satisfied that the finding of fact is supported by the evidence on the record—*Arshed Ali* *Emp* 30 C W N 166

Where the High Court hears the appeal of a co accused not sentenced to death along with a reference under section 174 in respect of a person sentenced to death it was held under the old law that it was not open to the High Court to go into the facts in the appeal—2 C W N 49 and the hearing of the appeal was limited as laid down in sections 418 and 423 (2) to points of law only—Ibid See also 11 B I R 14 But now see the new sub-section () of section 418

Question of jurisdiction—In determining whether the sentence should be confirmed the High Court may also consider whether the conviction was by a Court of competent jurisdiction—M 218

1060 Commutation of sentence—Where the condition of the convict was such that if he were ordered to be hanged, decapitation would ensue (owing to an aperture in the neck communicating with the larynx) the High Court commuted the sentence of death into one of transportation for life—2 C I R 15 In 17 C W N 121, there being a difference of opinion among the Judges who heard the reference the case had to be referred to a third Judge (see 3,8) and there was a delay of six months in the High Court before the final decision was arrived at The third Judge upheld the conviction for murder but commuted the sentence of death into one of transportation on the ground that the capital sentence had been hung over the head of the accused for six months owing to the delay in the High Court

Conviction for any other offence—Where the accused was tried before the Sessions Judge for murder and concealment of murder, and was convicted of murder but no finding was given on the minor charge, the High Court in acquitting the accused of the charge of murder, could convict him of the minor charge where there was evidence to support it, in spite of the omission of the Sessions Judge to give any finding in respect of this minor charge—1913 P R 8 The Bombay High Court holds that in a reference under this section the High Court cannot alter a conviction for murder into one for culpable homicide not amounting to murder, unless there is a petition of appeal along with the reference If no appeal is preferred the only course is to order a retrial for the other offence—1 Bom 639 But there is nothing in this section to warrant such a view

1061 Retrial—Where the evidence taken before the Court of Session was incomplete, and further evidence was necessary before judgment could be properly pronounced upon the accused the High Court ordered a retrial—6 C W N 91 Where the accused was undefended in the Sessions Court, the High Court ordered a retrial on the same charge after proper arrangement being made for his defence—19 C W N 556 See also 1 Bom 639 above

377 In every case so submitted, the confirmation of the

sentence or any new sentence or order passed by the High Court, shall, when such Court consists of two or

Confirmation or new sentence to be signed by two Judges.

more Judges, be made, passed and signed by at least two of them

378 When any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion

When a case is referred to a third Judge, he must give his own independent opinion, and should not necessarily decide the case according to the opinion of the Judge who was in favour of the acquittal—1887 A W N 125

379 In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order under the seal of the High Court, and attested with his official signature, to the Court of Session

380 Where proceedings are submitted to a Magistrate of the first class or a Sub divisional Magistrate as provided by Section 562, such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken

1062 The Magistrate to whom a case is submitted under section 562, must pass such sentence and make such order as he thinks fit. If however, on a perusal of the evidence he comes to the conclusion that the conviction should not have taken place he can acquit the accused under the powers vested in him under this section—*See The v. M. K. M., 1913 5 B R 1st Qr 55*

The Magistrate to whom the case is referred cannot send the case back to the inferior Magistrate. Where a second class Magistrate, finding the accused guilty of an offence under section 325 I P C., submitted the case to the District Magistrate for an order section 562, but the District Magistrate sent the case back to the 2nd class Magistrate pointing out that sec 562 [before its present amendment] was inapplicable.

(as the offence was beyond its scope) it was held that the District Magistrate's order sending back the case was illegal, because, under this section, he could pass such sentence or order as he might have passed if the case had originally come to him and he could not have sent it to the second class Magistrate for the purpose of sentence if he had originally heard it—4 L. B. R. 150

Appeal—See sections 407 and 408 as now amended

CHAPTER XXVIII

OF EXECUTION

381 When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary

The date named by the Sessions Court in its warrant for the execution of a sentence of death, shall not be less than fourteen or more than twenty-one days from the date of the issue of such warrant.—*Cal. G. R. & C. O.* page 39

382 If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life

Postponement of capital sentence on pregnant woman

1063 The fact that the accused is a pregnant woman is not a sufficient ground for commutation of sentence—15 W. R. 66 in such a case, execution will be deferred until delivery is provided by this section

The High Court is the only tribunal in which the law has vested the power of postponing the execution of a sentence of death passed on a woman found to be pregnant—2 Weir 441

The pregnancy of the woman should be certified by a civil surgeon—*Bombay Gazette* 1879 page 471

383 Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by Section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to be confined, and, unless the accused

Execution of sentences of transportation or imprisonment in other cases.

is already confined in such jail, shall forward him to such jail, with the warrant

1064 Sentence when to commence—A sentence of imprisonment ought to commence from the time the sentence is passed. A sentence of imprisonment to take effect at a future date is bad in law. A Magistrate has no power to postpone the execution of the sentence at the request of the accused—12 W R 47. Where a Magistrate passes a sentence of imprisonment on an accused and admits him to bail in order that he may have the means of appealing held that the admission to bail does not make the sentence one to commence at a future date and does not therefore make it illegal—In *re Okhoy Kumar* 7 C L R 393 12 W R 47. When a Judge convicts the accused he must pass sentence on him at once, he has no power to adjourn the passing of sentence for an indefinite period—14 Bom L R 144.

The commencement of the sentence cannot also be ante dated. A sentence of imprisonment for the time already passed in the lock up is illegal; but a sentence of imprisonment until the rising of the Court is good and legal—1907 P W R 9.

When a prisoner has been committed to jail under two separate warrants, the sentence in the one to take effect from the expiry of the sentence in the other the date of such second sentence shall in the event of the first sentence being remitted on appeal be presumed to take effect from the date on which he was committed to jail under the first or original sentence—Cal G R & C O page 40.

Where to be imprisoned—When a case is submitted to the High Court under section 307 and the High Court passes a sentence it does so as a Court of Reference and not in the exercise of its ordinary original jurisdiction and therefore it has power on conviction and sentence to send the accused to jail outside the Presidency Town. The High Court is required to send the accused to that jail in which he would have been confined by the Court submitting the case—29 Cal 286.

It is illegal for a Magistrate to direct the accused to be imprisoned in a Police lock up. A jail is a prison within the meaning of the Prisons Act and the Prisoners Act but it does not include a police lock up—K E v Po Thm 7 L B R 62.

It is illegal to confine a person in a jail other than that mentioned in the warrant—11 Cal 527 (cited under section 384).

Calculation of period of imprisonment—In calculating sentences of imprisonment the day on which the sentence is passed and the day of release ought to be included and considered as days of imprisonment, for example, a man sentenced on the 1st January to one month's imprisonment should be released on the 31st January and not on the 1st February—Mad G O No 2411 dated 22-11-81.

384 Every warrant for the execution of a sentence of

Direction of warrant imprisonment shall be directed to the officer in charge of the jail, or other place in which the prisoner is, or is to be, confined.

the levying of the fine imposed on the prisoner till the period of appeal shall have expired or until the orders of the Appellate Court are received on appeal preferred by the accused. Nor can the Appellate Court order the original Court to abstain from levying the fine till the disposal of appeal—2 W R (Cr 1st) 13. As to the period of limitation within which fine may be recovered, see section 70 I P C.

Who can levy fine—The term 'Court' is not restricted to the particular individual who held office. The successor in office of a Judge or Magistrate may levy a fine imposed by his predecessor—9 W R 50.

1068 Clause (a)—Distress and sale—It is lawful for the Magistrate to issue his warrant for the levy of fine by distress and sale of the goods of the offender and at the same time to order his imprisonment for non-payment of fine. It is not necessary to postpone imprisonment till the distress and sale of goods have failed to realise the fine, and the imprisonment should not be allowed to stop the process for the levy of fine so as to give the offender time to remove his goods beyond the reach of the law—17 W R 7.

This clause allows the distress and sale of moveable property of the offender. But growing crops are not moveable property for the purposes of this clause—2 Weir 444. Rights and interests or shares in the joint moveable property of a joint Hindu family, of which the accused is a member, cannot be sold under this clause—2 Weir 442, *Q E v Sita Nath* 20 Cal 478, *Hira Lal v Crown* 1915 P L R 28. If the accused is a member of an Aryasmitina family the distress and sale of his moveable property in execution of a warrant under this clause is illegal—2 Weir 443. But according to the Bombay High Court, the words "belonging to the offender" do not mean belonging exclusively to the offender and therefore the share of the accused in the moveable property of the joint Hindu family of which the accused is a member can be attached—*Shri Lingappa v Gurlingara*, 49 Bom 906, 27 Bom L R 1367. Moveable property (money) belonging to the accused's brother and deposited in Court by the accused's brother as security for the appearance of the accused in a criminal trial cannot be seized, as the money does not belong to the accused. Even the fact that the accused and his brother are members of a joint Hindu family will not enable the Court to seize the money—19 A I J 887. Moveable property of the offender in a Native State cannot be seized, only the property remaining in British India can be seized and sold—2 Weir 444.

1069 Clause (b)—The old law provided for the distress and sale of moveable property only. Immoveable property could not be attached and sold for the recovery of fine—22 Cr I J 39 (Lah), 5 B H C R 63, 20 Cal 478. Clause (b) now allows attachment and sale of immoveable properties also.

1070 Proviso:—Levy of fine after imprisonment—It was held under the old section that an offender who had undergone the full term of imprisonment to which he was sentenced in default of payment of fine was still liable to have the amount levied by distress and sale of any moveable

property belonging to him—3 W R 61, because the imprisonment which the Court imposed in default of payment was intended as a punishment for non payment and not as a satisfaction and discharge of the amount due—Ratanlal 91 But the Court had a discretion in the matter whether fine should be recovered after the accused had undergone imprisonment for non payment If it appeared that the fine was not paid for want of means or that its realisation would be ruinous to the offender or his family, it was not desirable that further steps should be taken for the levy of fine, but if there was reason to believe that the offender had means to pay but would not pay and would prefer to undergo imprisonment the law was strictly enforced and steps were taken for the realization of the fine within the period allowed by law—See *Punjab Circ*, Chapter LI, p 264

The proviso in the present section now lays down that if the offender has undergone the whole term of the imprisonment awarded in default of fine, the Court shall not issue a warrant for levy of the fine "The new proviso directs that after the imprisonment awarded in default of payment of fine has been served no further steps should be taken for the recovery of the fine unless the Court for special reasons to be recorded considers it necessary The infliction of a double punishment is ordinarily uncalled for, and by the issue of warrants for the recovery of fines when there is no real reason why they should be recovered, the time of the police is frequently wasted Convicted persons also are thus harassed for long periods after they have expiated their offences by undergoing imprisonment—*Statement of Objects and Reasons* (1921)

Unless for special reasons to do so—These words at the end of the proviso are intended for the case of a contumacious person who may evade the fine and suffer imprisonment, and yet having the means to pay the fine not pay the fine In such a case the serving of the period of imprisonment provided in default of payment of fine should not absolve the person from paying the fine See *Legislative Assembly Debates* 8th February 1923 page 2061

1071 Sub-section (2) —Claims of third parties—By this sub section, power is given to the Local Government to make rules regarding the execution of warrants and the determination of claims—*Statement of Objects and Reasons* (1914)

Under the old law, when a claim was preferred by a third party to the ownership of the property distrained, the Magistrate was not required by law to try any such claim, because this section did not contain any provision for the trial of claims which might be preferred to the property distrained under this section—*Q E v Gasper* 22 Cal 935, 1915 P L R 28 What the Magistrate had to do in such a case was to postpone the sale of the property and to allow the claimant an opportunity of establishing his title in a Court having jurisdiction to determine civil rights—2 Weir 445 When a claim was preferred, the Court was to direct postponement of the sale of the property for such time as might be necessary to enable the claimant to establish his right (by a civil suit) If property was of such a nature that an immediate sale would

benefit of the owner, the property could be sold and the sale proceeds held over—*Ratanlal* 976, *Q E v Kandappa*, 20 Mad 88, *Q E v Gasper* 22 Cal 935

Under the present law, the Magistrate is empowered to determine summarily the claims of third parties. This view was also taken in a Burma case—1 Bur S R 332

1072 Sub-section (3) — We would add a clause after sub-section (2) to enable a fine to be realised through the Collector as if the order was a decree of a Civil Court. We can see no reason why a property-owner who may be able to conceal his moveables should not be forced to pay a fine which has been inflicted upon him by a Criminal Court, just as much, and by the same process, as a civil debt. It seems to be recognised that the liability is so enforceable by section 70, Indian Penal Code, and the decision in *Emp v Sitanath Mitra* 1 L R 20 Cal 478, and we think that this should be made clear by the section under consideration. The proper person to effect such realisation is, we think, the Collector of the district who will be treated as the decree holder —*Report of the Select Committee of 1916*

The Joint Committee of 1922 approving of this amendment has remarked "We recognise that the procedure prescribed may in some cases involve considerable delay, and we attempted to find some more summary method of proceeding against immoveable property on the lines of those laws which enable moneys due to the Crown to be recovered as arrears of land revenue. We have, however, found ourselves unable to devise any procedure which will not be open to most of the objections put forward against the present clause."

1073 Revision.—The order of a Magistrate for sale of properties under this section is not a judicial proceeding and is not the proper subject of criminal revision, the claimant whose property is wrongly sold under this section may proceed by way of civil suit (either against the purchaser or against the Secretary of State)—1898 A W N 173, 20 Mad 88, 1915 F L R 28

387. A warrant issued under Section 386 sub-section (1)
Effect of such warrant clause (a) by any Court may be executed within the local limits of the jurisdiction of such Court, and it shall authorize the attachment and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found

Change:—The italicised words have been substituted for the words 'such warrant' (occurring in the old section) by sec 103 of the Cr P C Amendment Act VIII of 1923. The amendment is merely verbal, and consequential upon the amendment of sec 386

The word *attachment* has been substituted for the word *distress* in this section as well as in section 386, as the term is more appropriate

388 When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the Court issues a warrant under S 386, it may suspend the execution of the sentence of imprisonment and may release the offender on his executing a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before such Court on the day appointed for the return to such warrant, such day not being more than fifteen days from the time of executing the bond, and in the event of the fine not having been realized the Court may direct the sentence of imprisonment to be carried into execution at once

388 (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine and the *fine is not paid forthwith*, the Court may—

(a) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and

(b) suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond with or without sureties as the Court thinks fit, conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof as the case may be, is to be made, and, if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is able under the order. the

may direct the sentence of imprisonment to be carried into execution at once

(2) In any case in which an order for the payment of money has been made, on non-recovery of which imprisonment may be awarded, and the money is not paid forthwith, the Court may require the person ordered to make such payment to enter into a bond as prescribed in sub-sec. (1), and, in default of his so doing, may at once pass sentence of imprisonment as if the money had not been recovered.

(2) *The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made, on non-recovery of which imprisonment may be awarded, and the money is not paid forthwith, and if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment*

Change:—This section has been redrafted by the Criminal Procedure Code Second Amendment Act XXXVII of 1923. This amendment has been made on the recommendation of the Indian Jails Committee. See *Gazette of India* 1923 Part V, p. 242.

Sub-section (1) —Sub-section (1) is inapplicable where no alternative sentence of imprisonment (for non-payment of fine) has been passed. Where a Magistrate sentences an offender to a fine, but omits to pass a sentence of imprisonment in default of payment of the fine, he has no power to bind over the accused in his own recognizance to appear (under clause b) —2 Weir 445.

389 Every warrant for the execution of any sentence

Who may issue war may be issued either by the Judge or
rant Magistrate who passed the sentence, or
by his successor in office

See 9 W R 50 cited under sec. 386

390 When the accused is sentenced to whipping only,

Execution of sentence the sentence shall subject to the pro-
of whipping only. visions of Section 391 be executed at
such place and time as the Court may direct

The italicised words have been added by Sec. 21 of the Criminal Law Amendment Act XII of 1923.

1074 When the accused is sentenced to whipping only, the sentence cannot be deferred it must be carried out as soon as practicable. This section authorises the Court to fix the time and place for its execution but not to postpone it—*Ratanlal 906 26 Mad 465*. An order that an accused person shall not be whipped until after the expiry of the sentence of imprisonment passed in another trial is illegal. The sentence should be carried out as soon as practicable—*I B R (1900—1902) 53*. The sentence cannot be postponed pending an intended appeal—*26 Mad 465*. But these cases should now be read subject to clause (a) of sec 391 which allows postponement of whipping if the accused furnishes bail.

For general rules as to whipping see notes under sec 32

391 (1) When the accused is sentenced to whipping in addition to imprisonment, in a case which is subject to appeal, the whipping shall not be inflicted until fifteen days from the date of the sentence, or if an appeal is made within that time, until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days or in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

391 (1) When the accused (a) is sentenced to whipping only and furnishes bail to the satisfaction of the Court for his appearance at such time and place as the Court may direct, or

(b) is sentenced to whipping in addition to imprisonment, the whipping shall not be inflicted until fifteen days from the date of the sentence, or if an appeal is made within that time, until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

(2) The whipping shall be inflicted in the presence of the officer in charge of the jail, unless the Judge or Magistrate orders it to be inflicted in his own presence.

(3) No accused person shall be sentenced to whipping in addition to imprisonment, when the term of imprisonment to which he is sentenced is less than three months.

1075 This section has been amended by Act ... of the Criminal Law

Amendment Act, XII of 1923 The old section contemplated only those cases where the accused was sentenced to whipping as well as to imprisonment, if the accused was sentenced to whipping only, this section did not apply, and the sentence of whipping could not be postponed—2 Weir 446 But the newly added clause (a) now provides for such cases

Postponement of whipping till after imprisonment—Where a person has been sentenced to whipping as well as to imprisonment, the whipping may be postponed as provided by this section, until 15 days from the date of sentence or until confirmation of the sentence on appeal but it is illegal to postpone the sentence of whipping till after the term of imprisonment has expired—6 M H C R App 38 7 M H C R App 29, 4 Bom L R 436 Ratanlal 803 1881 A W N 138, 4 Bom L R 929 Where a Magistrate ordered that the prisoner be brought before him at the expiration of the sentence of imprisonment, and that the sentence of whipping should then be carried out, the High Court cancelled the sentence of whipping as having become inoperative and incapable of being carried out by lapse of time—20 W R 72

As soon as practicable—The whipping must be carried into effect as soon as practicable after the expiry of the time specified in this section If through accident, or neglect or wilful breach of duty of the officer the sentence of whipping was not carried into execution, the prisoner is not thereby freed from liability to undergo the sentence still remaining unexecuted—Ratanlal 136

Double sentence of whipping—An accused cannot be sentenced to a double sentence of whipping when he is convicted of two offences, thus, where a person is convicted of offences under sections 454 and 380 I P C, it is illegal to pass a sentence of 15 stripes for each offence—Ratanlal 955

Sub section (3)—When a sentence of imprisonment for less than three months is awarded an additional sentence of whipping is illegal—2 Bom L R 54

392 (1) In the case of a person of or over sixteen years

Mode of inflicting of age, whipping shall be inflicted with punishment

a light rattan not less than half an inch in diameter, in such mode, and on such part of the person, as the Local Government directs, and, in the case of a person under sixteen years of age, it shall be inflicted in such mode, and on such part of the person, and with such instrument, as the Local Government directs

(2) In no case shall such punishment exceed thirty

Limit of number of stripes stripes, and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes

Such part of the person—(1) In case of a person of or over sixteen years of age in C I, Madras, Bengal and Assam, the punishment of

whipping is inflicted on the bare buttocks, the offender being tied to a triangle—See *C P Gazette Notification No 20 of 4-1-1899, Fort St George Gazette, 1898, Part I, p 1248, Halkins 148, Assam Gazette, 1899, Part II, p 384* In Burma the punishment is inflicted on the breech—*Burma Gazette 1891, Part I, p 201* In Bombay, if the punishment is inflicted in private (*i.e.* within the precincts of the prison), it shall be inflicted on the bare buttocks and when inflicted in public (*i.e.* outside the Jail precincts), across the bare shoulders—*Bombay Govt Gazette 1893 Part I, p 110 Bom G R No 608 of 1897*

(2) In case of a person under sixteen years of age in Bombay, U P, C P, and the Punjab, the whipping is inflicted on the bare buttocks, with a light rattan not exceeding half an inch in diameter, but the offender is not tied to a triangle but simply held on it or is held in some other convenient way See *Bom G R No 6122, dated 16-9-1898, G O No 1290 of 12-5-1898 (U P) C P Gazette Notification No 20 of 4-1-1899 Punjab Gazette 1899 Part I p 314* In Burma the whipping is inflicted on the breech—*Burma Gazette 1898, Part I, p 307* In Bengal it may be inflicted on the posteriors or on the hands as the Court may direct—*Cal G R and C O page 62* "Having regard to the general feeling of the respectable classes of the people as to the degrading character of the punishment of whipping the Lieutenant-Governor has left it to the discretion of the Court in the case of juvenile offenders, to inflict the punishment on the hand instead of on the buttocks This discretion should be exercised according to the circumstances of each case as age and social position of the offenders and the nature of the offence For very young boys of respectable position convicted of offences which do not imply depravity or confirmed dishonesty strokes on the hand appear to be the appropriate punishment Care is, however, necessary and should be taken to avoid causing serious injury to the hand when whipping is inflicted on the palm"—*Cal G R & C O pages 63-64* In C P if the boy is under twelve years of age, the whipping may be inflicted on the hands at the discretion of the Magistrate—*C P Gazette Notification No 20 of 4-1-1899*

Number of stripes—Under the provisions of this section and the next, not more than one sentence of whipping and that not exceeding thirty stripes, should be awarded at one time—1906 U B R (Cr P C) 47

393 No sentence of whipping shall be executed by instalments and none of the following persons shall be punishable with whipping, namely—

Not to be executed by instalments Exemptions

- (a) females,
- (b) males sentenced to death or to transportation or to penal servitude, or to imprisonment for more than five years,
- (c) males whom the Court considers to be more than forty-five years of age,

1076 This section forbids the execution of the punishment of whipping in respect of certain persons, and since the execution is prohibited, such persons cannot therefore be sentenced to whipping, for it is futile to pass a sentence which cannot be executed. Therefore a person who is sentenced to 7 years rigorous imprisonment cannot be sentenced to whipping in addition because the execution of such punishment is prohibited by clause (b) of this section—*Ikbar v Crown*, 1919 17 R 30

Sentence of whipping cannot be enhanced—The accused was convicted under section 382 I P C and was sentenced to whipping and the sentence was duly executed. An application was afterwards made to enhance the sentence on the ground that it was inadequate, it was held that the sentence of whipping could not be enhanced by the infliction of an additional number of stripes because under this section no sentence of whipping could be executed by instalments—*Ratanlal* 537

Clause (b)—A sentence of whipping passed on a person who is already under sentence of death etc., is illegal. Even if the sentence of whipping precedes instead of following the other sentence, the passing of the latter sentence renders the inflicting of the punishment of whipping illegal—*Mad* 56

394 (1) The punishment of whipping shall not be inflicted unless a medical officer, if Whipping not to be inflicted if offender not in fit state of health present, certifies, or, if there is not a medical officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment

(2) If, during the execution of a sentence of whipping, a medical officer certifies, or it appears to the Magistrate or officer present that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped

1077 Particular attention should be directed to section 394 which prohibits the execution of a sentence of whipping when the offender is not in a fit state of health to undergo that punishment, and all officers are reminded that the Governor General in Council considers that the precaution of having a medical officer present at the time of the infliction of the punishment should be observed in every instance when practicable—*Cal G R & C O* page 65

Before the commencement of whipping, the Medical Officer must give a certificate whether the offender is in a fit state of health to undergo the whole punishment of whipping. There is no provision of law authorising a medical officer to give a certificate that the accused is fit to receive only a portion of the sentence, such a certificate cannot be held as granted under sub-section (1)—*Mad* 84. Such a certificate cannot be

treated as one under subsection (2), because that subsection refers to a certificate granted *during* the execution of the sentence—*Ibid*

Under subsection (1) the Medical Officer is to give a certificate either that the offender is in a fit state of health to undergo the *whole* sentence passed on him or that he is not in a fit state of health to undergo it at all. If he certifies that the accused is fit to undergo a *smaller* number of stripes than that ordered by the Magistrate, the certificate cannot be held as one granted under this section, and is invalid, the Magistrate cannot in such a case inflict a smaller number of stripes in accordance with the medical certificate and in lieu of the rest of the stripes not inflicted he cannot award imprisonment under section 395 *infra*—31 Mad 84

395 (1) In any case in which under Section 394, a sentence of whipping is wholly or partially prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it, and the said Court may, at its discretion, either remit such sentence, or sentence the offender in lieu of whipping or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months *or to a fine not exceeding five hundred rupees* which may be in addition to any other punishment to which he may have been sentenced for the same offence

(2) Nothing in this section shall be deemed to authorize any Court to inflict imprisonment for a term *or a fine of an amount* exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict

Change—The italicised words have been added by section 105 of the Criminal Procedure Code Amendment Act XVIII of 1923 'The Amendment in subsection (1) enables a sentence of fine to be awarded in lieu of a sentence of whipping which cannot be carried out'—*Statement of Objects and Reasons* (1914)

Under the old law it was held that the Court had no power to revise a sentence of whipping by inflicting a *fine*—11 All 308 Weir (3rd Edn) 993 2 Weir 449 These cases are now rendered obsolete

1078 'Wholly or partially prevented'—Wholly prevented' refers to sub-section (1) of section 394 'Partially prevented' refers to sub-section (2) of that section—31 Mad 84

'The Court which passed the sentence can revise it'—The only Court which can revise the sentence is the Court which passed the sentence. Even where a sentence of imprisonment and whipping passed by a District Magistrate is confirmed on appeal by the Sessions Judge still the Magistrate is not prevented from revising the sentence—1889 P

the words the Court which passed the sentence do not mean the same officer who inflicted the sentence therefore where a Magistrate who passed the original sentence of whipping was transferred the District Magistrate who had jurisdiction over the whole district was competent to commute the sentence of whipping to one of imprisonment—1901 P R 33

Power of remission—The Court can revise the sentence of whipping by awarding solitary confinement in lieu of whipping under this section—1899 P R 14 The Court may remit the sentence altogether, even though it is competent to inflict a term of imprisonment in lieu of whipping—11 I B R 202

The imprisonment which the Court can award under this section must not exceed the term which the Court is competent to award Where a Magistrate sentences the accused to the maximum term of imprisonment which he is competent to inflict as well as whipping, and the whipping cannot be carried out he cannot sentence him to a further term of imprisonment in lieu of whipping but ought to remit the sentence of whipping altogether—2 Weir 419 21 All 25 1901 P R 11

396 (1) When sentence is passed under this Code on an escaped convict, such sentence, if of

Execution of sentences on escaped convicts death, fine or whipping, shall, subject to the provisions hereinbefore contained, take effect immediately, and, if of imprisonment, penal servitude or transportation, shall take effect according to the following rules, that is to say—

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, penal servitude or transportation, as the case may be for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence

Explanation—For the purposes of this section—

(a) a sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment,

(b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement, and

- (c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement

1079 The word *sentence* includes an order of imprisonment passed under section 123—*Ratanlal 774 Contra—3 I B R 72*

What this section contemplates is that the severer sentence must be undergone first. Where the accused who was a life-convict under sentence of transportation for murder was convicted for attempting to escape from lawful custody and was sentenced to four months rigorous imprisonment the latter sentence must not commence immediately but should be undergone after the expiry of the sentence of transportation—*Ratanlal 965*

397 When a person already undergoing a sentence of imprisonment, penal servitude or transportation is sentenced to imprisonment, penal servitude or transportation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence

Provided that if he is undergoing a sentence of imprisonment and the sentence on such subsequent conviction is one of transportation the Court may in its discretion direct that the latter sentence shall commence immediately or at the expiration of the imprisonment to which he has been previously sentenced

Provided further that where a person who has been sentenced to imprisonment by an order under Section 123 in default of furnishing security is whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order the latter sentence shall commence immediately

Change—The italicised words and the second proviso have been added by section 106 of the Criminal Procedure Code Amendment Act XVIII of 1923. The reasons are stated below.

1080 **Principle**—The general rule is that a sentence commences to run from the time of its being passed and this section creates an exception in the case of persons already undergoing imprisonment and postpones the operation of the subsequent sentence until after the expiry of the previous sentence—*3 B I R 1 C 50 20 V R 70*

'Undergoing imprisonment'—A person is said to be undergoing an imprisonment the moment the sentence of imprisonment is passed, though he has not yet been sent to jail. Therefore, where a person is tried on the same day for two different offences in two different trials, then as soon as the first trial is over and he is convicted and sentenced he is said to 'undergo imprisonment', and if he is convicted and sentenced in the second trial also, he is said to be sentenced to imprisonment 'while already undergoing a sentence of imprisonment' within the meaning of this section—2 Weir 451 *Emp v Nga Po* 3 Bur L J 32 25 Cr L J 1310. But in *Makhan v Emp*, 19 Cr L J 207 (All), it has been held that until an accused has actually passed into jail, he cannot be said to be undergoing imprisonment, and therefore where two sentences of imprisonment are passed in two trials on the same accused on the same day, this section does not apply, as the accused cannot be said to be 'undergoing imprisonment' under the first trial, as soon as the sentence is passed therefore the second imprisonment need not commence after the expiry of the imprisonment awarded in the first trial the Magistrate may order that the two sentences should be concurrent.

Detention under the order of a Civil Court is not a sentence of imprisonment within the meaning of this section therefore a Magistrate has no power to order that the sentence of imprisonment awarded by him shall take effect on the expiry of a term of detention in the Civil jail which had been ordered by a Civil Court—*Emp v Makha Gy* 4 Bur L J 9 3 Rang 93 26 Cr L J 821 A I R 1925 Rang 202.

1081 Order of sentences—The meaning of this section is that sentences will take effect in the order in which they are passed. The sentence which is first passed and which the accused is undergoing must be given effect to first, and any subsequent sentence passed upon the accused must follow after the expiration of the first sentence. Where a Magistrate passes separate sentences of imprisonment on the same accused in separate trials but on the same day, the sentences will take effect in the order in which they are passed, by the terms of this section, and the Magistrate need not therefore give any direction in his judgment in respect of the same—2 Weir 451. In another case appearing on the same page of the same report (2 Weir 451) however it is laid down that the direction that the sentence in one case is to run from the date of the expiration of the sentence in a previous case passed on the same day must appear in the body of the sentence and should also be inserted in the warrant.

But the above rule as to the sequence of sentences applies only to the 1st para of this section. It is only the sentences mentioned in para 1 that can be directed to take effect in the order in which they were passed—Rattinal 300. As regards the sentences mentioned in the first proviso, the Magistrate has a discretion to direct either that the subsequent sentence should take effect after the expiration of the prior sentence, or that it should take effect at once.

Imprisonment in foreign territory—Where a person sentenced to imprisonment in a foreign territory is subsequently convicted of an offence in British India, it is competent for the Magistrate to pass a sentence

which shall take effect after the expiration of the sentence in the foreign State—20 Mad 444

1082 Concurrent sentences.—It was held, prior to the present amendment, that a Magistrate could not direct that the subsequent sentence should run concurrently with the previous sentence because a Magistrate could pass concurrent sentences only when the offences were tried at *one and the same trial* (see sec 35)—20 C W N 1300 Ratanlal 552 Ratanlal 18, 2 Bom L R 111 4 Bom L R 8-6 1912 M W N 396, 2 Weir 453, 19 A L J 310 11 A L J 263 *Vga Sein Po v Emp* 1 Rang 306, 1912 P L R 20 2 S L R 23 15 C P L R 57 4 L B R 147 even where the trials were held on the same day the Magistrate could not make the sentences in the two trials concurrent—1894 P R 12 But now the amendment made at the end of the first para of this section will allow the subsequent sentence to run concurrently with the previous one "In accordance with the amendment a Court will be empowered to pass a sentence to run concurrently with any other term of imprisonment etc which the person convicted is already undergoing"—Statement of Objects and Reasons (1914)

It the expiration of—A person was convicted by a Magistrate and sentenced to 2 years imprisonment and a month afterwards he was sentenced to three years imprisonment by the Court of Session, which directed the sentence to take effect on the expiration of the sentence passed by the Magistrate. On appeal the conviction and sentence passed by the Magistrate were set aside. It was held that the sentence of the Sessions Court must be deemed to have commenced from the time it was ordered to commence viz after the expiration of the Magistrate's sentence whether by reversal or completion of the punishment and not before—Ratanlal 139 Ratanlal 523 But in 2 Weir 450 under similar circumstances, it was held that the imprisonment already undergone must be reckoned as imprisonment under the sentence in the conviction which was not reversed. So also the Calcutta High Court lays down "Where a prisoner has been committed to jail under two separate warrants, the sentence in the one to take effect from the expiry of the sentence in the other, the date of such second sentence shall in the event of the first sentence being remitted in appeal be presumed to take effect from the date on which he was committed to jail under the first or original sentence—Cal G R & C O page 40 But these remarks can only apply where the sentences in the two trials are of the same kind, otherwise the Bombay rulings cited above should apply. Those rulings are more reasonable and practical though the Madras case and the Calcutta High Court Rule are more favourable to the accused.

First proviso—Where a person who is already undergoing imprisonment is sentenced by the Sessions Judge to transportation for life, the sentence of transportation passed by him will commence at the expiration of the previous sentence of imprisonment unless the Judge in his discretion makes a further order that the sentence of transportation shall take effect immediately—Ratanlal 391

An order directing that a sentence shall take effect on the expiration

of another sentence, is not a part of the judgment and may therefore be made after the judgment has been signed. Therefore, where a Sessions Judge in ignorance of the fact that the accused is already undergoing imprisonment sentences him to transportation for life, it is subsequently open to him to order even after the judgment has been signed, that the sentence of transportation shall take effect immediately—Ratanlal 391

1083 Second proviso—This proviso lays down that if a person who is imprisoned under section 123 in default of furnishing security, is subsequently sentenced to imprisonment for an offence committed prior to the passing of the order under section 123 the latter sentence (i.e. the substantive sentence of imprisonment) shall take effect immediately. This is also laid down in a large number of decided cases 31 Mad 515 5 Bom 178 5 Bom L R 26 8 N L R 20

Under the old law there was no distinction as to whether the offence for which the person imprisoned under section 123 was subsequently convicted was committed before or after the making of the order under section 123. The law was that if a person undergoing imprisonment under section 123 was subsequently convicted of an offence and sentenced to imprisonment (whether this offence was committed before or after the sentence of imprisonment passed under section 123 was immaterial) the latter imprisonment must take effect at once and should not be postponed till after the expiry of the period of imprisonment awarded under section 123—Ratanlal 970 2 Weir 452 1 Bur S R 364 16 (C L J) 622 (Mad) Emp v Ilishu Balakrishna 14 Bom L R 965 5 Bom L R 26 6 Bom L R 1098 1914 M W L 500 3 S L R 114 (Crown v Sukhil 15 S L R 203 Crown v Ghulan 7 S L R 203 27 Mad 525 31 Mad 515 37 Bom 178 *Shin Tiu g v Emp* 10 Bur L T 266 1815 P R 14, 8 N L R 20. And this law has not been altered under the present section. In 34 Bom 326 and *Markunda v A E*, 1 P L J 212 it has been held that the two sentences must run concurrently. This would be in consonance with the amendment made at the end of the first part of this section. (In 30 All 334 it was held that the sentence under section 123 must take effect first. But this ruling was dissented from in almost all the cases cited above.)

With reference to this amendment the Joint Committee (1922) observe: "We think that the law should be that in cases where an offence has been committed prior to the order under sec 123 but the conviction takes place subsequently, the sentences should ordinarily run concurrently but where the offence is committed after the order under sec 123 has been passed e.g. cases of escape from custody or jail or offences committed in jail then we think that the imprisonment for the subsequent offence should ordinarily not be concurrent, otherwise the prisoner might in some cases receive no further punishment for his subsequent offence."

398 (1) Nothing in Section 396 or Section 397 shall be

Saving to Ss 396 and 397 held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of transportation or penal servitude for an offence punishable with imprisonment, and the person undergoing the sentence is after its execution to undergo a further substantive sentence or further substantive sentences of imprisonment, transportation or penal servitude, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences

Subsection (2) renders obsolete the ruling in *Ratanlal* 132, where it has been held that when a convict is imprisoned under two warrants which order consecutive punishments the first warrant should be completely executed both in respect of the substantive sentence of imprisonment and the imprisonment in default of fine before any effect is given to the second warrant. Now under subsection (2) the imprisonment in default of payment of fine shall take effect last of all

399 (1) When any person under the age of fifteen years

is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail, shall be confined in any reformatory established by the Local Government as a fit place for confinement in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person willing to obey such rules as the Local Government prescribes with regard to the discipline and training of persons confined therein

(2) All persons confined under this section shall be subject to the rules so prescribed

(3) This section shall not apply to any place in which the Reformatory Schools Act, 1897, is for the time being in force

1084 A sentence of imprisonment is a condition precedent to an order under this section. Where there is no preliminary sentence of imprisonment an order under this section cannot be passed—1910 P R 34

The period of detention in the Reformatory School should be a definite period. Where the trying Magistrate ordered the offender to be detained in a Reformatory for five years or until he attains the age of 18 years, in lieu of imprisonment it was held that the words or until 18 years should be deleted—*Emp v Rama Sudama* 15 Bom L R 306

The period of detention in the Reformatory must not be longer than the period of imprisonment at first ordered. Where a Magistrate find

a juvenile offender guilty of theft in a building sentenced him to three months rigorous imprisonment and ordered that in lieu of that sentence the offender should be confined in a Reformatory for 14 months it was held that having once passed a sentence of imprisonment for a particular term it was not competent to the Magistrate to direct that the offender should be confined in a Reformatory for a longer term—*Ratanlal* 109

Reformatory —Where no *Reformatories* have been established but only *Reformatory Schools* the Court should not order the offender under this section to be sent to a *Reformatory* but should pass an order under the *Reformatory Schools Act* sending the boy to a *Reformatory School*—11 Mad 94

Subsection (3) —The introduction of the *Reformatory Schools Act* repeals the operation of this section so far as may be practicable in those places where that Act applies—12 Mad 94 Thus this section has no application in the Punjab where the *Reformatory Schools Act* is in force—*Crown v Noor Mohamed* 1918 P R 17

400 When a sentence has been fully executed, the officer executing it shall return the warrant to the Court from which it issued with an endorsement under his hand certifying the manner in which the sentence has been executed

CHAPTER XXIX

OF SUSPENSIONS REMISSIONS AND COMMUTATIONS OF SENTENCES

401 (1) When any person has been sentenced to punishment for an offence, the Governor General in Council or the Local Government may, at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the Governor-General in Council or the Local Government for the suspension or remission of a sentence, the Governor-General in Council or the Local Government, as the case may be, may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the state-

ment of such opinion a certified copy of the record of the trial or of such record thereof as exists

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the Governor-General in Council or of the Local Government, as the case may be, not fulfilled, the Governor-General in Council or the Local Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police-officer without warrant and remanded to undergo the unexpired portion of the sentence

(4) The condition on which a sentence is suspended or remitted under this section, may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will

(4d) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property

(5) Nothing herein contained shall be deemed to interfere with the right of His Majesty, or of the Governor-General when such right is delegated to him, to grant pardons, reprieves, respites or remissions of punishment

(5A) Where a conditional pardon is granted by His Majesty or, in virtue of any powers delegated to him, by the Governor-General any condition thereby imposed of whatever nature shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly

(6) The Governor-General in Council and the Local Government may, by general rule, or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.

Change.—The italicised words and subsections (4d) and (5A) have been added by section 107 of the Criminal Procedure Code Amendment Act XVIII of 1923

1085 Scope of section.—This section applies only to persons sentenced to imprisonment, and not to persons upon whom a conditional pardon has been tendered under section 337—11 VII 75

In cases of murder, the Judge may report any circumstances calling for a mitigation of the punishment

the Government may thereupon take such action under this section as it thinks proper—23 Cal 604, 10 Bom 512 In these two cases, the accused committed murder without any apparent sane motive, and was suffering from mental derangement of some sort, and the High Court holding that the accused was not entitled to be acquitted under section 84 I P C, recommended the case to the Local Government under this section to be dealt with in such manner as it thought fit

Procedure:—All recommendations for remission or suspension of a sentence made under section 401 by an officer of any subordinate Court to the Local Government, in regard to a convict whose case has been before the High Court on appeal, shall be made through the High Court —Cal G R & C O p 40

Certified copy of record—The original record need not be sent. Objection has been taken to the inconvenience of this, and we think that it will be sufficient to require a certified copy of the record to be furnished —*Report of the Select Committee of 1916*

Such record thereof as exists —“It is well known that in the case of proceedings in a High Court the Judges object to their notes being treated as part of the record, and we have therefore referred in our proposed amendment of section 401 (2) to ‘a certified copy of the record of the trial or of such record thereof as exists’ We think in cases where it is necessary, in considering a petition for mercy, for Government to know, as it frequently may be the nature of the evidence given at a trial in a High Court we can safely trust to the courtesy of High Court Judges to furnish a copy of their notes —*Report of the Select Committee of 1916*

Subsections (4 A) and (5 A) —“The new clause (4 A) is intended to make it clear that the power to remit sentences conferred by section 401 can be exercised in the case of orders of a penal nature, e.g., orders under section 503 of the Code. The object of the new clause (5 A) is to enable any condition upon which a pardon has been granted by His Majesty or by the Governor General when such power has been delegated to him, to be enforced in the same way as a sentence of a Court” —*Statement of Objects and Reasons (1921)*

In subsection (4 A), the word ‘has’ has been used instead of the more common word ‘yet’ to make it clear that this section applies to the case of persons sentenced by tribunals constituted by Regulations and Ordinances—*Report of the Joint Committee (1922)*

Subsection (5) —“Or of the Governor General” —“We have made a formal amendment in this subsection in view of the special delegation to the present Governor General of His Majesty’s prerogative of pardon” —*Report of the Select Committee of 1916*

402 (1) The Governor-General in Council or the Local

Government may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it —

death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine

(2) *Nothing in this section shall affect the provisions of Section 54 or Section 55 of the Indian Penal Code*

Sub section (2) has been added by section 108 of the Criminal Procedure Code Amendment Act, XVIII of 1923. Doubts have been expressed as to the consistency of section 402 with section 54 or 55 of the Indian Penal Code, and these have now been resolved.—*Statement of Objects and Reasons* (1914)

CHAPTER XXX

OF PREVIOUS ACQUITTALS OR CONVICTIONS

403 (1) A person who has once been tried by a Court of competent jurisdiction for an offence

Person once convicted
or acquitted not to be
tried for same offence

and convicted or acquitted of such offence shall while such conviction or acquittal remains in force, not be liable

to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under sec 237

(2) A person acquitted or convicted of an offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub section (1)

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or section 188 of this Code

Explanation—The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused, or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section

Illustrations

(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or upon the same facts with theft simply, or with criminal breach of trust

(b) A is tried upon a charge of murder and acquitted. There is no charge of robbery, but it appears from the facts that A committed robbery at the time when the murder was committed, he may afterwards be charged with, and tried for, robbery

(c) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide

(d) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B

(e) A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within paragraph 3 of the section

(f) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of B. A may be subsequently charged with, and tried for, robbery on the same facts

(g) A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B and C may afterwards be charged with, and tried for, dacoity on the same facts

1086 Principle.—This section is an amplification of the well known maxim of law '*nemo debet bis vexari*'. This principle does not rest on any doctrine of estoppel but embodies the well established rule

of common law, that a man may not be put twice in peril for the same offence—29 Mad 126 (F B) Where an offence has already been the subject of judicial investigation and adjudication, and there has been an acquittal, the acquittal is conclusive, and it would be a very dangerous principle to adopt to regard a judgment of not guilty as not fully establishing the innocence of the accused—*Rex v Plummer*, [1902] 2 K B 339, cited in 38 Cal 559 (578)

1087 A person —*Person not tried at the first trial* —This section bars a subsequent trial of the same person who had once been placed on trial for the same offence. But does it bar the trial of persons who had not been placed in the first trial but who were implicated in the offence committed by the accused who was placed in the first trial? According to 7 C W N 493, the principle of this section extends to such persons, and therefore where three out of five persons concerned in the same offence were at first placed on trial and acquitted, a subsequent trial of the remaining two persons for the abetment of the offence was barred by this section. But this ruling has been disapproved of in several other cases. Thus, where on a complaint charging a number of persons with several offences, only three were sent up for trial and they were acquitted on the ground that the prosecution case was untrue, and subsequently other persons alleged to be implicated in the same offences were sent up, it was held (dissenting from 7 C W N 493) that the trial of these persons was not barred under this section—37 Cal 680. So also, where in a previous trial, two persons were acquitted by the jury of the offence of conspiring with a third person who was not placed on trial, it was held that the acquittal of those two persons did not operate as a bar to the trial of the third person—41 Cal 754. See also 10 C W N 1031.

Person absent in the first trial —Where a complaint against two accused A and B was dismissed and the accused A who attended Court to answer the charge was acquitted, the acquittal would operate in favour of the other accused (B) also who was absent, and would bar fresh proceedings against him on the same facts—4 C W N 346. In this case the second accused was placed on trial, though he was absent on the day of hearing. But where out of three persons concerned in an offence, two persons were found and the third absconded and the two were placed on trial and convicted, the case of the third when found, should be heard and decided irrespective of the fact that there had been a previous trial and conviction of the other accused. The second trial is not barred by this section—36 All 168.

1088 "Tried".—There must be a previous trial of the accused, to bar a subsequent trial under this section. Where a complaint of a non-cognizable offence was made before the Police and the Magistrate did not take cognizance of that offence on the police report, there could not be said to have been a trial of that offence, and consequently a subsequent complaint of that offence is not barred by this section—5 Bom 405. Also, where a Magistrate after taking cognizance of an offence dismissed the complaint under section 203, there cannot be said to have

trial of the accused, and it is open to the Magistrate to rehear the complaint—29 Mad 126 So also, where no process had been issued against the accused, and no proceedings taken against them, but the Magistrate simply permitted the withdrawal of the charge sheets against the accused it was held that the withdrawal of the charge sheets was no bar to fresh proceedings being taken against the accused by drawing fresh charge-sheets—*In re Muthia Moopan* 36 Mad 315 14 Cr L J 559

It is not necessary that there should be a full previous trial and an acquittal or conviction *on the merits*. Where the accused appears and answers to a charge, he is said to be *tried* although the case may be dismissed for non appearance of the complainant. He is not liable to be tried again for the same offence on the same facts upon the complaint of another person—2 Weir 457 34 Mad 253 The words 'who has once been tried' mean against whom proceedings have been commenced in Court, i.e. against whom the Court has taken cognizance of the offence and issued process. Therefore where the Police filed a charge sheet against a certain person before a Magistrate and summons was issued, but before it was served the Public Prosecutor, with the consent of the Court, withdrew from the prosecution under sec 494 and the accused was acquitted, it was held that the accused must be said to have been 'tried and acquitted' within the meaning of this section and the acquittal barred a further trial for the same offence—40 Mad 976 But in another Madras case it is held that the non appearance of a complainant on the first day of hearing and the consequent acquittal of the accused under sec 247 do not bar a retrial, because the accused cannot be said to have been 'tried' on the first complaint the trial of an accused in a summons case cannot be said to begin until the particulars of the offence are stated to the accused under sec 242, and where there is nothing in the record to show that any trial was commenced on the first complaint, sec 403 would not bar the Court from taking cognizance of the second complaint—40 Mad 977 (Note) See Note 1083 below

Irregularity in the first trial—If there is a gross irregularity or illegality in a trial, such trial will not operate as a bar to a retrial of the accused for the same offence—13 W R 42 But if the trial is regularly conducted, it will bar a second trial even though the second Court considers that the former conviction or acquittal was unwarranted by the evidence given in the first trial—7 W R 15 Even if the order of acquittal was passed in the first trial under a misapprehension of law, it would still operate as a bar to a second trial—4 S I R 174 The absence of a charge does not make the trial illegal. Where the trial had otherwise been regularly conducted even though no formal charge had been framed, the order of acquittal would bar subsequent proceedings—3 All 129

But where the first trial was conducted without any complaint at all the trial was void *ab initio* and therefore a second trial is not barred—*Sanakram v Emp* 19 Cr L J 796 (Oudh)

1089 Conviction or Acquittal:—This section bars a second trial

when the accused is *acquitted* in the first trial and not where he is simply *discharged*—*Parmeshwar v Jagannath* 17 A L J 867

What amounts to acquittal—It is not necessary that there should be an acquittal on the merits therefore the withdrawal of the remaining charges under section 240 on conviction of one of several charges has the effect of acquittal and bars a fresh trial on the same facts—19 W R 55 The non appearance of the complainant in a summons case has the effect of acquitting the accused (see 247) and he cannot be tried again for the same offence—see 7 Weir 45 45 All 58 38 C L J 196, 1885 A W N 43 4 C W N 346 2 P L T 170 *Kiran Sarkar v Fmp* 5 P I T 15 24 Cr I J 815 *In re Cuggilapu Paddaya* 34 Mad 253 26 M L J 160 40 Mad 976 *Contra*—40 Mad 977 (Note) cited above The withdrawal of a summons-case by the complainant operates as an acquittal of the accused A compromise under sec 245 has the effect of acquittal—*Ratanlal* 519 1914 P R 29 The withdrawal of the Public Prosecutor from the case under section 494 (b) has the effect of acquitting the accused and will bar a fresh trial—12 Mad 35, *Mahadeogir v Fmp* 9 N I R 26 40 Mad 976 23 Cr L J 305 (Sind) But an order made under sec 494 (a) is an order of discharge of the accused person and sec 403 does not bar the entertainment of a fresh complaint—*Ramanaid v Ali Hassan* 26 Cr I J 129 (Pat) The dismissal of a summons-case amounts to an acquittal—1917 P W R 14 An order of acquittal under sec 258 cannot be treated as an order of discharge it is one of acquittal and bars a second trial of the same offence on the same facts—43 Mad 330

But a wrong order of acquittal will not bar a subsequent trial under this section If a Magistrate tries a warrant case as a summons case and acquits the accused without framing a charge such an order of acquittal will be treated as one of discharge only and cannot operate as a bar to a re trial—1886 A W N 260 1888 A W N 96 If in a warrant case before the charge is drawn up and the accused called upon to plead to it the Magistrate erroneously acquits the accused the acquittal amounts only to a discharge and does not bar a re trial—6 W R 13 (But if the trial has been otherwise regularly conducted the absence of a formal charge will not convert the order of acquittal into one of discharge, and the order of acquittal will bar a re trial—3 All 129) Where a preliminary charge-sheet was laid by the Police before the Magistrate under sec 107 against several persons but the Police intending to withdraw it in order that they might present a fresh charge sheet against some only of those included in it the Magistrate permitted the withdrawal and endorsed on the charge-sheet that the accused were acquitted, it was held that such an endorsement was illegal because neither an order of discharge nor one of acquittal could be in a case where no process had been issued against the accused and therefore the Magistrate's order was no bar to fresh proceedings being taken on a second charge-sheet—36 Mad 315

On the other hand, where a person who ought to have been *acquitted* is erroneously ordered to be *discharged* only, the order of discharge will

be treated as one of acquittal and will bar a retrial. Thus, where a Public Prosecutor withdraws from the case under sec 494, after the frame of charge the accused ought to be acquitted and not discharged. If however, he is ordered to be discharged he will be deemed to have been acquitted and a subsequent trial and conviction on the same facts is illegal and will be set aside—12 Mad 35. So also where in a warrant case the accused has pleaded to a charge the Magistrate can either convict or acquit him. His order dismissing the case will be one of acquittal and not one of discharge of the accused—5 C I R 259 1914 P R 29.

Burden of proof—The burden of proof of previous conviction or acquittal is upon the party setting it up—1889 A W N 8.

1090 Court of competent jurisdiction—The Council of Elders established under the Punjab Frontier Regulation (IV of 1887) is a Court of competent jurisdiction for the purposes of this section, and a person convicted by such Council cannot be retried on the same facts—1884 P R 30. Under the Burma Village Act the village headman has the power to try as a Court an offence under sec 294 I P C and other offences. Therefore a person who had once been tried by the village headman for an offence under sec 294 I P C is not liable to be tried again for the same offence—144 E v A F 1 Rang 449.

It is necessary to a plea of *autre fois acquit* that the first Court should have had competent jurisdiction to try the offence and therefore the conviction or acquittal of an accused by a Court not having jurisdiction is no bar to the institution of fresh proceedings against the accused on the same facts—2 W R 9 (1 W R 11). A trial by a Court not having jurisdiction is void *ab initio* and the accused if acquitted is liable to be retried. It is not necessary to get the trial set aside before the accused can be retried—8 Bom 307. Where a conviction by a Magistrate who had no jurisdiction to try the offence is set aside by the Appellate Court and that Court discharges the accused without ordering a retrial this section does not bar fresh proceedings being taken in the proper Court—29 Cal 412, 39 All 203. But where an accused is tried and acquitted by a Court which on the face of it is a Court of competent jurisdiction in respect of the offence charged his subsequent trial is barred by this section and the second Court in which the accused is tried again is not entitled to impeach the competency of the Court which held the first trial on the ground that the presiding officer might perhaps have laboured under the disqualification prescribed by sec 556 of the Code. Until the order of acquittal passed by the first Court is set aside by some competent Court, the man acquitted is entitled to plead it under sec 403 in connection with any other proceeding that may be taken against him—*Darbari v A F*, 8 A L J 1129.

The trial of the accused by a Court in a Native State bars their trial by a Court in British India on the same facts and for the same offence—*Teja Singh v Emp*, 5 Lah 1 J 574.

Where the law requires a previous sanction (now abolished) or complaint under sec 195 before a charge can be entertained by a Court that Court is not a Court of competent jurisdiction until the sanction has been obtained or the complaint has been made—*Emp v Jiwan*, 37 All 107.

16 Cr I J 144, 22 Bom 711 40 Bom 97 Therefore, where the accused was acquitted in the previous trial for the offence of forgery and cheating a Sub-Registrar, for which no sanction was obtained under section 195 before prosecution the acquittal did not bar a subsequent trial for aiding and abetting cheating held after a formal sanction had been granted by the Sub-Registrar The previous trial was not a trial by a Court of competent jurisdiction since no sanction under sec 195 was obtained before trial—*Fulp v Jivan* 13 A I J 4 37 All 107 *Contra*—36 Mad 308 where it was held that the absence of a sanction or complaint did not affect the competency of the tribunal But this ruling is no longer good law and under the amended provisions of sec 195 a complaint by the Court or public servant concerned is essential to the jurisdiction of the Court to try the case

No sanction is required for a prosecution under sec 82 of the Registration Act and therefore a Court has competent jurisdiction to try the accused for that offence without a sanction—*Maung Saing v K E* 1 Rang 299 23 Cr I J 191 (following 11 Cal 566)

While such conviction or acquittal remains in force—This means 'as long as such conviction or acquittal is not set aside by a Court of Appeal or Revision If the conviction or acquittal is set aside by the Appellate Court the result will be that the previous trial is annulled and the prisoner may be again put upon his trial—7 W R 2 7 W R 3 So long as the conviction or acquittal is not set aside it will bar a second trial even though the second Court considers that the acquittal in the first trial is not warranted by the evidence produced in the first trial—7 W R 15 So also an acquittal of an offence arising out of certain facts under a wrong section will prevent a further inquiry into any offence based on the same facts until that acquittal is set aside—*Ram Adh v Ram Saran* 26 O C 282

1091 Retrial—Where the jury is discharged under section 305 the accused may be retried under section 308 such a retrial is not barred by this section In such a case the accused is being tried on the original indictment and not tried again The duty of the Court is to continue the trial of the accused before another jury and the process may continue, without the accused being tried again under section 403—*Emp v Nirmal Kanta* 41 Cal 1072 (Moreover in such a case i.e. where the jury is discharged under section 305 the accused is neither convicted nor acquitted and therefore his retrial is not barred under this section)

An appeal or a revision is not a retrial but a continuation of the same trial—23 Cal 975 9 All 134 and therefore the Court of Appeal can convict the accused on a charge on which he has been acquitted by the first Court or order a retrial on the same charge—22 Cal 377

1092 "For the same offence"—The former conviction or acquittal is a bar to a second trial if the offence is the same Thus, a person charged with and acquitted of an offence under the Abhaya Law (Bombay Act V of 18-8) cannot subsequently be tried for the same offence—10 Bom 181 If the offences be different and based on different

though based on the same evidence, the previous trial will not bar a second trial. Thus, where the prisoner was charged with the forging of a certain document in the first trial and acquitted, he can afterwards be tried for the forging of some other document with regard to which evidence was given at the previous trial. It would be no defence in the second trial that evidence was given in the first trial which if believed would have ended in his conviction for both the offences—7 W R 15. The trial of the accused for the dishonest receiving or retaining of certain stolen articles bars a second trial of the accused in respect of other stolen articles found in his possession on the same date, in the absence of evidence to show that the different articles which were the subject of the charges in the two trials were received at different times—*Ganesh Sahu v Emp* 50 Cal 594. *A E v Bishan Singh*, 3 Pat 503 (519). 5 P L T 319. 25 Cr L J 738. *Ishan Muchi v Q F*, 15 Cal 511, *Q E v Mahan* 15 All 317.

Where a person has been tried for some offence and acquitted, he cannot be subsequently charged with conspiracy of which that offence is alleged to form a part—38 Cal 559.

Continuing offence —A person who has once been tried for building a house without the sanction of the Municipal Committee and acquitted cannot be retried for the same offence simply on the ground that the house continues to stand and thus constitutes a continuing offence. The previous acquittal will bar a retrial—1917 P W R 17.

Second complaint by different person —A person once convicted of an offence cannot be tried again for the same offence and on the same facts even though the complainant in the second case is not the same person as the complainant in the first case. Thus, the accused assaulted several persons A, B etc. At first A filed a complaint against the accused, and they were convicted under section 323 I P C. Afterwards B filed a similar complaint against the same accused on the same facts. Held that the second trial was barred—*Ham Chaudh v Emp* 18 A L J 83.

'Same facts' —A Court ought not to decide that a charge pending trial before him is barred under this section without an investigation of the facts put forward on behalf of the complainant—*Radha Kishan v Fatik chand* 23 C W N 543. Where the complainant charges the accused before the Magistrate with a certain offence, and a preliminary objection is put forward on behalf of the accused that he had been previously tried on the same facts in another Court and acquitted it is the duty of the Magistrate to hear the evidence and ascertain what are the facts in the two cases, in order to determine whether the facts in the present case are the same as those in the previous case—*M V Mukherjee v Matangi Charan Palit* 23 C W N 599. Where the accused was charged in the former trial for an offence under sec 401 I P C, but the charge failed because the approver's statement on which the prosecution was based was considered unreliable, a subsequent trial for an offence under sec 413 I P C is not barred by the provisions of this section, because the second trial is not based on the same facts as those on which the former trial proceeded. In the first trial the prosecution rested primarily

on the approver's statement, but in the second trial the prosecution is based entirely on the evidence as to the discovery of the stolen property in the house of the accused—*Chhappu v Emp* 26 P L R 470 26 Cr L J 1097

1093 Trial for different offence upon the same facts:—The protection offered by this section extends to different offences only when they are based on the same facts and fall within the provisions of section 236 or section 237—1 Bom L R 15 Where a person has been tried and convicted or acquitted for an offence arising out of a particular set of facts, he cannot, while such conviction or acquittal remains in force, be again tried in respect of any offence based on the same facts unless the case can be brought under one or other of the specific exceptions to the rule provided by subsections (2) to (4)—9 N L R 26

Examples —(1) A trial for the offence of theft of an animal bars a subsequent trial for the offence of mischief for subsequently killing that animal—1 Weir 497 Similarly where a person was tried for the offence of mischief and was acquitted on the ground that the tree in respect of which the mischief was alleged to have been committed was his own property, he cannot afterwards be tried for theft of the same tree, on the same facts—8 Mad 296 (2) Where the accused with a body of people committed rioting and mischief to the trees of the complainant, and was at first tried for the offence of mischief alone and acquitted, held that he could not be tried again for the offence of rioting which was based on the same facts as the offence of mischief—*In re Chinnappa* 33 M L T 269

(3) Where the accused have been tried and acquitted on charges of forgery and abetment thereof, they cannot afterwards on the same facts be prosecuted for offences under sec 82 (c) of the Registration Act, since they could have been charged in the previous trial under sec 82 of the Registration Act—*Maung Sang v Emp* 1 Rang 299 25 Cr L J 191

(4) A person acquitted of using criminal force cannot be tried for hurt on the same facts—16 W R 3

(5) Where a person is convicted on a charge under sec 411 I P C, of having been dishonestly in possession of property knowing it to be stolen, he cannot be subsequently convicted under sec 414 I P C of voluntarily assisting in concealing other property stolen on the same occasion from the same person—28 All 313 The accused was charged before the Sessions Judge with the offence of abetment of theft, the Judge acquitted the accused but was satisfied that he had committed the offence of receiving stolen property (sec 411 I P C) The Judge however did not charge him with that offence, as he could have done under sec 236 of this Code Subsequently, the accused was charged with an offence under sec 411 I P C, and put on his trial Held that the second trial was barred under the provisions of sec 403—*In re Pundalik* 26 Bom L R 440 26 Cr L J 831

(6) Where a person has been tried and acquitted on a charge under section 211 I P C he cannot be tried again on a charge under sec 182 I P C—36 Mad 308

(7) A person charged under section 324 I P if the offence

has been compounded be again tried on the same facts for an offence under section 323 I P C, if the composition which has the effect of an acquittal is still in force—*Ratanlal* 519

(8) Where a Magistrate issued processes against and summoned the accused for one of several offences alleged against them, and acquitted them of the offence for which they were summoned, no fresh processes could be issued against them either in respect of the offence already tried or in respect of the other offences—2 C L J 622

(9) Where the prisoner was at first tried under sec 498 I P C for having enticed away a married woman from her husband, and was acquitted on the ground that the whole case was fabricated, and the prisoner was next charged and convicted under sec 363 I P C of having kidnapped two infants of the woman who were with her when she left the house it was held that the second trial was illegal, because so long as the acquittal under section 498 I P C remained in force, the second Court was bound to take it as proved that the accused did not entice away the woman and therefore the offence under sec 363 alleged to have been committed while the prisoner enticed away the woman was disproved by the above finding of fact—1911 P L R 56

(10) A person acquitted of the charge of cheating cannot be tried again for the offence of falsification of accounts, upon the same facts—20 Cr I J 667 (Patna)

(11) The accused was tried under sec 363 I P C and acquitted. The Sessions Judge directed further inquiry to be made to ascertain whether offences under secs 366 and 368 I P C were committed. It was held that the order directing further inquiry was illegal, in as much as kidnapping (sec 363 I P C) is an essential element in offences under secs 366, 368 I P C and the accused having been already acquitted of the offence of kidnapping he could not be put on trial again for offences under secs 366 368 I P C—20 Cr L J 526 (Pat)

(12) An acquittal of the prisoner on charges under secs 380, 411 I P C for being found in possession of a quantity of jute, bars subsequent proceedings in respect of the same act under sec 54A of the Calcutta Police Act, because in the previous trial the charge of theft (secs 380, 411 I P C) might have been joined with a charge under sec 54A of the Calcutta Police Act, under the provisions of sec 236 of the Code—45 Cal 727

(13) Where the accused was acquitted of a charge of unlawful assembly with the common object of assaulting a person, the District Magistrate is not justified in ordering a further inquiry into the offence of hurt on the same facts, while the order of acquittal remains in force—5 C W N 72

(14) Where a person was at first charged with kidnapping a minor girl, under section 363 I P C, but the trying Magistrate finding that the girl was not under sixteen, acquitted the accused, a second trial on the same facts for the offence of abducting the girl in order to confine her secretly (section 365 I P C) was barred. The accused in the first trial might have been charged in the alternative with the second offence under section 237 of this Code—*Kala Nath v. KE*, 24 C W N 856

(15) If a person charged under section 338 I P C, with having caused grievous hurt by rashly driving a motor car, was acquitted on the ground that it was not proved that he was driving the car, he cannot be subsequently tried under section 16 of the Motor Vehicles Act for the offence of driving the car without a license—2 P L T 31

(16) Where an accused was tried under sec 408 I P C for criminal breach of trust in respect of three sums of money alleged to have been dishonestly misappropriated, and it was part of the prosecution case at the trial that he had made three false entries to conceal the misappropriation, and he was acquitted by the jury, but was subsequently charged on the same evidence under section 477A I P C (falsification of accounts) in respect of the said three entries, it was held that he should not on the same facts be tried again for what were virtually the same offences charged in a different form—49 Cal 924

(17) Where the accused were at first charged under sec 193 I P C and acquitted by the Magistrate who dealt very exhaustively with the evidence and come to the conclusion that the culpability of the accused had not been established beyond reasonable doubt, and the accused were subsequently charged with offences under secs 467 and 471 read with sec 120B of the I P C upon facts which were wholly inseparable from the facts upon which the previous case was proceeded with, held that the subsequent trial was barred by this section—*Cheragali v Satish*, 30 C W N 384 26 Cr L J 1023

But the previous trial for an offence founded on a particular set of facts does not bar a second trial for a different offence based on *different* facts. Thus, the previous acquittal on a charge of theft does not bar a subsequential trial for the offence of receiving stolen property, as the latter offence is supported by certain additional facts ascertained subsequent to the first trial—10 C W N 1031. The previous trial for forging a certain document does not bar a subsequent trial for forging another document—7 W R 15. An acquittal on the charge of murder does not prevent another trial upon a charge of robbery, because the two offences are so widely different that in the first trial for murder the accused could not have been convicted of the offence of robbery under the provisions of sec 237 of this Code—*Hallu v Crown* 4 Lal 373 (375)

"For which a different charge might have been made"—This section protects a person against a trial for 'any other offence for which a different charge from the one made against him might have been made', but where the offence for which he is to be tried again is the same charge that was made against him in the first trial, the defence must fail. Thus, where the accused was charged in the first trial with the murder of A under section 302 I P C, as well as with culpable homicide of A under section 304 I P C, and was acquitted by the jury of the charge of murder, but the jury disagreeing as to the culpable homicide, the accused was retried for that offence, it was held that the second trial was not illegal, for a charge in respect of that offence had already been made in the first trial. If the accused had been charged with murder alone, no doubt a verdict of not guilty would protect him from another trial for cul

pable homicide, but where a charge of culpable homicide was also made, the case falls outside the provisions of the law dealing with cases where it 'might have been made'—*Emp v Nirmal Kanta Roy*, 41 Cal 1072

1094 Sub section (2) —Examples —(1) Where certain persons, after beating the inmates of a house, carried off a woman, and on the first trial they were charged under sections 452 and 325 I P C for house trespass and grievous hurt, and convicted, it was held that such conviction did not bar a subsequent trial for the offences of abduction which had been committed in the course of the same transaction. The case fell under section 235 (1) and therefore under sub section (2) of this section—3 A L J 2

(2) A previous conviction for being in possession of counterfeit coins, under section 243 I P C, does not bar a subsequent trial under section 240 I P C for passing other coins, knowing them to be counterfeited. They were two distinct offences—31 Cal 1007

(3) The accused was at first tried on a charge of abetment of forgery of a document. He was again tried by the Sessions Court, in respect of the same document, for using as genuine a forged document. It was held that the previous acquittal was no bar to the second trial. The case was not governed by sub section (1) of this section, in as much as the case was not one contemplated by section 236, there being nothing doubtful what should be the true view of the offence committed, the case fell under sub section (2) of this section, because the two offences were distinct offences, and committed in the course of the same transaction within the meaning of section 235 (1)—40 Bom 97

(4) The acquittal of an accused on a charge under section 400 I P C does not bar the trial of the accused under section 395 I P C for committing one of the dacoities in respect of which evidence was given at the previous trial—1 Bom L R 15

(5) Where six documents were alleged to be fabricated at one and the same time, and at first the accused was tried for fabricating three of the documents and acquitted a second trial for fabricating the other three documents is not barred. But in the circumstances of the case it was not desirable that the second trial should take place, as the fabricating of all the documents was treated in the first trial as one offence—2 A L J 673

(6) Where the accused threatened three witnesses, the trial and conviction of the accused for threatening one witness does not bar a second and separate trial and conviction of the accused for threatening the other two witnesses—9 W R 30

(7) The conviction of the accused for an offence under the Excise Act does not prevent the accused from being subsequently tried for an offence under the Merchandise Marks Act, the two offences being distinct and committed in the course of the same transaction—23 Cal 174

(8) The conviction of the accused for committing affray (sec 260 I P C) is no bar to their trial and conviction for the offence of causing hurt (sec 323 I P C) committed in the course of the affray—*Ram Suleh v Emp*, 47 All 284 23 A L J 81 26 Cr L J 688

(9) A complaint was preferred under sections 352 and 504 f P but the Magistrate issued process upon the accused directing him to appear and take his trial under section 352 only. The Magistrate acquitted the prisoner of the offence under section 352, but being of opinion that on the evidence adduced a *prima facie* case of an offence under section 504 had been made out, ordered process to issue directing the accused to appear and stand his trial under section 504. It was held that sub-section (1) of this section applied and the retrial was not illegal—20 Cr L J 43.

(10) The accused who were Police constables, committed rioting in the course of which they took several persons in custody. They were at first tried for wrongful confinement under section 342 I P C in respect of the arrests made by them, and were acquitted, subsequently they were convicted of rioting under section 147 I P C. Held, that the second trial was not barred. The two offences fell under section 235 (1) of the Code—48 Cal 78.

(11) The accused was charged under sec 409 I P C for criminal breach of trust in respect of Rs 18,924, alleged to have been misappropriated by him between 1st October 1921 and 1st March 1922. The charge was withdrawn with the leave of the Court and the accused was acquitted. He was subsequently charged with having committed criminal breach of trust in respect of a sum of Rs 100 on the 30th November 1921. The prosecution alleged that the defalcation of this item of Rs 100 was not included in the sum of Rs 18,924 and the facts relating thereto were not known to him at the time of the previous charge. Held that as the sum of Rs 100 (the subject of the subsequent charge) was not included in the gross sum of Rs 18,924 (the subject of the previous charge), the offence subsequently charged was not the same in respect of which the accused was previously acquitted, therefore the previous acquittal did not operate as a bar to the subsequent trial of the accused—*Nagendra Na v Emp* 50 Cal 632 25 Cr L J 156 27 C W N 578 (following *En v Kashinath* 12 Bom L R 226).

But a person who has been tried and acquitted of offences under sections 201 and 202 I P C cannot be tried again for an offence under section 176 I P C based on the same facts. Such a case does not come under section 235 (1) but under section 235 (2), and therefore sub-section (2) of this section does not apply. It falls under sub-section (1) of the section, and the second trial is barred—10 C W N 518.

1095 Sub-section (3) — Constituted a different offence.—The facts or circumstances must be such as to indicate a different kind of offence of which there could be no conviction at the first trial. It is enough to show merely circumstances of aggravation or serious consequences of the offence which have occurred since the first trial. When a person was convicted under section 31 of the Rangoon Police Act, 18 for being in possession of an article supposed to be stolen, he cannot be tried subsequently for an offence under section 457 I P C merely on the ground that the owner of the article is traced and some further evidence is available—8 Bur. L T. 129. The new evidence must constitute

a different kind of offence, for which he could not have been tried at the first trial

Were not known to the Court—The new facts or consequences must have occurred since the conviction or acquittal at the first trial. Thus, where a person was at first tried for causing grievous hurt and convicted, and after the conviction the injured man died, it was held that the accused could be again tried for the offence of culpable homicide, since the consequence of hurt (i.e. the death) did not take place until after the first trial—1901 P R 3, 36 All 4. So also, where a person was acquitted of an offence under the Bombay City Municipal Act, for proceeding to erect certain balconies in contravention of the Act, he can be subsequently tried for failure to remove these balconies after notice, because the offence of non removal of these balconies could not have been committed until the notice to remove them was served, and the service was made only after the previous acquittal—4 Bom L R 575

But if the new facts or consequences were known to the Court at the time of the first trial a second trial for an offence constituted by these new facts would be barred. Thus, where the prisoner was at first tried for causing hurt, and before the trial and conviction for hurt the injured man died, and the fact was known to the Court which convicted the prisoner for hurt he could not again be tried for homicide under this subsection, though he might be under subsection (4)—9 N L R 26

1096 Subsection (4) — Was not competent—The words 'not competent to try' mean 'had no jurisdiction to try'—24 Mad 641. If a person has been acquitted or convicted of an offence, but the same facts disclose another offence which could not be tried by the same Magistrate who tried the first offence then the previous acquittal or conviction is no bar to further proceedings for the latter offence—*In re Venkataranga*, 18 Cr L J 643 (Mad). *Palani Goundan v Emp* 48 M L J 490 26 Cr L J 1087. Therefore the trial of the accused for an offence of voluntarily causing grievous hurt by a Magistrate does not bar the trial of the accused for attempt to murder on the same facts, as the previous trial was by a Court not competent to try the latter offence—7 N W P H C R 371. Where a Magistrate convicted the accused of rioting, a fresh complaint of dacoity based on the same facts was not barred, since the Magistrate who tried the offence of rioting was not competent to try the offence of dacoity—7 Mad 557. Similarly, a previous conviction for the offence of causing hurt tried before a Magistrate does not bar a subsequent trial by the Sessions Judge of an offence under section 304, upon the same facts—5 Bom L R 125, 43 Mad 330. A conviction by a Magistrate for a minor offence does not bar a subsequent trial for murder, because the Magistrate was not competent to try the offence of murder—*Ratanlal* 337, *Madhava v Crown*, 1912 P R 7. A person acquitted or convicted by a Magistrate under section 465 I P C may on the same facts be tried by a Court of Session under section 467 on the allegation that the document said to have been forged was a valuable security—19 Cr L J 388 (Cal). When on a complaint made under sections 409 and 477A I P C, a second class Magistrate proceeded to deal with the case as one

under section 408 I P C and acquitted the accused, and the complainant afterwards presented a further complaint to the District Magistrate praying for the trial of the accused under sections 409 and 477A I P C, it was held that the District Magistrate was competent to take cognizance of the second complaint as the second class Magistrate who dealt with the first complaint was not empowered to commit the accused persons for trial to the Court of Session—*Krishnadhoni v. Mahendra* 23 C W N 518. A person convicted by a village Headman under the Burma Village Act, for assault, can be tried subsequently by a Magistrate for the causing of hurt upon the same facts the village Headman not being competent to try the offence of causing hurt—(1919) L B R 3rd Or 135.

If however the Court (Sessions Judge) which tried the previous offence was also competent to try the subsequent offence the trial of the latter offence is barred by this section, and the fact that the first offence was triable with the aid of assessors and the second offence was triable by a jury, is immaterial—24 Mad 641. This subsection refers to the competency of the tribunal to try the offence—36 Mad 308, and not to the nature of the offence, i.e. as to whether it is triable by jury or with assessors.

The absence of a proper complaint under section 199 of the Code renders the Court incompetent to try the offence. Where a Magistrate dismissed a complaint of an offence under section 498 I P C on the ground that the complaint was not made by the person specified under section 199 and acquitted the accused it was held that the order of acquittal amounted to a finding that the Court was not competent to try the offence in the absence of a complaint by the proper person, and therefore a fresh complaint instituted by the proper person (the husband of the woman) was not barred under this section—31 All 317. Similarly, where the accused was first tried under sections 366, 368 and 376 I P C and acquitted, and subsequently the husband of the woman preferred a complaint under section 498 I P C, on the same facts and the accused was tried and convicted it was held that the second conviction was not illegal, since the previous Court was not competent to try the accused under section 498 in the absence of a complaint by the husband—*Eno v. Tikaram*, 17 Bom L R 6-8. As to the effect of absence of complaint under sec. 195, see Note 1090 above.

Where a previous prosecution for an offence under sec. 171, I P C failed on the ground that sanction under sec. 196 Cr P C was not obtained, a subsequent prosecution on the same facts and for the same offence is not illegal if it is launched after obtaining such sanction. In the absence of a sanction in the first trial, the first Court which tried the accused was not a Court of competent jurisdiction in respect of the offence, and the second trial is not therefore barred—*Ram Nath v. A E*, 24 A L J 180. A L R 1926 All 231. A prosecution for an offence specified in sec. 82 of the Registration Act cannot be commenced without the sanction of the officers mentioned in sec. 83 of that Act, and consequently, an acquittal in a previous trial for an offence under sec. 419 I P C when no such sanction under sec. 83 had been given, is no bar to a subsequent

prosecution under sec 82 of the Registration Act on such sanction being given. The Court in the previous trial was not competent to try the accused under sec 82 of the Registration Act—*Mohan Lal v Emp* 19 A L J 813 22 Cr L J 50. But see *Rang* 299 and 11 Cal 566.

1097 Explanation—*What orders do not amount to acquittal*—

(1) The dismissal of a complaint under section 203 is not an order of acquittal within the meaning of this section, and therefore upon such dismissal, it is competent for the Magistrate to entertain a fresh complaint or to rehear the original complaint see notes under sec 203.

(2) An order under section 240 stopping the proceedings of a trial has been specifically excluded by the explanation from being an order of acquittal, and therefore it does not bar fresh proceedings—1913 P R 9.

(3) A stay of trial under section 240 has not the effect of acquittal of the accused. Where a Magistrate trying an accused for offences under sections 193 and 204 I P C convicted the accused under the former section but with regard to the latter the Magistrate thinking that the facts constituted some other offence ordered the papers to be placed before the District Magistrate and later on the accused was again put on trial under section 204 I P C. It was held that the first disposal did not amount to an acquittal but only to a stay of trial under section 240, and the subsequent trial was not barred by this section—1889 A W N 8.

(4) Where the prisoner is released by the Appellate Court on the ground of illegal or irregular procedure in the Lower Court, the release is no bar to the retrial of the accused for the same offence—13 W R 42.

Discharge of accused—Sec 403 applies only to cases of acquittal or conviction and has no application to a case in which the accused person has been discharged—17 A L J 867.

It is competent for the Magistrate to rehear a complaint after the accused is discharged under sec 253 or 259. See notes under those sections. An order of discharge under sec 313 is no bar to fresh proceedings—40 Cal 71 but see 52 Cal 590. When a person is discharged under sec 119, he is merely permitted to depart. Such a discharge is not an acquittal, and fresh proceedings may be taken against the accused. See 33 Mad 83. Where a conviction by a Magistrate who had no jurisdiction to try the case is set aside on appeal and the Appellate Court without ordering a retrial merely discharges the accused this section does not bar a fresh trial by a competent Magistrate—29 Cal 412, 3 Mad 48.

But although there is nothing in law against the entertainment of a second complaint on the same facts against a person who has been discharged, yet, unless very strong grounds are shown, (i.e. discovery of new facts, etc.), a person who has been charged once and discharged ought not to be harassed on the same charge—18 Cr L J 329 (Mad).

When an order of discharge is passed, no formal order under sec 436 or 437 is necessary for the institution of a fresh trial—1 Cal 28, 2 Cal 405, 4 Cal 16, 10 Cal 268, 28 Cal 211, 29 Cal 726, 29 All 7, 2 Bom 534, 10 Bom 131, 28 Mad 310, 32 Mad 220, 17 O C 273.

J O D PART VII.

OF APPEAL, REFERENCE AND REVISION

CHAPTER XXXI

OF APPEALS

404 No appeal shall lie from any judgment or order of a Criminal Court except as provided Unless otherwise provided, no appeal to lie. for by this Code or by any other law for the time being in force

1099 No appeal.—Ordinarily no appeal lies, except as otherwise provided by this Code or by any other special law. In a case in which no appeal lies from an order, the proper course is to make an application for revision—1893 A. W. N. 147. Although the law may not allow appeal in certain cases, the High Court in the exercise of the powers vested in it as a Court of Revision may, in those cases and on very exceptional grounds, act as an Appellate Court—8 Bom. 197. If an appeal is presented to the High Court in a case in which no appeal is allowed to the High Court, the case may be disposed of under its revisional powers, if the High Court finds that it is a proper case in which it may exercise its revisional jurisdiction. See 9 Cal. 313.

1100. Appeal to Privy Council.—Unlike the Civil Procedure Code, the Code of Criminal Procedure contains no provision for appeal to the Privy Council. It is only in the power of the Judicial Committee of the Privy Council exercising the prerogative right on behalf of the Crown to entertain appeals in matters of criminal jurisdiction—*In re Joy Kissen Moolerjee*, 1 W. R. 13 (P. C.).

An appeal to the Privy Council lies only under very special and exceptional circumstances. It is not in every case in which it could be shown that the Judge had misdirected the jury, that an appeal will be allowed—15 All. 310. Before granting the certificate that the case is a fit one for appeal to the Privy Council the High Court must be satisfied that there is a reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice—*In re Bal Gangadhar Tilak* 33 Bom. 221. 10 Bom. L. R. 973, 9 Cr. L. J. 226. The Judicial Committee of the Privy Council does not lightly interfere in criminal cases, but where justice had been gravely and injuriously miscarried and the sentence pronounced against the appellant formed an invasion of his liberty and denial of his just rights as a citizen their Lordships felt called upon to interfere—

Louis Edouard Lanier v King 18 C W N 98 (P C) 15 Cr 1 J 395
26 M L J 1

The Sovereign in Council interferes only when it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as for example, in the admission of improper evidence will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of the evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below. Error in procedure may be of a character so grave as to warrant the interference of the Sovereign. Such error may for example deprive a man of a constitutional or statutory right to be tried by a jury, or by some particular tribunal. Or it may have been carried to such an extent as to cause the outcome of the proceedings to be contrary to fundamental principles which justice requires to be observed. But where the error consists only in the fact that evidence has been improperly admitted which was not essential to a result which might have been come to wholly independently of it, the case is different. The dominant question is the broad one, whether substantial justice has been done and if substantial justice has been done it is contrary to the general practice of the Board to advise the Sovereign to interfere with the result—*Dal Singh v A F* 44 Cal 876 (P C) 15 A I J 413 19 Bom 1 R 310 21 C W N 818 33 M L J 555 19 Cr 1 J 471

Period of limitation for appeal—See Arts 150 150A, 154 155 and 157 of the Indian Limitation Act IX of 1908

405 Any person whose application under section 89 for appeal from order rejecting application for restoration of attached property of the sale thereof has been rejected by any Court, may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court

* Court to which appeals ordinarily lie means Court to which appeals lie in the majority of cases, even though in a particular instance, the appeal may lie to another Court—11 Bom 438

406 Any person who has been ordered under Section 118 requiring security for keeping the peace or for good behaviour may appeal against such order—

(a) If made by a Presidency Magistrate, to the High Court,

(b) If made by any other Magistrate, to the Court of Session

Provided that the Local Government may, by notification in the local official Gazette, direct that in any district specified

in the notification, appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session

Provided further, that nothing in this section shall apply to a person the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section (2) or sub-section (31) of Section 12,

1101 Change:—This section has been redrafted by section 109 of the Criminal Procedure Code Amendment Act XVIII of 1923. The old section stood thus —

“406 Any person ordered by a Magistrate other than the District Magistrate or a Presidency Magistrate to give security for good behaviour under section 118 may appeal to the District Magistrate.”

The main changes introduced are —(1) Under the old section an appeal was allowed only in a *good behav*our case no appeal lay from an order directing security to *keep the peace*—27 All 623 *Har Datt v Emp* 14 A L J 268 17 Cr L J 165 *Bararasi v Partab* 11 A I J 16 35 All 103, 11 Bom L R 740 *Shamrao v Emp* 19 N I R 160. These cases are now over ruled, and an appeal is now allowed from such order.

(2) Under the old law there was no appeal against an order of a District Magistrate or Presidency Magistrate directing security—1898 A W N 127 under the present law an appeal lies from the order of any Magistrate.

(3) Under the old law, the appeal lay to the District Magistrate under the present law, it will ordinarily lie to the Court of Session, and in the case of orders by a Presidency Magistrate to the High Court. This provision did not exist in the Bills or Reports but was made during the debate in the Legislative Assembly. The reason of this amendment has been thus stated by Dr Gour on whose motion the amendment was carried: “All cases in the district relating to the breach of the peace and good behaviour are cases in which the District Magistrate is interested officially, and it is only fair that any order passed by a Magistrate should be revisable on appeal by an independent tribunal such as the Sessions Judge.

Is the accused likely to get fair and even handed justice at the hands of the District Magistrate who peruses case-durries and police reports and hears a good many things which undoubtedly he is bound to hear about the *badmasheries* of his district and about people who are disturbers of public peace? or is it likely that justice will suffer and has suffered in the past by such cases being finally disposed of by him rather than by an independent tribunal such as the Sessions Judge.” —*Legislative Assembly Debates* 8th February 1923 pp 2063 2064

1102 Scope:—This section applies only to an order requiring security under sec 118 an order directing security to *keep the peace* under sec 118 is not appealable—2 Weir 460

Clause (b)—Under the old law, an appeal from an order passed by a Magistrate (other than the District Magistrate) lay to the Court of the District Magistrate and not to the Court of Sessions—*Mahendra v. A. E.* 48 Cal 874 25 C W N 383 23 Cr I J 229 1 S L R 98. Even an appeal from the order of an Additional District Magistrate lay to the District Magistrate and not to the Sessions Judge—48 Cal 874. Under the present law the appeal will lie to the Sessions Court only under a special notification under the first proviso the appeal will lie to the District Magistrate.

Second proviso—This proviso expressly lays down that the moment a reference is made to the Court of Session under sec 123 it operates as a bar to an appeal. The reason is twofold *first* since the Sessions Judge is seized of the case on the reference, any appeal to him is unnecessary *secondly* if an appeal is allowed to the Court of the District Magistrate under the first proviso there may be two different decisions, one by the District Magistrate on appeal and another by the Sessions Judge on the reference. The principle of this proviso was recognised under the old law see *Qamar Din v. Emp.* 23 Cr L J 434 (Lah).

Where the order of a Subdivisional Magistrate under sec 123 is confirmed by the Sessions Judge, the order passed by the Sessions Court becomes the operative order, and no appeal lies therefrom to the District Magistrate as it were from the order of the Subdivisional Magistrate—L R R (1893 1901) 381. When a reference has been made to the Sessions Judge under sec 123 and disposed of no appeal lies to the District Magistrate—1900 P R 15 nor even to the High Court—9 Cal 8-8.

406A Any person aggrieved by an order refusing to

accept or rejecting a surety under Section 122 may appeal against such order—

(a) if made by a Presidency Magistrate, to the High Court,

(b) if made by the District Magistrate, to the Court of Session, or

(c) if made by a Magistrate other than the District Magistrate to the District Magistrate

This section has been added by section 110 of the Criminal Procedure Code Amendment Act XVIII of 1923. We think that there should be a general right of appeal against the rejection of a surety, and we have provided for it in section 406A.—*Report of the Select Committee of 1914*

407 (1) Any person convicted on a trial held by any Magistrate of the second or third class

or any person sentenced under Section 349 or in respect of whom an order has been made or a sentence has been passed under Section 380 by

a Sub-divisional Magistrate of the second class, may appeal to the District Magistrate.

(2) The District Magistrate may direct that any appeal under this section, or any class of such appeals, shall be heard by any Magistrate of the first class subordinate to him and empowered by the Local Government to hear such appeals and thereupon such appeal or class of appeals may be presented to such Subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to such Subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

Change:—The italicised words have been added by section 111 of the Criminal Procedure Code Amendment Act XVIII of 1923. A similar amendment is made in section 408 also.

1103 'Convicted on a trial'—Since the word 'offence' is defined by section 4 includes an act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act a person against whom an order under section 22 of that Act is made is a person 'convicted on a trial' within the meaning of this section, and an appeal against such conviction by a second or third class Magistrate lies under this section—29 Mad 517; *Rodrika v Pupa Dada* 46 Bom 58.

Second or Third Class Magistrate—If a second class Magistrate is holding a trial and after the hearing is complete, he is invested with first class powers and he convicts the accused in the latter capacity, he will be deemed to have held the trial as a second class Magistrate and the appeal will lie against his judgment at this trial to the District Magistrate. It is not the conviction but the holding of the trial by a second or third class Magistrate that determines the forum of appeal—*Emp v Nga Pau* 4 L B R 239 8 Cr L J 48. But where a Magistrate begins a trial as a second class Magistrate but before the hearing of the arguments he is invested with first class powers i.e., where part of the trial is held by him as a 2nd class Magistrate and part as a first class Magistrate, the proper tribunal for hearing the appeal from his conviction is the Sessions Judge and not the District Magistrate—*Sheobhanjan v Emp* 6 P L T 534 26 Cr L J 914 A I R 1925 Pat 472.

An appeal from a Bench of Magistrates invested with 2nd or 3rd class powers will lie under this section to the District Magistrate—9 Mad 36. But if a Bench when sitting together is invested with first class powers, though consisting of second or third class Magistrates, an appeal from such Bench will not lie to the District Magistrate but to the Sessions Judge—9 Cal 96.

1104 Sub-section (2):—Transfer by District Magistrate—The District Magistrate may delegate his work of hearing appeals, but any revisional work. Where a District Magistrate directed an Ass

Clause (b) —Under the old law, an appeal from an order passed by a Magistrate (other than the District Magistrate) lay to the Court of the District Magistrate and not to the Court of Sessions—*Vahendra v. A. E.* 48 Cal 874 25 C W N 383 23 Cr 1 J 229 1 S 1 R 98 Even an appeal from the order of an Additional District Magistrate lay to the District Magistrate and not to the Sessions Judge—48 Cal 874 Under the present law the appeal will lie to the Sessions Court only under a special notification under the first proviso the appeal will lie to the District Magistrate.

Second proviso —This proviso expressly lays down that the moment a reference is made to the Court of Session under sec 123, it operates as a bar to an appeal. The reason is two fold first since the Sessions Judge is seized of the case on the reference any appeal to him is unnecessary secondly if an appeal is allowed to the Court of the District Magistrate under the first proviso, there may be two different decisions one by the District Magistrate on appeal and another by the Sessions Judge on the reference. The principle of this proviso was recognised under the old law see *Qamar Din v. Emp.* 23 Cr L J 424 (Lah).

Where the order of a Sub-divisional Magistrate under sec 123 is confirmed by the Sessions Judge the order passed by the Sessions Court becomes the operative order, and no appeal lies therefrom to the District Magistrate as it were from the order of the Sub-divisional Magistrate—L R R (1893 1901) 381 When a reference has been made to the Sessions Judge under sec 123 and disposed of no appeal lies to the District Magistrate—1900 P R 15 nor even to the High Court—9 Cal 878

406A Any person aggrieved by an order refusing to

accept or rejecting a surety under Section 122 may appeal against such order—

(a) if made by a Presidency Magistrate, to the High Court,

(b) if made by the District Magistrate, to the Court of Session, or

(c) if made by a Magistrate other than the District Magistrate, to the District Magistrate

This section has been added by section 110 of the Criminal Procedure Code Amendment Act XVIII of 1923. We think that there should be a general right of appeal against the rejection of a surety and we have provided for it in section 406A.—*Report of the Select Committee of 1916*

407 (1) Any person convicted on a trial held by any

Magistrate of the second or third class, or any person sentenced under Section 349 or in respect of whom an order has been made or a sentence has been passed under Section 380 by

Appeal from sentence of Magistrate of the second or third class

a Sub-divisional Magistrate of the second class, may appeal to the District Magistrate

(2) The District Magistrate may direct that any appeal

under this section, or any class of such appeals, shall be heard by any Magistrate of the first class subordinate to him and empowered by the Local Government to hear such appeals and thereupon such appeal or class of appeals may be presented to such Subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to such Subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

Change:—The nathward words have been added by section 111 of the Criminal Procedure Code Amendment Act VIII of 1923. A similar amendment is made in section 408 also.

1103 *Convicted on a trial*—Since the word offence as defined by section 4 includes an act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act a person against whom an order under section 22 of that Act is made is a person 'convicted on a trial' within the meaning of this section and an appeal against such conviction by a second or third class Magistrate lies under this section—29 Mad 517, *Rodrig's v. Papa Dada* 46 Bom 58.

Second or Third Class Magistrate—If a second class Magistrate is holding a trial and after the hearing is complete he is invested with first class powers and he convicts the accused in the latter capacity, he will be deemed to have held the trial as a second class Magistrate and the appeal will lie against his judgment in this trial to the District Magistrate. It is not the conviction but the holding of the trial by a second or third class Magistrate that determines the forum of appeal—*Emp v. Nga Pau* 4 L B R 239 8 Cr 1 J 48. But where a Magistrate begins a trial as a second class Magistrate but before the hearing of the arguments he is invested with first class powers so where part of the trial is held by him as a second class Magistrate and part as a first class Magistrate, the proper tribunal for hearing the appeal from his conviction is the Sessions Judge and not the District Magistrate—*Sheobhajan v. Emp* 6 P 1 T 234 26 Cr L J 914 A I R 1925 Pat 47.

An appeal from a Bench of Magistrates invested with 2nd or 3rd class powers will lie under this section to the District Magistrate—9 Mad 36. But if a Bench when sitting together is invested with first class powers though consisting of second or third class Magistrates an appeal from such Bench will not lie to the District Magistrate but to the Sessions Judge—9 Cal 96.

1104 *Sub-section (2):—Transfer by District Magistrate*—The District Magistrate may delegate his work of hearing appeals, but not any revisional work. Where a District Magistrate directed an Assistant

Collector under him to perform all routine work of the Collector's office including criminal appellate and revisional work," it was held that as regards revisional work such a delegation was *ultra vires* because this section does not refer to work of that kind but as regards appellate work the delegation is valid—2 Bom L R 536

An Additional District Magistrate is subordinate to the District Magistrate for the purposes of this sub-section and the District Magistrate may transfer an appeal to the Additional District Magistrate. See sec 10 (3)

The Court to which an appeal is transferred for disposal, and on which the responsibility for its correct disposal rests is not bound by any opinion as to the necessity for taking further evidence formed by the Court from which the appeal was transferred and which is no longer responsible for the decision of the appeal—*In re Hagu Imbalam* 31 Mad 277 18 M L J 89 7 Cr L J 429

Even though a District Magistrate has transferred the appeal to a Subdivisional Magistrate the District Magistrate has jurisdiction to withdraw the appeal to his own file from the file of a Sub Divisional Magistrate by whom it has been heard in part. Where such Sub Divisional Magistrate had issued summons for the examination of certain witnesses as Court witnesses it is not incumbent on the District Magistrate on the withdrawal of the case to his own file to examine those witnesses as he is not bound by any opinion of the Sub Divisional Magistrate—*In re Hagu Imbalam* 31 Mad 277

408 Any person convicted on a trial held by an Assistant

Appeal from sentence of Assistant Sessions Judge or Magistrate of the first class, or any person sentenced under Section 349 or in respect of whom an order has been made or a sentence has been passed under Section 380 by a Magistrate of the first class, may appeal to the Court of Session

Provided as follows —

(a) * * *

(b) when in any case an Assistant Sessions Judge or a Magistrate specially empowered under Section 30 passes any sentence of imprisonment for a term exceeding four years or any sentence of transportation the appeal of all or any of the accused convicted at such trial shall lie to the High Court,

(c) when any person is convicted by a Magistrate of an offence under Section 124A of the Indian Penal Code the appeal shall lie to the High Court

Change.—The italicised words have been added by section 112 of the Criminal Procedure Code Amendment Act, XVII of 1923. Clause (a) which

referred to Europe in British Subjects has been omitted by the Criminal Law Amendment Act, VII of 1923

1105 'Convicted':—A person who is convicted but on whom no sentence is passed, the person being released on probation under section 562, is said to be 'convicted' within the meaning of this section and can appeal—*Emp v Monohar*, 1904 P R 24 1 Cr L J 1098 *Hayat v Crown* 1917 P R 20 18 Cr L J 401, *Bahadur v Ismail* 52 Cr L 463 29 C W N 151 If a Magistrate of the first class passes an order under sec 562 in a summary trial, section 414 will not apply but the case will be governed by this section, and an appeal will lie to the Sessions Judge—*Emp v Hira Lal*, 46 All 818 (830) 22 A L J 751 23 Cr L J 1244

Sentence under Section 319—When a case is referred to a District Magistrate under section 349, the fact that he is also invested with special powers under section 30 will not empower him to pass a sentence of five years' imprisonment, such a sentence is *ultra vires* having regard to the last clause of section 349 The appeal in such a case will lie to the Court of Session, and not to the High Court under proviso (b)—4 I B R 53

Sentence under Section 380—Where proceedings were submitted under section 380 by a second class Magistrate to a first class Magistrate, in order that the accused might be dealt with under section 562 and the latter convicted and sentenced the accused and the question arose under the old law as to whether an appeal lay to the Sessions Judge or to the District Magistrate, it was held that the sentence passed by the first class Magistrate under section 380 in a case submitted to him was unquestionably a sentence passed by such Magistrate, and the appeal lay to the Court of Session—*Emp v Ishimappa*, 17 Bom L R 893 This is now expressly laid down in the present section as amended

1106 Court of Session:—Where a Magistrate was authorised to try all offences throughout the whole District and there were two Sessions Divisions in the District an appeal from a sentence of the Magistrate will lie to the Sessions Division within whose jurisdiction the Headquarters of the Magistrate were situate, irrespective of the place where the offence was committed—30 Mad 136 *Hiralal v Crown* 1918 P R 7 P L R 48 19 Cr L J 310

Appeal heard without jurisdiction—Where an accused person was acquitted by a Sessions Judge in an appeal which he had no jurisdiction to hear, he may be re-arrested even after the expiration of the period to which he was originally sentenced to be imprisoned and may be made to undergo the rest of his term—*Ratanlal* 17

1107. Proviso (b)—The reason for this proviso obviously is that when a long term of imprisonment has to be undergone, the question whether the offence is proved should be tried in appeal by a Court of a higher grade than it would be tried by if the sentence were less—4 I B R 53 The sentence of imprisonment exceeding four years in this proviso must be taken to mean the substantive sentence of imprisonment apart from any sentence of imprisonment in default of fine Therefore an appeal from a sentence awarding 4 years' rigorous imprisonment and a fine of Rs 100, and in

default of fine, to six months' rigorous imprisonment, lies to the Court of Session and not to the High Court—*Ahuda Bakhsh v Crown*, 1918 P. R. 19 19 Cr L J 742

An appeal from the conviction and sentence of less than four years' imprisonment by an Assistant Judge lies to the Sessions Judge, and not to the High Court simply because by the time the appeal is filed the Assistant Sessions Judge has been promoted to the position of Offg Sessions Judge (and is therefore incompetent to hear the appeal against his own order). The proper procedure in such a case would be to file the appeal before the Offg Sessions Judge who on the receipt of the appeal would either send it to the High Court or would postpone its hearing till the return of the permanent incumbent—*Garib Lal v Crown* 3 P. L. J. 192 19 Cr L J 442

1108. Concurrent sentences:—Under section 35 (3), concurrent sentences cannot be aggregated together for the purpose of raising the status of the forum of appeal—*Gurusahay v Emp* 3 P. L. J. 138, *Tulsi Ram v K E* 11 A. L. J. 111 35 All 154. Therefore, where an Assistant Session Judge or a Magistrate specially empowered under sec 30 passes several sentences of imprisonment upon an accused each of which is for a term of four years or under, and the sentences are ordered to run concurrently, the appeal from the conviction and sentences lies to the Sessions Court and not to the High Court—*Lakshmi v K E* 23 C. I. J. 595, *Gurusahay v Emp* 3 P. L. J. 138, *Sher Muhammad v Crown* 1901 P. R. 25

Magistrate acting under section 30—Under this proviso, where a person is convicted by a Magistrate invested with enhanced powers under section 30 and sentenced to imprisonment for more than four years, an appeal lies to the High Court and not to the Court of Session—*Ahmad Khan v Crown* 1916 P. R. 5 17 Cr L J 299 1916 P. L. R. 122

If the appeal is presented to the Sessions Judge instead of to the High Court, and the Sessions Judge disposes of the appeal, the proceedings before the Sessions Judge are void under sec 530 (f)—*In re Abdullah v Rang* 386 (387) 26 Cr L J 293

1109. 'All or any of the accused':—This amendment provides that in a trial in which more than one person are accused and in which by reason of the sentences passed an appeal lies in the case of some persons to the Sessions Judge and of others to the High Court, the appeal of all shall lie to the latter tribunal—*Statement of Objects and Reasons* (1914). If several persons are tried jointly, and the Assistant Sessions Judge passes a sentence of over four years' imprisonment on some of the accused, and a sentence of less than four years on the others, the appeal by the latter will also lie to the High Court and not to the Court of Session—*Palani v Emp* 17 M. L. J. 248, *Richie v Emp* 13 A. L. J. 272 16 Cr L J 153. *Q. E. v Jaisingh*, 1900 P. R. 12, *Debi Dutt v K. F.* 24 A. I. J. 151 27 Cr L J 175 (The contrary view held in 41 M. L. J. 561 is hereby overruled). Even if in such a case, the persons over whom sentences of over four years were passed did not appeal to the High Court the appeal of the other persons over whom sentences of less than four years were passed would lie to the

High Court and not to the Court of Session—*Har Dayal v Emp* 37 All 471 13 A L J 719- 16 Cr L J 606, *Ismad Khan v Emp*, 1916 P R 5

Proviso (c)—Where the accused was convicted by a District Magistrate under section 124A I P C, and sentenced to two years imprisonment, and was in the same trial convicted of an offence under section 153A I P C and sentenced to one year's rigorous imprisonment the two sentences must be aggregated and considered as one sentence under section 35 (3) for the purposes of appeal and the appeal against the single sentence will lie to the High Court. It is not necessary that the prisoner will file an appeal against the conviction under section 141 to the High Court, and another appeal against the conviction under section 153A to the Court of Session—38 Cal 214

409 An appeal to the Court of Session or Sessions Judge

Appeals to Court of shall be heard by the Sessions Judge or Session how heard. by an Additional Sessions Judge

Provided that an Additional Sessions Judge shall hear only such appeals as the Local Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him

Change—The proviso has been added by section 113 of the Criminal Procedure Code Amendment Act VIII of 1923

1110 Under this section the Sessions Judge can transfer an appeal preferred to him to the Additional Sessions Judge he cannot transfer it to the Assistant Sessions Judge for disposal *But* section 193 (2) does not confer on him such powers, because the word *case* under that section does not include an appeal—37 All 286

410 Any person convicted on a trial held by a Sessions

Appeal from sentence Judge or an Additional Sessions Judge of Court of Session may appeal to the High Court

Convicted on a trial—If a Sessions Judge imposes a fine for intention of insult to him in Court in a summary way the accused is said to be convicted on a trial and may appeal under this section to the High Court—4 M H C R 146

May appeal—This section confers a right of appeal to the High Court to a person convicted on a trial held by the Sessions Judge or an Additional Sessions Judge. The word *may* does not mean that it is at the option of the High Court to entertain or not appeals under this section—15 Cr L N D 48

411 Any person convicted on a trial held by a Presidency

Magistrate may appeal to the High

Appeal from sentence of Presidency Magistrate. Court if the Magistrate has sentenced him to imprisonment for a term exceed-

ing six months or to fine exceeding two hundred rupees

1111 'Imprisonment'—The word 'imprisonment' means a substantive sentence of imprisonment, and does not include an award of imprisonment in default of payment of fine, the operation of which is contingent only on the fine not being paid. Therefore, where the Presidency Magistrate inflicted a sentence of six months' rigorous imprisonment and a fine of Rs 200 and in default of payment three months' simple imprisonment, the two sentences of imprisonment could not be combined to give the prisoner a right of appeal—2 Mad 30 16 Cal 799 20 Bom 145

412 Notwithstanding anything hereinbefore contained, where an accused person has pleaded No appeal in certain cases when a accused pleads guilty of Session or any Presidency Magistrate or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence

1112, Conviction on his own plea—The principle of this section is that the accused in pleading guilty to the charge is considered to have waived his right to question the legality of the conviction. He can only question the extent or legality of the sentence—Emp v Ikub Ali 31 C 1 J 122 3 Bom 83. When a person has been convicted on his own plea by a Presidency Magistrate no appeal shall lie to the High Court, except as to the extent or legality of the sentence, although he is sentenced for a term exceeding six months or to fine exceeding Rs 200—3 Bom 83. Where a charge has been framed against an accused person under section 221 (7) of this Code and such person has pleaded guilty to the charge that he is a previous convict the Appellate Court under section 412 is precluded from opening the question whether the accused is a previous convict or not—4 N L R 163

Extent and legality of the sentence—Under this section, the right of appeal when the accused has pleaded guilty is limited to such matter as may be a special ground of complaint with respect to the sentence (as distinguished from the conviction itself) whether on the ground that the sentence is beyond what the circumstances of the case required, or that the sentence is illegal or not authorized by law—5 Bom 85. Although the Appellate Court may reject an appeal on the ground that the accused has pleaded guilty before the lower court still the extent and legality of the sentence will have to be considered by the Appellate Court—Ratanlal 954. and in order to consider the legality of the sentence the Appellate Court must satisfy itself that the plea of guilty was properly made after the nature of the offence was explained to and understood by the prisoner—22 Bom 75

But where no sentence was passed (e.g. where the accused was convicted upon his own plea of guilty, and was released under section 562 on his executing a bond) the right of appeal is absolutely barred—Hidayat v Crown 1917 P R 20

413 Notwithstanding anything hereinbefore contained, No appeal in petty cases shall be no appeal by a convict—**413 Notwithstanding anything hereinbefore contained,** No appeal in petty cases shall be no appeal by a con

ed person in cases in which a Court of Session or the District Magistrate or other Magistrate of the first class passes a sentence of imprisonment not exceeding one month only or of fine not exceeding fifty rupees only or of whipping only

acted person in cases in which a Court of Session [* * *] passes a sentence of imprisonment not exceeding one month only or in which a Court of Session or District Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding rupees fifty only
* *

Explanation—There is no appeal from a sentence of imprisonment passed by such Court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has also been passed

Change—This section has been amended by section 24 of the Criminal Law Amendment Act, 1913. Under this section is now amended a right of appeal is given against convictions by District Magistrates or Magistrates of the first class where they pass sentences of imprisonment even for a period of one month or less. Under the old law (section 416) only a European British subject could appeal against such sentence. We consider that outside the presidency towns in the case of all persons both European and Indian there should be an appeal against any sentence of imprisonment passed by a Magistrate. This involves a substantial modification of the general law of the land and will to a certain extent increase the work of the Sessions Courts. Nevertheless we are of opinion on general grounds and apart from the particular case of the European British subject that an appeal should lie against any sentence. It is to be noted that short sentences of imprisonment should where possible be avoided and the number of sentences of one month and under passed by District Magistrates and first class Magistrates should not as far as we can judge be very large. In the case of a sentence passed in a trial by a Court of Session we would allow no appeal in respect of a sentence of one month or under.—*Report of the Racial Distinctions Committee Para 19*

This section also gives a right of appeal against a sentence of whipping

1113 Sole sentence of imprisonment—Where the accused was sentenced to 14 days imprisonment and to pay the cost of court fees the sentence is a sole sentence of imprisonment not exceeding one month and the order to pay the court fees is no part of the sentence and is not a sentence of fine added to imprisonment, so as to make it appealable (see 415)—10 Cal 687, 11 Mad 423 20 Mad 188 1 Weir 724 (Cottrell—22 Mad 153 5 M H C R App 28)

Fine—Compensation awarded under section 22 of the Cattle Trespass Act is not a fine and therefore an appeal lies from the order awarding compensation less than rupees fifty.—*Rodrigs v Papa Dada* 46 Bom 58

Aggregation of sentences—Where a person is charged with two separate offences in one trial, the amount of the whole punishment awarded for the two offences must be regarded as one sentence for the purpose of determining whether an appeal lies or not—3 C L R 511, 1 Bom 223 See section 415

Passing appealable sentence at the request of accused—When a Magistrate at first passed a non appealable sentence, and shortly afterwards at the request of the accused enhanced the sentence to make it appealable, and on appeal the Sessions Judge struck out the added sentence as illegal and declined to hear the appeal on the ground that the sentence as originally passed was not appealable, it was held that as the Magistrate had passed an appealable sentence, an appeal lay under this section, whether that sentence was passed legally or illegally and that the Sessions Judge was bound to hear the appeal on the merits—35 Bom 418

<p>414 Notwithstanding any thing hereinbefore contained, there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under section 260 passes a sentence of imprisonment not exceeding three months only, or of fine not exceeding two hundred rupees only, or of whipping only</p>	<p>414 Notwithstanding any thing hereinbefore contained, there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under section 260 passes a sentence [* * *] of fine not exceeding two hundred rupees only [* * *]</p>
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This section has been amended by section 25 of the Criminal Law Amendment Act VII of 1923. By this amendment, certain sentences passed on summary convictions which were originally non appealable (viz, imprisonment for three months or less, or whipping) are now made appealable. Under the old law, only European British subjects could appeal from such sentences.

If a Magistrate of the first class passes an order under sec 562 in a summary trial, this section does not apply, because an order under sec 562 is not a sentence of imprisonment or fine, but section 408 will govern the case and an appeal will lie to the Court of Session—*Emp v Hira Lal* 46 All 828 (82) 22 A I J 751 25 Cr II J 1244

415 An appeal may be brought against any sentence referred to in section 413 or section 414 by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be appealable

merely on the ground that the person convicted is ordered to find security to keep the peace

Explanation—A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this section

1114. Combination of sentences—Where the accused was sentenced to one day's imprisonment and a fine of fifty rupees, the fact that the accused was not actually sent to jail does not prevent the combination, the passing of the sentence of imprisonment is sufficient, and the two sentences of imprisonment and fine may be combined for the purposes of appeal—33 All 310

Security to keep the peace—The imprisonment to be undergone in default of furnishing security to keep the peace is not a part of a substantive sentence. If the substantive sentence is not in itself appealable, it does not become so, merely because the person convicted has been ordered to find security to keep the peace—*Maighu v A F 7 O C 338 1 Cr I J 1054*

The words "security to keep the peace" refer only to those cases where the accused is ordered to find security to keep the peace under this Code and not where he is ordered to do so under any local enactment. Thus, where the accused was sentenced in a summary trial to three months' imprisonment, (which was non appealable) prior to the amendment of sec 414) and further ordered under sec 31A of the Rangpoor Police Act to give security, it was held that this section did not apply and the sentence passed was appealable—4 I B R 359

Again this section applies where the accused is ordered to give security to keep the peace and not where he is required to furnish security for good behaviour—4 I B R 359

415A Notwithstanding anything contained in this Chapter, when more persons than one are convicted in one trial and an appealable judgment or order has been passed in respect of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal

This section has been added by sec 114 of the Criminal Procedure Code Amendment Act XVIII of 1923, to remove the conflict of opinion which existed under the old law as will be evident from the undernoted cases

1115. Where several persons are tried and convicted at one trial, some of whom are sentenced to appealable sentences while the rest are awarded non appealable sentences, all of them will be able to appeal the fact that non appealable sentences are passed on some of them does not, by virtue of sec 413 take away their right of appeal. Sec 413 applies to the case where only a non appealable sentence is passed and not where non-appealable as well as appealable sentences are pronounced—*Crown v Naurati* 1915 P R 30 4 I B R 354, *Jaisukh v Crown* 1916 P R 16 *Sheopal v A F 15 O C 380*, *Lal Singh v Emp.* 38 All 195, *Biswanath v Em*

22 Cr I J 297 (Pt.) Section 413 curtails the right of appeal only in cases in which there is no sentence upon any convicted person above the limit prescribed by sec 413 but if any of the convicted persons in the same case has received any punishment above that limit, the right of appeal of any other person receiving a sentence below that limit is not at all curtailed but he along with the one who received a higher punishment has the right uncontrolled and uncurtailed—*Pheku v K J* 4 P I J 435 20 Cr I J 545 (per Justice Prasad J) This view has been adopted in the present section.

The contrary view was taken in 7 B H C R 35, 5 B H C R 24, 7 M H C R App 5 *In re Umma*, 16 M I T 33, 40 Mad 591 4 P I J 435 (per Atkinson J) 39 All 293 *Crown v Umar* 10 S L R 156, *In re Annasami* 24 M I T 182 24 Cr L J (77) (All), in these cases it was held that the language of section 413 was imperative and took away the right of appeal under such circumstances, and the accused against whom non appealable sentences were passed could not acquire the right by reason of the fact that they were tried jointly with some other persons who received appealable sentences—24 M I T 182 This view has not been accepted by the Legislature and is overruled by the present Amendment.

Where a person has been ordered to be released on probation of good conduct under sec 562 (which order is appealable under sec 408) and other persons have been awarded non appealable sentences, the latter persons also will be entitled to appeal by operation of the provisions of this section—*Bahadur v Ismail* 32 Cal 463 29 C W N 151 26 Cr I J 455

416 [Repealed]

This section which has been repealed by the Criminal Law Amendment Act, XII of 1923 stood as follows:—

‘416 Nothing in section 413 and 414 applies to appeals from sentences passed under Chapter XXXIII on European British subject’

That is it laid down that in respect of those sentences which were non appealable in the case of Indian subjects an European British subject had a right of appeal. This distinction is now abolished and both European and Indian subjects are placed on the same footing, and given equal rights of appeal.

417 The Local Government may direct the Public Pro-

secutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

Appeal on behalf of Government in case of acquittal.

If on trial an accused is acquitted and no appeal is preferred by the Government against his acquittal, he must be deemed to be innocent of the charge made against him and the Sessions Judge (in an appeal by the other accused against his conviction) ought not to pass any remarks impugning the correctness of the acquittal. If the Sessions Judge passes any such remarks, the High Court will order those remarks to be expunged from the record—*Ibdu lillah v Emp* 25 Cr I J 1245 (1st)

1116 Appeal against acquittal:—The High Court has no authority to entertain an appeal under this section except upon an appeal by the Local Government—19 W R 55 6 C I R 245 14 Mad 363 The intention of the Legislature is that there should be no interference by the High Court with acquittal even though improper, except upon a formal appeal by the Local Government—3 Bom 150 The law, by leaving the right of appeal against judgments of acquittal to the Local Government, prevents personal vindictiveness from seeking to call in question judgments of acquittal by way of appeal and evidently intends that such interference shall take place only in cases where there has been a miscarriage of justice so grave as would induce the Local Government to move in the matter—22 Cal 164

The power of appeal under this section should be sparingly used by the Government, but the discretion to exercise that power is not subject to the control of the High Court—21 Bom I R 1034 *Emp v Mohi*, 26 Bom I R 113 25 Cr I J 86 *Crook v Pr* 11 1917 P R 43 19 Cr I J 85

The High Court will not even *re issue* an order of acquittal except at the instance of the Local Government—5 A I R 4 It will not exercise its revisional jurisdiction in the case of an acquittal, because an appeal can always be made by the Local Government against such order under this section—15 Bom 349 6 C I R 245 *Juant v Haricharan* 26 Cr I J 516 (Pr) 15 S I R 171 (Contra—1 All 139 2 All 448, 2 S I R 25 where it is held that it is competent for a private prosecutor to apply to the High Court in the case of acquittal to exercise its powers of revision when there is a material error in the proceeding in the case) See note 1204 under sec 439

The High Court should not entertain an application by a complainant to revive an order of acquittal after the Local Government has declined to direct an appeal against it—8 I B R 356

Even the District Magistrate is not competent to refer the case to the High Court—*K E v Chandika* 24 O C 4 Where the prisoners convicted by a Magistrate are acquitted on appeal by the Sessions Judge, it is not competent for the District Magistrate to transmit the proceeding to the High Court to have the Sessions Judge's order of acquittal set aside—6 C I R 245

1117 Public Prosecutor:—Only the Public Prosecutor can file an appeal under this section. The Local Government cannot direct any other person to appeal. The Legal Remembrancer is a Public Prosecutor within the meaning of this section. *Legal Remembrancer v Tularam* 23 C W N 76 46 Cal 544 By a notification published in the Calcutta Gazette on the 24th June 1886 the Legal Remembrancer of Bengal became the *ex officio* Public Prosecutor in all cases before the High Court on its Appellate side except in cases coming from the Presidency Magistrates or the Magistrates in Calcutta. So also, by a notification in the Behar and Orissa Gazette on the 1st April 1912 the Legal Remembrancer of Bihar and Orissa became the *ex officio* Public Prosecutor for that province. But the Legal Remembrancer of Bengal cannot be deemed to be Public Prosecutor for

the province of Behar when he has not been specially appointed as a Public Prosecutor for that province even the fact that the Legal Remembrancer of Bengal has been directed by a letter of the Government of Behar to file an appeal in the Calcutta High Court under section 417 Cr P C against an order of acquittal passed in a Behar case does not make him a Public Prosecutor for Behar, when the letter did not specially appoint him as such and especially when there is already a Public Prosecutor for the province of Behar. And the Legal Remembrancer of Bengal therefore cannot file the appeal—*Deputy Legal Remembrancer v Gaya Prosad* 41 Cal 425

A private prosecutor can neither present an appeal under this section nor apply in revision—14 Mad 363 7 Cal 477

1118 High Court.—An appeal will lie under this section only to the High Court. Where a District Magistrate entertained an appeal from an order of acquittal passed by the subordinate Magistrate it was held that the District Magistrate acted without jurisdiction—7 Mad 213, 26 Mad 48. So also a Sessions Judge has no right to entertain an appeal against an order of acquittal—20 Cal 633 2 C W N celvi

1119 Order of acquittal.—The withdrawal of a complaint by a complainant operates as an order of acquittal—19 W R 55. A judgment passed by the Sessions Judge following the verdict of the jury acquitting the accused is a judgment of acquittal for the purpose of appeal by the Local Government—2 Cal 273. The words 'appellate order of acquittal' mean and include all judgments of an Appellate Court by which a conviction is set aside—24 W R 41

The 'acquittal' contemplated by this section need not be acquittal upon all the charges. Where in a case tried by jury an accused charged with murder was acquitted of that charge but was convicted of culpable homicide not amounting to murder this section did apply and an appeal by the Local Government would lie in respect of the charge of murder, even though the judgment of the Sessions Judge was not a judgment of absolute acquittal—2 Cal 273

The Local Government can appeal only against an order of 'acquittal' it is not open to the Government to appeal against an interlocutory order, e.g. an order refusing to add or alter charges—16 Bom 414

1120 When appeal will lie.—Although the right of appeal against an order of acquittal conferred under this section on the Local Government is unlimited—2 Cal 273, *Crown v Irjan* 1917, P R 43 still an appeal by Government from orders of acquittal should be made only in cases of some importance—1868 P R 15 and where there has been a grave miscarriage of justice—2 Cal 164. The High Court will not interfere merely because it might itself sitting as a Court of original jurisdiction have arrived at a different conclusion—1903 P R 11, 1918 P I R 70, 1916 P W R 7. *Emp v Ram Karan* 26 P I R 205 7 Lab L J 528 26 Cr L J 1141 4 All 148, 3 P I R 196, but it must be shown, before an appeal can be accepted, that the judgment of the Lower Court was so clearly wrong or perverse that its main

tenance would amount to a miscarriage of justice—1897 P R 10 *Emp v Rai Kiran* 26 P L R 295 4 All 148 16 All 212 3 P L R 396, 16 Cr L J 987 (Lah) *Emp v Sundardis* 26 Cr L J 1028 (Sind) The High Court will not accept an appeal against an acquittal merely because the trial in the Court below was illegal on account of misjoinder of charges the Appellate Court will interfere only where it is satisfied that the order of acquittal is obviously erroneous or is one which should not be maintained owing to the trial Court having omitted to consider material evidence—19 Cr L J 987 (Punj) Sound principles of criminal jurisprudence require that the indications of error in a judgment of acquittal ought to be clear and more palpable and the evidence more cogent and convincing in order to justify its being set aside, than would be necessary in the case of a judgment of conviction—1904 P R 7 21 Cr L J 349 (Lah) Where there has been an acquittal by a unanimous verdict of the jury accepted by the Sessions Judge the mere fact that there has been a misdirection to the jury will not justify the reversal of the verdict unless the misdirection has in fact occasioned a failure of justice—26 C W N 538 Where no evidence whatsoever was produced against the accused owing to the neglect or omission of the Crown, and he was acquitted, the High Court would not accept an appeal against the acquittal and remand the case to the lower Court on the ground that there had not been a proper trial of the accused Such a procedure would expose the accused to a further ordeal and expenses, and he ought not to be made to suffer because of the deficiencies of the prosecution in the conduct of the trial—*Crown v Jarwant Rai* 5 Lah 404 The High Court will not interfere unless the judgment of the Court below was wrong and perverse and without jurisdiction and based upon obvious errors in procedure it will not interfere where the decision of the Magistrate even though wrong was based at the most on a doubtful weighing of facts and not on any irregularity or negligence or other matter going to the jurisdiction or the regularity of the trial—*Dy Legal Remembrancer v Imulyt* 18 C W N 606 The right of appeal will be exercised under this section only in those cases where it is highly probable that the appeal will end in conviction—1918 P W R 30 1885 P R 29 or where there exist special circumstances such as gross miscarriage of justice, the production of fresh and credible evidence or the interests of justice and of the public calling for the right of appeal—1885 P R 29 Where the question involved in the case is not of any public interest, and the parties have a remedy in a Civil Court no interference with the order of acquittal is necessary—*Ganga Singh v Ram an* 26 Cr L J 337 (Lah) Where the evidence is all oral and its credibility is a mere matter of opinion without involving other considerations, the opinion of the Court which heard the witnesses must be treated as conclusive and the High Court should not interfere—22 Cr L J 172 (Lah) Before the High Court could interfere it must be satisfied that the indications of mistake are obvious or the evidence is too strong to be rejected—1918 P R 25 *Pillai v Crown* 1919 P W R 12 22 Cr L J 172 (Lah) An appeal will lie under this section when there is an error of law on the part of the Lower Court—21 All 122 Where

the Lower Court has taken an erroneous view of the evidence, an appeal will lie, and the High Court has jurisdiction to convict the accused—
9 S L R 17

1121 Procedure on appeal.—There is no distinction in this Code as to the mode of procedure which governs an appeal by the Government from an acquittal and an appeal from a conviction and sentence. Both appeals are governed by the same rules and subject to the same limitations—17 Cal 485 20 All 459 So also, with regard to the considerations of evidence an appeal from an acquittal does not stand on a different footing from an appeal from a conviction. No distinction is drawn in the Code between the two kinds of appeal, as regards dealing with the evidence in the appeal—*Dy Legal Remembrancer v Matukdhar* 20 C W N 128 *Emp v Sakharani* 21 Bom L R 1054 If the High Court thinks that the lower Court has taken an erroneous view of the evidence and should have convicted, the High Court can convict the accused in the same way as it can acquit an accused in an appeal against a conviction, if it thinks that the lower Court ought to have acquitted. In this respect the Code makes no distinction between an appeal from an acquittal and an appeal from a conviction—*Emp v Moti* 26 Bom L R 113 25 Cr I J 486 *Emp v Sakharani* 21 Bom L R 1054 *Emp v Kadir Bux* 9 S L R 17 But it would be improper for the High Court to consider the appeal on grounds not contained in the objection urged on behalf of the Government—19 Bom 51, 17 C P I R 75

An appeal by Government against acquittal must be considered on its merits just as any other appeal always must be. The onus is on the appellant and the onus is all the heavier if the judgment appealed from is one which approaches the consideration of the question from a correct point of view and gives the accused the benefit of a reasonable doubt which exists in the mind of the Judge—*Emp v Autar*, 47 All 306 23 A L J 25 26 Cr I J 676 A I R 1925 All 315

In a criminal appeal by the Government to the High Court the arrest of the accused may be ordered pending appeal—1 Cal 281 2 All 340 In capital cases in which the Government appeals under this section, it is undesirable that the prisoner's fate should be discussed while he remains at large, in such cases the Government should apply for the arrest of the accused under section 42—9 All 528 Where, on an appeal under this section the accused is arrested and convicted, and sentence is passed on him the sentence will run from the date of the committal of the accused to jail and not from the date of the arrest or of the sentence—C I R 349

Limitation.—An appeal under this section must be presented within six months from the date of the order appealed against (See Art 15 of the Indian Limitation Act, 1908)

418 (1) An appeal may lie on a matter of fact as well

Appeal on what matters as a matter of law, except where the admissible

trial was by jury, in which case the appeal shall lie on a matter of law only

Explanation—The alleged severity of a sentence shall, for the purposes of this section, be deemed to be a matter of law

(2) *Notwithstanding anything contained in sub-section (1) or in Section 423, sub-section (2), when, in the case of a trial by jury, any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law*

Change:—Sub-section (2) has been newly added by sec. 115 of the Cr P C Amendment Act XVIII of 1923. The reason is stated below.

1122 Scope of section—This section is applicable alike both to appeals by Government (see 417) against an order of acquittal and to appeals by convicted persons against conviction and sentence—17 C P I R 73 (92). Therefore where in a case tried by jury, the Local Government appealed to the High Court under section 417 against an order of acquittal, and the grounds of appeal were all questions of fact the High Court rejected the application because under this section an appeal in the jury-case can lie only on a question of law—10 CrI 1029.

A Judicial Commissioner sitting on the original side and holding a sessions trial is to be deemed a Sessions Judge and not a Judge of the High Court and an appeal from his decision lies under this section to a Bench of the Judicial Commissioners Court—*Khadabur v Emp* 26 Cr. I J 312 (F B) A I R 1925 Sind 249.

1123 Trial by jury—Where the trial was by jury the appeal will lie on a matter of law only. By restricting appeals from cases triable by jury to matters of law only, this section gives finality to the verdict of the jury where there has existed no error of law nor misdirection and where the Judge has concurred with the majority—*Ratanlal* 730.

The words 'where the trial was by jury' mean where the trial was in fact held by jury and not where the trial ought to have been held by jury. And therefore where the accused was tried by jury in a case which ought to have been tried with the aid of assessors no appeal would lie except on a question of law the trial would be treated as one by a jury—25 Bom (No 23 Bom 696) 25 Cal 555 3 Bom I R 278. But in 3 Cal 765 24 W R 30 *Ratanlal* 961, 18 W R 59 it was held that in such a case the trial would be deemed as one held with the aid of assessors treating the verdict of the jury as the opinion of the assessors, and the prisoner would not lose his right of appeal on the facts. In 26 Mad 243 where a person was charged with an offence triable by jury, and the jury acquitted him of that charge but found him guilty of an offence triable with the aid of assessors *Benson J* held that the verdict was to be treated as an opinion of assessors and that an appeal lay on the facts of the case but *Bhashyam Aiyangar J* held that the jury had authority under section 238, in trying an offence triable by jury, to find as an incident to the trial that certain facts were proved in the trial which constituted a minor offence and to return a verdict of guilty on

such offence though such offence might not be triable by a jury, and therefore in this case the verdict was to be treated as a verdict on a trial by jury and an appeal would lie only on a point of law.

In a case where a person is tried by a jury, and there is also another charge which is tried by the Judge with the same jury as assessors, an appeal will lie on a matter of fact—18 Cr L J 346 (Mad)

1124 Matter of law.—An appeal under this section from cases tried by jury lies on matters of law only, and the Appellate Court can not go into the facts of the case. If it were to do so, it would be substituting the decision of the Judges of that Court for the verdict of the jury who had the opportunity of seeing the demeanour of witnesses and weighing the evidence with the assistance which this affords, whereas the Judges of the Appellate Court can only arrive at a decision only on a perusal of the paper-evidence—21 Cal 955, 39 All 348, 23 C W N 661. If there is no question of law involved in the case, the High Court has no power to interfere, however absurd or perverse the verdict may be—14 Mad 36.

Every petition of appeal in cases tried by jury should state clearly in what respect the law has been contravened. The Court will not hunt through the records and find out the illegality if any. The parties must point out in their petition of appeal wherein there has been a departure from the law. Unless the exact contravention of law is pointed out, the petition of appeal is liable to be rejected—1 W R 21.

Examples of matters of law.—The question as to the admissibility of evidence which has been rejected by the Sessions Judge is a matter of law—2 Bom 61, so also, the question as to whether the evidence which had been admitted by the Sessions Judge ought to have been admitted is a matter of law—27 Bom 626, 23 C W N 661, so also an omission to consider relevant evidence—7 Cal 263, or a misdirection to the jury—25 Cal 230, 23 C W N 661, or a non-direction by the Judge on a question of prime importance in favour of the prisoner—27 Bom 624. But the High Court will not interfere with the verdict of the jury merely because the Sessions Judge admitted an inadmissible evidence regarding an unimportant matter which had only a remote bearing on the question in issue and the admission of which could not have affected the verdict of the jury—*Keramat v A F* 42 C I J 528, 27 Cr I J 277, A I R 1926 Cal 14.

The High Court on a point of law as to the admissibility of evidence can review the whole case and determine whether the admission of rejected evidence would have affected the result of the trial—2 Bom 61, 10 Bom 749.

When High Court can go into facts.—Where a Judge does not agree with the verdict of the jury and submits the case to the High Court under section 307, the whole facts of the case may be gone into by the High Court. The clear provisions of section 307 allowing the High Court to consider the entire evidence are not in any way curtailed by section 418 or 423 and the High Court can interfere with the verdict of the jury if it thinks proper to do so—9 All 420, see also 39 All 348.

So also, the High Court can go into the facts when a case is referred to it under section 374 for a confirmation of the sentence of death—19 W. R. 57, 2 C. W. N. 49. In short, in a case tried by a jury, the High Court can enter into facts only on a reference under section 307 or 374, and not on an appeal under this section.

Sub-section (2):—Where in a Sessions trial of several accused, one of the accused was sentenced to death and the other to lower punishments, and all of them appealed, it was held under the old law that the High Court, on a reference under section 374 in respect of the person sentenced to death, could go into the facts but in dealing with the appeal of the other persons the High Court must be confined to matters of law and could not enter into the facts—2 C. W. N. 49. This anomaly is now removed by sub-section (2). This clause provides that when in the case of a trial by jury, one person is sentenced to death and another to a lower punishment, the second accused may appeal on a matter of fact as well as on a matter of law. This is intended to remove the anomaly under the existing law that a High Court acting under section 374 could consider the facts of the case as regards the former accused, but on an appeal of the second accused could only intervene on a point of law.—*Statement of Objects and Reasons (1914)*

419 Every appeal shall be made in the form of a petition

Petition of appeal

in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under Section 367.

1125 Scope of section:—This section prescribes the form under which a petition of appeal is to be presented. It applies even where the accused is in jail, section 420 deals only with the mode in which the petition of appeal is to be presented when the petitioner is in jail, and does not dispense with the other formalities prescribed by this section—1831 A. W. N. 48. Section 420 is not derogatory to the general rule laid down in section 419. The latter section (419) applies as much to a prisoner in jail, as to any other appellant and requires that the petition shall be prepared in a certain form, while section 420 is only concerned with the manner of presentation of an appeal from jail—13 All. 171.

1126 Contents of petition:—A petition of appeal in a case tried by jury can be made only on a question of law and the petition should state clearly in what respect the law has been contravened—1 W. R. 21 (cited under section 418).

A petition of appeal containing defamatory statements against the Magistrate will not be entertained. Such petition may be returned for representation after eliminating the scandalous remarks—15 Bom. 488. A petition of appeal containing a false statement will not make the petitioner liable to punishment for the false statement, because a crimina

appeal is a continuation of the criminal case, and the appellant has got all the privileges of the accused—12 Mad 451 (cited in Note 981 under section 342)

1127 Presentation of petition:—As regards presentation no special method is enjoined in the Code, and the question is one of administrative convenience alone. Therefore an actual presentation to an officer of the Court, such as a Bench Clerk (in the High Court) or to one of the Judges, its members, is valid—29 M L J 101. But depositing a petition of appeal in a box kept for the convenience of parties (in the compound of a Court house) and intended for the deposit of papers for the Court is not a proper presentation, because the box is not intended for appeals and also because a petition of appeal might have been deposited there by a person who could not legally present it—19 Mad 324.

The petition should be presented in person, the transmission of it by post is not a sufficient compliance with the requirements of this section—2 Weir 467, Ratanlal 464. 15 Mad 137.

Presentation by Pleader—The petition should be delivered to the proper officer of the Court, either by the appellant or by his pleader—15 Mad 137. Presentation of appeal by the vakils gomasta or clerk is equivalent to presentation by pleader, if the vakil has signed the petition and has been duly authorised by a vakalatnama—2 Weir 469, 20 Mad 87. But presentation of the petition through a person who is not the clerk of the pleader, and over whose action and conduct the pleader has no control, is not a proper presentation—21 Mad 114. Where a petition of appeal was prepared on behalf of three accused and signed under vakalat by their pleader, and was presented by another pleader who held vakalat only from one of the accused, it was held that there was a proper presentation of the petition of appeal on behalf of all the accused—2 Weir 476. But where the prisoners had conflicting interests to each other, and where each of the prisoners made confessions exonerating himself and incriminating the other, it would be improper for one pleader to present an appeal on behalf of both and to represent both who had conflicting interests—1830 P R 13.

The word 'pleader' includes a 'mukhtar' as well as any other person authorised by the appellant and the presentation of the petition through them would be proper—Imp 1. Sitarani 6 Bom 14. In re Suba Itala 1 Mad 304. This is now made clear by the present definition of the word 'pleader' in Section 4 (r) as amended in 1923 by which a mukhtar has been placed on the same footing as a pleader.

1128 Copy of Judgment—It is in the discretion of the Appellate Court to admit an appeal without its being accompanied by a copy of the judgment or order appealed against, where injustice might accrue to the appellant by insisting on a strict compliance with this section. But in such cases before hearing the appeal, the Court should have before it a copy of such judgment or order which it may get by sending for the record—Imp 1. Sitarani, 5 Bom L R 704.

Where there are several accused in a case, and all of them prefer a joint appeal, only one copy of the judgment appealed against is required

to be filed, and it is not necessary that there shall be a distinct appeal petition by each of the convicted persons separately accompanied by a separate copy of the judgment—3 Bom F R 704 *Batasha v Emp*, 18 Cr L J 512 (Oudh)

A copy furnished in the prisoner's own language is sufficient—Ratan Lal 82 See notes under Section 371

420 If the appellant is in jail he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper Appellate Court

1129 This section deals with the manner of presentation of an appeal by a prisoner in jail but it does not dispense with the formalities prescribed by section 419 These formalities must be observed see 1891 A W N 48 and 13 All 171 cited in Note 1125 under section 419

Where the petitioner is in jail every facility such as pen ink, paper and even a writer should be allowed to him to enable him to prepare the petition of appeal—13 W R 69 1 B 11 C R 16

There is nothing in this section to indicate that it is intended to deprive the appellant in jail of the opportunity of being heard in appeal Therefore, where the appellant is in jail notice of the date of hearing should be given either to him or his pleader so that he may have a reasonable opportunity of being heard in support of his appeal—2 Weir 472

Where a jail appeal has been presented through the officer in charge of the jail and has been dismissed under sec 421 no further appeal can be preferred through Counsel under section 419 ante—24 O C 304 44 All 729 *In re Kunhanmad* 46 Mad 382 (392) *Ram Jutar v Emp* 11 O F J 536 1 O W N 324 25 Cr L J 1313 The reason is that when a right of appeal has once been exercised and that appeal has been disposed of the accused will not be allowed to appeal again—44 All 759

A jail appeal can be heard and disposed of by a Vacation Judge—*In re Kunhanmad* 46 Mad 382 (392)

421 (1) On receiving the petition and copy under Section 419 or Section 420, the Appellate Court shall peruse the same and, if it considers that there is no sufficient ground for interfering it may dismiss the appeal summarily

Summary dismissal of appeal. Provided that no appeal presented under Section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so

1130 Appellant not bound to appear:—An appeal should not be dismissed merely because the appellant or his pleader failed to appear to support the petition, but the Appellate Court must consider whether there exist sufficient grounds for its interference, and must judicially determine the appeal on the merits—*Ratanlal* 593, *Ram Bharose v. Emp.* 14 A L J 327, 5 N H R 76, 46 Mad 382 (402), *Baldeo v. Emp.* 24 Cr L J 475 (Pat.) If the appellant does not appear but leaves the question of admission or rejection of the appeal to be determined by the Appellate Court on the papers, the Appellate Court is bound to peruse the papers and the appellant is not bound to appear a second time by counsel or in person—*Ratanlal* 739. But if the Appellate Court thinks that the presence of the prisoner (appellant) is necessary for the purpose of disposing of the appeal, the Court can direct that the prisoner be brought before it—2 Weir 473.

'No sufficient ground for interfering'—The appellant's pleader should be allowed, if necessary, to refer to the certified copies of the evidence to show that there were sufficient grounds for interfering. Where the Judge disallowed the pleader to refer to the evidence, he acted erroneously—11 O C 360.

Where there are in the memorandum of appeal allegations of withholding witnesses of refusal to grant warrants and summonses to witnesses, and of disregard of certain evidence filed in the case, there were sufficient grounds for interference—*Ratanlal* 916. So also, where the grounds of appeal disclose reasons for discrediting the witnesses for the prosecution, there are sufficient grounds for interference and the Appellate Court ought not to dismiss the appeal—29 Mad 236.

If no sufficient grounds for interference are shown, the Appellate Court should not interfere, but should dismiss the appeal—5 All 386.

1131 Summary dismissal of appeal:—Although this section gives the Appellate Court power to dismiss an appeal summarily, that power must be exercised with judicial discretion. Appeals which are complained both in law and fact ought not to be summarily dismissed—19 Cr L J 228 (Cal.) 3 P L J 38, 22 Cr L J 349 (Cal.) Where there has been a dispute as to facts and where the credibility of witnesses for the prosecution has been impugned, it is proper for the Appellate Court to call for the record and look at the evidence, and not to dismiss the appeal summarily—*Padurath v. Emp.* 24 Cr L J 477 (Pat.) The summary dismissal of an appeal is not justified where there were disputed questions of fact in the case and the number of witnesses and documents were large and the Court of first instance had discussed the evidence and come to certain findings—*Rahimuddin v. Emp.* 22 Cr L J 349 (Cal.)

An order of summary rejection of appeal under this section is final. Such an order is not open to review and it is immaterial whether such order is made before or after the papers have been called for—4 Bom 101, 19 Bom 732, 1887 P R 24. But the Madras High Court holds that if the appeal has been dismissed for default of the pleader's appearance, and if it is proved to the satisfaction of the Appellate Court that there is a reasonable excuse for the non-appearance of the pleader, the Appellate

Court may rehear the appeal on the merits—7 M H C R App 29, *In re Kunhammad* 46 M L 382 (403)

When an appeal is dismissed under this section, the Court has no power to alter (diminish or enhance) the conviction and sentence—2 Weir 475, Ratanlal 304 Ratanlal 384, Ratanlal 74 If the Appellate Court wishes to alter the sentence, it cannot do so summarily under this section, but must proceed according to Secs 422 and 423—2 Weir 474 Ratanlal 384

Withdrawal of appeal—A petition of appeal presented for admission may be withdrawn, before it is dismissed under this section—5 C L R 372

Dismissal of a connected appeal—Where two accused presented two appeals, the fact that the Appellate Court admitted the appeal of one of the appellants, does not affect his power to dismiss the other appeal summarily under this section—5 C W N 332

1132. Judgment and record of reasons.—An Appellate Court in rejecting an appeal summarily under this section is not bound to write a judgment—21 Cal 92 20 Bom 540 25 Mad 534 *Nagar Mohd v Hara Singh*, 26 P L R 616 27 Cr H J 23 2 P L J 695 9 C W N 623, 13 N L R 169 19 Cr L J 316 (Bur) 1 B R (1906) 2nd Qr 49 But it is advisable that a Court which dismisses an appeal under this section should briefly record its reasons for such dismissal in view of the possibility of such order being challenged by an application for revision—1895 A W N 68 8 All 514 36 All 496 *Gurbani v Emp* 2 P L J 695 *Gobind v Emp* 2 P L J 10 19 Cr L J 304 (Pat), 17 All 241, 13 N L R 169 *Jagannath v Emp* 25 Cr L J 1237 (Pat) *Brij Mohan v Emp* 26 Cr L J 4 (Oudh) Though ordinarily an Appellate Court in rejecting an appeal summarily is not bound to record a judgment, still the Court should not dispose of an appeal under this section otherwise than by a judgment showing on the face of it that it has applied its mind to a consideration of the evidence on the record, and of the pleas raised by the accused both in the Court below and in his memorandum of appeal—38 All 393 *Jauhar Ram v Gyan Chaud* 21 Cr L J 139 (Pat), 1 P L J 318, 2 P L J 10 Where in a case in which the evidence was voluminous the Appellate Court without considering either the evidence of the witnesses or the documents, disposed of the appeal practically in a single paragraph the appellate judgment was not in accordance with law and the appeal must be reheard—*Narain Prosad v Emp*, 1 P L J 716

The Appellate Court need not go to the length of writing an elaborate judgment, but should notice briefly and clearly what objections were urged on appeal and how they were disposed of—32 Cal 178 It should record at least so much as would satisfy the High Court, when an application for revision is made that it has fully considered all the questions in issue and has appreciated the simplicity or gravity of the case—2 P L J 615 Where no reason is given the summary dismissal would involve either a remand of the appeal to be admitted and heard, or an examination of the evidence by the High Court—19 Cr L J 304 (Pat), 19 Cr L J 316

1133 Proviso—Right of appellant to be heard:—The proviso lays down that no appeal under section 419 shall be dismissed without giving the appellant or his pleader an opportunity of being heard. But this proviso does not apply to jail appeals presented under sec 420 and therefore the Appellate Court is not bound to give the accused any time to engage counsel. But under Rule 50 of the Madras Rules of Practice seven days' time is allowed before a jail appeal is circulated to the Judges. So an appellant has sufficient opportunity of engaging counsel if he wishes to do so.—*In re Annamalai* 46 Mad 382 (400)

It is not competent to the Appellate Court to reject an appeal summarily without giving a reasonable opportunity to the appellant or his pleader of being heard.—*Rangachari v Emp* 29 Mad 236, 2 P L T 10, 12 C W N 248, *Ranga Reddy v Emp* 23 M I J 371 13 Cr L J 710. If the appeal is rejected under this section without hearing the appellant or his pleader, the Appellate Court may be directed to rehear the petition of appeal and to give the appellant an opportunity of being heard.—*Ratnivil* 703. Where the Appellate Court rejected the appeal summarily owing to default of the pleader's appearance, and satisfactory reason for non appearance was shown the Court should rehear the appeal on the merits.—7 M H C R App 29 46 Mad 382 5 N I R 76. Where the notice for hearing the appeal was served in the afternoon of 21st March on the appellant's pleader at Amalner asking him to be present on the 22nd March at Jalgaon or any other place where the camp of the District Magistrate might be and on the day in question the District Magistrate was encamped at Idhar, at a considerable distance from Amalner, so that the appellant's pleader could not appear at that place and the appeal was consequently dismissed held that the order of dismissal must be set aside as there was no sufficient notice to the appellant's pleader of the date and place of hearing.—*In re Iyjun* 22 Bom I R 188. Where the District Magistrate called upon the appellant's pleader to argue the appeal on the same day that it was presented, and on the pleader asking time the Magistrate refused to grant him time and rejected the appeal, it was held that the appellant's pleader was not afforded a reasonable opportunity of being heard.—7 Bom I R 89 *Samthal v Emp* 36 Cal 383 13 C W N 681 *Furka Hussan, In re* 47 M I J 661 48 Mad 383 20 I W 623. But where the Appellate Court heard the appellant's pleader in support of the appeal and then sent for the records of the case, but disposed of the case without hearing the appellant's pleader a second time, held that the Appellate Court did not act illegally.—2 S I R 39.

Even when an appellant is in jail reasonable notice should be given either to him or his pleader so that he may have a reasonable opportunity of being heard in support of the appeal.—2 Weir 472, 3 A L J 103.

Reasonable notice of the day on which the appeal is to be heard must be given to the appellant or his pleader, so that he may have a reasonable opportunity of being heard in support of his appeal.—*Pombay Cattle* 18,9 H L J p 473. A general notice posted in the Court that appeals will be heard for admission only on the first Court-day next after presentation is not a compliance with the provisions of this section. The

Court should fix a time in each particular case, so as to enable the appellant or his pleader to be heard—5 Mad 11

If the hearing of the appeal is adjourned to another date, notice of the adjournment should be given to the appellant—20 Cr L J 271 (Pat) Where a Magistrate disposed of an appeal before the day fixed for the adjourned hearing, and without giving notice to the appellant or his pleader, it was held that the procedure was illegal—2 Wrie 475

1134 Sub-section (2)—Although the Legislature does not make it obligatory on the part of the Appellate Court to send for the records before dismissing an appeal, still the practice of summarily dismissing an appeal without calling for the records is always inconvenient and must not be adopted—1883 A W N 145 If questions of fact are argued in the appeal, the appeal ought not to be disposed of under section 421 without sending for the original records of the Court below.—*In re Turka Hussain* 48 M L J 385 47 M L J 661 26 Cr L J 411 Where the grounds of appeal disclose reasons for discrediting the witnesses for the prosecution, the Appellate Court ought to call for the records—*Rangachari v Emp* 29 Mad 236

A Magistrate is not bound to call for the record in an appeal in which the only question is a mere question of fact and the judgment of the Court below is so plain and clear that calling for the record would be a mere waste of time But when the judgment of the lower Court is a long and intricate judgment requiring careful consideration, the Appellate Court ought not to refuse to call for the record—3 P L J 389

After the record is sent for and received, the Appellate Court ought to hear the pleader and can not dismiss the appeal summarily without hearing him—*Lalit Kumar v A E*, 42 C L J 551 27 Cr L J 382, *Surendra v A F* 42 C L J 554 27 Cr L J 412 See Note 1139 under sec 423

1135 Revision—Where an appeal has been dismissed summarily under this section without recording any reasons or judgment the High Court can either go into the case on its own account and examine the evidence, or can remand the appeal to the Lower Appellate Court to be admitted and heard—*Ram Kant v Emp* 19 Cr L J 304 (Pat) Though the practice usually is to remand the case to the Lower Appellate Court and ask for a judgment from that Court after a regular hearing, the High Court has a discretion to go into the case itself, and if necessary, to consider the questions of fact as if in first appeal—13 O C 309, 19 Cr L J 316 (Bur) If the High Court finds that the case is one which should not have been dealt with summarily the High Court will send back the case ordering the Appellate Court to hear it on its merits and pass a judgment—19 Cr L J 316 (Bur) Where the Sessions Judge summarily dismissed an appeal from the conviction of a Magistrate, the High Court itself, finding that the evidence on which the conviction was based was insufficient, set aside the conviction and acquitted the accused, instead of remitting the appeal for a rehearing on the merits—10 C W N 446 See also 13 O C 309

422 If the Appellate Court does not dismiss the appeal

summarily, it shall cause notice to be
 Notice of appeal

given to the appellant or his pleader, and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal;

and, in cases of appeals under Section 417, the Appellate Court shall cause a like notice to be given to the accused

1136 Restrictive order for admission:—A restrictive order for admission of a criminal appeal is not contemplated by this section, and must be deemed to be *ultra vires*. Therefore, where a criminal appeal was admitted for consideration of the sentence only, it was held that the whole appeal should be heard and that the appellant could not be restricted to any selected ground out of those specified in his petition—*Nagar v. Emp.* 18 C. W. N. 147, 41 Cal. 406, *Gaya Singh v. Emp.* 4 Pat. 254, 6 P. F. T. 381, 26 Cr. L. J. 86. Except where there are express words as in secs. 412 and 418, the Code does not provide for an appeal for the limited purpose of reviewing only a part of the judgment. The appellant has a right to be heard fully on the merits and the Judge is bound by sec. 424 to record a complete judgment—*Ratanlal* 826

1137 Notice:—Notice to the appellant of the time and place of hearing is obligatory, and it is a material error in procedure to dispose of an appeal without giving such notice—2 Weir 475. Where a criminal appeal filed through a counsel is admitted, it cannot be dismissed summarily without giving notice to the accused for after an appeal is admitted the Court cannot act under sec. 421—*Ta. Pu. v. Emp.* 3 Bur. L. J. 18, 25 Cr. L. J. 933

*To whom to be given:—*Notice may be given to the appellant or his pleader. But the attention of the pleader should be directed to the notice, when notice is given to the pleader only the mere fact that the pleader of the appellant is present in Court when an order is made admitting an appeal is not sufficient—10 C. I. R. 57

The word 'pleader' includes mukhtar and notice to the mukhtar is sufficient for the purposes of this section—6 Bom. 14

If the appellant could not be found at the address given by him, the notice of the hearing of appeal or a copy of it should be left at the address given—*Ratanlal* 809

In case of appeals under sec. 417, notice must be given to the accused

Where the Court passes an order, awarding compensation to the accused under sec. 250, and the complainant appeals, notice should be given of the appeal to the Public Prosecutor or the officer appointed by the Local Government, but no notice to the accused is necessary—41 M. L. J. 172, 31 M. L. 801, 27 M. L. J. 621. But in such a case it is desirable that notice should be given to the accused so as to afford him an opportunity of supporting the order passed in his favour, although there

is no express provision of law directing the giving of notice to the accused in such a case—29 *M I* 187 38 *M I* 1091 25 *Cr I J* 209 (*Lah*)

Although this section does not require any notice to be given to the complainant still in appeals from orders under sec 545, (directing that the expenses properly incurred by the prosecution be defrayed out of the fine), it would be better in practice to give notice to the complainant also. But the absence of such notice will not afford any ground for interference in revision—14 *N I R* 131

Notice should also be given to such officer as the Local Government appoints—29 *M I* 187 In Bengal notice should be given to the Legal Remembrancer so far as the High Court is concerned. In other cases, the District Magistrate has been appointed as the officer to receive notices of appeals. If the rule is granted against the order of a Sessions Judge, he is the proper person to show cause—7 *C W N* 80, *Calcutta Gazette*, 1893, Part I, page 120. In Bombay District Magistrates should be served with notice—*Pombay Gazette* 1883, Part I, page 182 24 *Bom L R* 1150. The same is the rule in the Punjab Oudh and *C P* See *Punjab Gazette* 1883 Part I page 53 *Oudh Crim Digest* p 27 *C P Gazette*, 1883, Part II, page 101. In Madras, the Public Prosecutor is the officer to be served with notice in case of appeals to the Sessions Court and the High Court—*Fort St. George Gazette* 1884, Part I, page 30. In other cases, the District Magistrate is the proper officer. Thus, in an appeal before the Joint Magistrate notice should be served on the District Magistrate—1915 *M W N* 540

Omission to give notice to the District Magistrate is a mere irregularity, according to the Madras High Court—*Iellavauambalam v Solai* 39 *Mad* 505 28 *M I J* 693 but according to the Bombay High Court, such omission is an illegality and not merely an irregularity—*Emp v Shivlingappa* 24 *Bom I R* 1150. But objection on the ground of absence of notice should be made by the District Magistrate and not by the complainant and the High Court will not interfere in revision at the instance of the complainant where the objection on the ground of absence of notice to the District Magistrate comes not from the District Magistrate but from the complainant—25 *Bom I R* 251 *Deendra v Shethappa* 26 *Cr L J* 751 (*Bom*). But where an appeal is heard by the District Magistrate who is himself the officer authorised to receive notice, no formal notice to him is necessary—41 *M I J* 172. But in another Madras case, where an appeal was originally heard by the District Magistrate and was ultimately heard by a Joint Magistrate it was held that this fact did not relieve the Joint Magistrate of his duty of giving notice to the District Magistrate—*Id Mustafa v Shanmug* 25 *Cr I J* 1389 *A I R* 1925 *Mad* 375

Time and place of hearing—The notice must specify the exact date of hearing. It is not enough that the Magistrate had directed that the appeal would be heard in a certain month (e.g. in January)—1881 *A W N* 46. So also, a general notice posted in the Court house that the appeal will be heard for admission on the first Court day next after

presentation of the appeal is not sufficient. The particular date must be fixed—5 Mad 11

It is imperative on a criminal Appellate Court to hear the appeal at the time and place named in the notice of appeal—5 N I R 26. Therefore where a notice is issued fixing a particular place for the hearing of the appeal the Court ought not hear the appeal at a different place without giving notice of the change of place—1891 P R 2. If notice has been issued to an appellant to appear at the headquarters on a particular date and if on that particular date the officer who will hear the appeal moves out into camp he should fix a fresh date and issue a fresh notice. A general order directing appellants to follow the officer into camp is not sufficient—1903 P R 11

423 (1) The Appellate Court shall then send for the

record of the case if such record is
Power of Appellate Court in disposing of appeal not already in Court. After perusing such record and hearing the appellant

or his pleader if he appears and the Public Prosecutor if he appears and in case of an appeal under Section 417, the accused if he appears the Court may if it considers that there is no sufficient ground for interfering dismiss the appeal, or may—

(a) in an appeal from an order of acquittal reverse such order and direct that further inquiry be made or that the accused be retried or committed for trial as the case may be, or find him guilty and pass sentence on him according to law

(b) in an appeal from a conviction (1) reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial or (2) alter the finding, maintaining the sentence, or with or without altering the finding reduce the sentence or (3) with or without such reduction and with or without altering the finding alter the nature of the sentence but subject to the provisions of Section 106 sub-section (3) not so as to enhance the same,

(c) in an appeal from any other order, alter or reverse such order,

(d) make any amendment or any consequential or incidental order that may be just or proper

(2) Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him

1138 Powers and duties of Appellate Court:—It is the duty of the Appellate Court, in dealing with an appeal preferred to it, to consider the evidence both oral and documentary, and to apply its mind to the case before recording a judgment therein. Where the Appellate Court fails to do this, the judgment cannot be said to be a judgment in accordance with law—P I R 716. The rule by which a Criminal Appellate Court is to be guided in dealing with a criminal appeal is that it has to come to a conclusion for itself upon the evidence on the record, assisted so far as it might be by such reasons or arguments as it might elicit from the conclusions and reasons contained in the judgment of the original Court. If the Appellate Court entertains any doubt about the correctness of the conviction or the commission of the offence, it should discharge the accused—23 CrI 347 1898 P R 6 4 L B R 340. If the Appellate Court is unable even with the aid of the Magistrate's finding of fact, to form an independent judgment as to whether the prisoners had committed the offence or not, the accused ought to be acquitted—20 W R 13. In an appeal from a conviction and sentence, it is for the Appellate Court to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the accused has been established beyond all reasonable doubt. It is not for the appellants to satisfy the Appellate Court that the first Court had come to a wrong finding—*Kanchan v Emp* 47 CrI 374.

It is the duty of the Magistrate to look into the evidence of both sides in order to come to a decision. Where the Appellate Court did not think it necessary to deal with the evidence adduced by the defence in the case, because no reference to that evidence was made by the counsel for the appellants, and that evidence was practically ignored by him, held that the Appellate Court acted illegally in doing so—40 CrI 376.

The power of an Appellate Court to pass sentence is measured by the power of the Court from whose judgment or order the appeal has been made. Therefore an Appellate Court when passing a sentence on appeal cannot pass a sentence which the original Court was not competent to pass—*Sitaram v Emp* 7 N I R 109, 2 Weir 487, *Emp v Muhammad Yakub* 45 All 594 39 CrI 157 12 Mad 45. Thus, where a second class Magistrate passed a sentence of 4 months imprisonment, but the District Magistrate on appeal altered the sentence into a fine of Rs 400, held that the sentence passed by the Appellate Court was *ultra vires* because the second class Magistrate could not have awarded a fine of Rs 400 (see 32)—*Emp v Muhammad Yakub*, 45 All 594.

When an inspection of the scene of the occurrence is material either to the case for the prosecution or for the defence, it is desirable that the Appellate Court should inspect the spot—1911 P W R 16

When an Appellate Court does not dismiss an appeal summarily, it must dispose of it in the manner provided by this section. It has no power to refer to the High Court for decision a question of law arising in an appeal—7 L B R 251

The Appellate Court must peruse the whole record, and not merely the judgment of the lower Court. A decision based upon a perusal of the judgment alone is not valid, and the appeal must be reheard—14 Cr L J 182 (Cal). If the records of the case are lost, it is the duty of the Appellate Court to order a new trial—1889 A W N 55, 1885 A W N 117

If the appeal is not dismissed summarily under sec. 421, the Appellate Court is bound to peruse the record and consider whether there is any ground for interference with the acquittal or conviction, *even though the appellant does not appear*. The Appellate Court must dispose of the appeal on the merits, and is not entitled to dismiss an appeal for default of appearance of the appellant. An order for dismissal of an appeal for non-appearance is not contemplated by this section—20 Cr L J 744, 5 A L R 76, 13 All 171, 50 Cal 92. *Ramchandra v Emp*, 21 A I J 100, 14 A L J 327, *Shiam Behary v Emp*, 20 Cr L J 271 (Pat), *Baldeo v Emp*, 24 Cr L J 475 (Pat). *Neesa Lal v Emp*, 4 P L T 552

In dealing with a case under this section, there is no restriction on the powers of the Appellate Court to dispose of the case in any of the manners provided by this section. It can acquit the accused, or order a retrial or order the accused to be committed, etc.—*Tajm Framnik v Q F*, 25 Cal 711. *Ramprasad v Emp*, 26 Cr L J 1000 (Nag)

Sufficient ground for interference—An appellant is not precisely in the same position before an Appellate Court as he is before the Court trying him but must satisfy the Court that there is sufficient ground for interfering with the order of conviction. If no sufficient ground has been shown, it is the duty of the Appellate Court not to interfere—5 All 36

1139. Dismiss the appeal:—Where an appeal is admitted and dealt with under this section the Appellate Court can dismiss the appeal only on the merits and has no power to dismiss it summarily—1 Bom J R 225, *Ram Han v Sintuk*, 23 Cr L J 733 (Cal), *Neesa Lal v Emp*, 4 P L T 552, *Ta Pu v Emp*, 3 Bur L J 18, 25 Cr L J 933

In dismissing an appeal under this section on the merits, the Appellate Court is bound to write a judgment and the judgment must comply with the requirements of sections 424 and 36. On failure to do so the judgment may be set aside and the appeal directed to be reheard—1 Bom L R 225

1140. Right of parties to be heard:—If the appellant is present or is represented by a pleader, the appellant or person or his pleader must be heard—13 All 171, 20 Cr L J 271. But where the Appellate Court disposed of the appeal on the merits after perusing the records and con-

sidering the grounds of appeal, the judgment of the Appellate Court would not be set aside on the mere ground that the pleader for the accused was not heard in the Appellate Court (the pleader being prevented from appearing in time on account of a railway strike)—*Olayet Khan v K-F*, 1 Pat 589 (590)

A complainant cannot claim as of right to be heard in the appeal. The matter is one which may be left in each case to the discretion of the Court—7 M H C R App 42. A private prosecutor as such has no right to be heard but the Court may grant permission in any particular case—1880 P R 29, 9 C W N 15.

If the Public Prosecutor does not appear on behalf of the Government a valid private prosecutor to support the prosecution may be heard—Weir 476.

The counsel for the appellant has a right of reply—11 C W N 411. There is nothing in the language of this section to preclude the appellant or his pleader from replying to the arguments of the Public Prosecutor, and as a matter of principle such right of reply should be conceded to him. The practice of the High Court has been uniformly in favour of allowing this right to the appellant or his pleader—1917 P R 21, 38 Cal 307. The Oudh Court holds that although the appellant's counsel has no right of reply, still it is a *privilege* which should not ordinarily be refused—*Praji v Emp* 11 O I J 603, 1 O W N 471, 25 Cr L J 1169. *Pahra v Emp* 25 Cr L J 1173 (Oudh).

1141 Clause (a) —Appeal from acquittal:—Clause (a) of this section can apply only to the High Court because section 417 which provides for appeals against orders of acquittal requires that such appeals shall lie to the High Court—7 Mal 213. Therefore a Sessions Judge has no power to set aside the order of acquittal and direct the commitment of the accused to the Court of Session—2 C W N 411, or to direct further inquiry to be made in a case of acquittal by a Magistrate. Such a power can be exercised only by the High Court—20 Cal 633. So also a District Magistrate has no power to entertain an appeal from an order of acquittal and is incompetent to reverse a Subordinate Magistrate's order of acquittal and direct a rehearing—Mid 213, 6 Mad 478.

The discretionary powers of the High Court under this clause will be exercised only when it is satisfied that the case is of sufficient consequence to justify it in acting under this very exceptional section—7 M H C R 339. In appeals against acquittals the High Court ought not to interfere unless the trying Judge was clearly wrong and the judgment is either perverse or based on obvious error of procedure—16 Cr L J 529 (Mad). The indications of error in a judgment of acquittal ought to be clear and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a judgment of conviction—1904 P R 7, 21 Cr L J 349. See Note 1120 under section 417.

The High Court, in exercising jurisdiction in the matter of appeals against acquittals, should confine its exercise to the particular acquittal

complained of by the Government. At the same time it would not be proper for the High Court to consider the appeal on grounds not contained in the objection urged on behalf of the Government—19 Bom 51 17 C P L R 74. In 12 B H C R 1 it has been held that a ground of objection not taken in the petition of appeal may be allowed, if it has not prejudiced the accused and sufficient time has been given to the other side to be prepared for the same.

Acquittal—This clause confers a power to direct further inquiry only in respect of a case of an appeal from an order of acquittal and not in a case in which an order of discharge or dismissal may have been passed—27 Cal 126.

1142 Clause (b) —Appeal from conviction:—In an appeal from a conviction, the Appellate Court may, if it likes, take further evidence (section 428) but cannot direct further inquiry—19 A L J 961.

'Reverse the finding and sentence'—Before an Appellate Court can set aside a conviction it must be satisfied that the conviction is wrong. It seems a logical consequence of this that when without finding the conviction to be wrong the Appellate Court set it aside, the appellate order would be *ultra vires*—17 C P L R 97.

An Appellate Court is not competent to set aside a conviction merely on the ground that all the witnesses cited for the defence have not been examined. The proper course in such a case is to have the evidence taken of the other witnesses before disposing of the appeal—2 Weir 481. A conviction ought not to be reversed unless the admission of the rejected evidence would have affected the result of the trial—2 Bom 61.

The proper procedure on appeal in a case where the Lower Court had refused to take the defence of the accused is to set aside the conviction and sentence passed by the Lower Court, and order the Magistrate to begin the proceedings anew against the accused from the stage when his evidence was refused—1884 P R 28.

After reversing the finding and sentence, the Appellate Court can order the accused either to be retried or to be committed for trial. The Appellate Court cannot itself frame a charge against the accused, and hold a regular trial—G C Sircar v. A. F., 3 Rang 68 4 Bur L J 29 26 Cr L J 1119 A I R 1925 Rang 230.

1143 Re-trial.—A Sessions Judge has power to order a new trial when the case comes before him in appeal. This power should however be sparingly exercised and a retrial should not be ordered unless there are grave reasons for doing so—13 A L J 477.

Before quashing a conviction and ordering a new trial on the ground that though the accused was shown by the evidence to have committed some offence, he has been convicted under a wrong section, the Appellate Court must come to a certain conclusion as to the offence which the accused was shown by the evidence to have committed, and it ought to consider whether, if the evidence showed that the accused should properly have been convicted of another offence than that he was charged with, he would be prejudiced by amending the conviction. Before ordering a

retrial, the Appellate Court is bound to see what possible object could be served by a fresh trial—2 Weir 480

When retrial may be ordered—(1) A retrial may be ordered where the trial is held to be illegal on the ground of want of jurisdiction of the Court that tried the case—1885 A W N 293 3 Bur L T 9 Thus where an offence triable by a Magistrate of the 1st class or Court of Session was tried by a second class Magistrate, the Appellate Court may order the accused to be tried by a 1st class Magistrate or by the Court of Session—8 All 14 2 Weir 482 2 Weir 484 In 20 Cal 412 it has been held that where a trial was void for want of jurisdiction it is not necessary for the Appellate Court to order a retrial, and therefore where the Appellate Court in such a case merely discharged the accused and did not order a retrial, the omission to order retrial would not prevent the Magistrate from taking further proceedings against the accused (2) If in an appeal from a conviction the Judge finds that the evidence discloses the commission of a more serious offence, he may set aside the conviction and sentence and order the accused to be retried by a Court of competent jurisdiction or committed for trial according to the nature of the evidence against him—11 C W N 1 (3) A retrial would be proper where the accused was rightly acquitted of one offence but the Appellate Court comes to the conclusion that he ought to have been tried for another—36 Mad 457 (4) If the Appellate Court is of opinion that the appellant ought to have been convicted of an offence different from that with which he was charged in the Lower Court the Appellate Court ought to annul the conviction and order a retrial—1882 A W N 112 (5) A retrial may be ordered in a case in which the Appellate Court sets aside the conviction on the ground of misdirection to the jury—4 C W N 576 (6) An Appellate Court in discharging the accused on the ground of misjoinder of parties has power to add a direction that the accused should be retried—28 Cal 104 (7) A retrial ought to be ordered if it is found that the accused has not been properly convicted—3 C W N 332 (8) An Appellate Court may order a retrial if it is of opinion that the proceedings before the Magistrate have been irregular—1883 A W N 99 (9) Where the Lower Court has committed an error in procedure in convicting the accused upon evidence which was not given in their presence the Appellate Court is competent to order a retrial—2 Weir 481 so also a retrial may be ordered where the conviction is reversed on account of an irregularity in the procedure by which material evidence was excluded—Ratanlal 938 36 Mad 457 (10) A Sessions Judge has power to direct a retrial to be had upon a charge framed in whatever manner he thinks fit on the ground that the accused has been misled in their defence by the absence of a charge or by a defect in the charge—7 C W N 301, see also 9 N L R 42 (11) Where the trial Court has failed to record a judgment in conformity with section 367, the proper procedure for the Appellate Court is to reverse the order of the Court below and to remand the case for a trial *de novo*—(1920) M W N 120

Where the Sessions Judge on appeal annuls the conviction of the accused on the ground of want of jurisdiction of the Magistrate who tried

the case, but omits to order a new trial, the Judge is not precluded from passing such order subsequently. The order of retrial does not amount to an alteration of the judgment annulling the conviction, within the meaning of sec 369—3 Mad 48.

Where the High Court on appeal set aside the verdict of the jury who convicted the accused, and observing that it would be open to the Crown to proceed further with the case if so advised, directed the petitioner to be released on bail until fresh trial if any, it was held that the order amounted to an order of retrial—46 Cal 212.

Scope of retrial—Where an Appellate Court reverses the verdict of a jury and orders a retrial, such retrial, unless the Appellate Court has limited the scope, must be taken to be one upon all the charges originally framed—22 Cal 377, 13 Cr 1 J 497 (Cal). Where an order of remand is passed by an Appellate Court under section 423, the Court cannot restrict the evidence to be taken to that mentioned in its order, but it should order the case to be retried in the view of the instructions contained in its order. The accused is entitled to adduce such additional evidence as he may desire—3 C 1 J 303. Thus, where in an appeal from a conviction, the Sessions Judge set aside the conviction and ordered a retrial but at the same time directed that the evidence already on the record should be treated as evidence in the case, it was held that the direction was contrary to the provisions of secs 423 and 428 of the Code, and was therefore illegal—3 P 1 W 224, 14 Cr 1 J 77.

When retrial should not be ordered—The mere fact that the Appellate Court finds the decision of the Lower Court not so satisfactory as it should have been, does not authorise the Appellate Court to pass an order remanding the case to the Lower Court with instructions to write out a proper judgment—32 Cal 1069. Where a Sessions Judge on appeal thinks that the evidence of some more witnesses, who were not examined in the Lower Court, is necessary, he should proceed under sec 428 (1) and can not order retrial on that ground—31 Cal 710, 16 A L J 325. Where the evidence recorded by the Magistrate is as full as the law requires, and there is no irregularity in the procedure, it is not competent to a Sessions Judge on appeal to order a retrial. He must consider the case on the evidence before him and proceed to judgment—Ratanlal 530, 1 Bur L J 32, the mere fact that an inadmissible or irrelevant evidence has been admitted by the Lower Court does not justify a retrial. Such evidence may be left out of consideration—1 Bur L J 32. Where there is no evidence on the record to warrant a conviction for the offence charged, an order for retrial is not justified—*Ramprasad v Emp*, 26 Cr L J 1000 (Nag). A I R 1926 Nag 53.

'By a Court of competent jurisdiction'—Under this section when an Appellate Court orders a retrial, it can specify the Court by which the appellant is to be retried. There is nothing in this section which prevents such specification of the Court—Ratanlal 367.

If the Appellate Court finds that the accused had committed an offence which the Lower Court was not competent to try, the Appellate Court ought to order a retrial by a Court competent to try the offence—8 All.

14, 2 Weir 484. Even if the Lower Court was competent to try the offence, the Appellate Court may order the retrial by another Court of competent jurisdiction—L B R (1893—1900) 238

Under the provisions of this section, the retrial, if ordered, must be by a Court of competent jurisdiction 'subordinate to the Appellate Court, and therefore an Appellate Court cannot direct a case to be retried by itself—Ratanlal 482. But in 30 Mad 228 and 2 Weir 481, it has been held that the words 'Court of competent jurisdiction subordinate to such Appellate Court' are not to be taken as words of limitation, and do not exclude the Appellate Court from itself trying the offender when the offence is within the jurisdiction of the Appellate Court.

The Appellate Court may order the retrial to be held by any Court of competent jurisdiction. The High Court has power under this section to order a retrial of the appeal by the Lower Appellate Court—1913 P L R 7

1144. Order of commitment.—If the Appellate Court finds that the accused has committed an offence which the Lower Court was not competent to try, the Appellate Court may order retrial by a Court of competent jurisdiction and if there is no Court of competent jurisdiction subordinate to the Appellate Court it ought to direct the committal of the accused to the Sessions—2 Weir 484. Where the accused has committed an offence triable exclusively by the Sessions Court, and has been tried by a Magistrate the Appellate Court is competent to direct a committal to the Sessions—8 All 14. *Hasan Raza v Emp* 20 A L J 368. Even if the offence be not exclusively triable by the Court of Session, the Appellate Court is still competent to direct a committal to the Sessions—23 Cal 350. This section gives the Appellate Court the power to order an accused person to be committed to the Sessions, when it considers that that is the procedure which should have been adopted by the Magistrate in the case—16 Bom 580. 15 All 203. Thus a commitment may be ordered by the Appellate Court if it is of opinion that the Magistrate, though of competent jurisdiction to try the case was not competent to punish the accused adequately—1893 P R 16.

When the Appellate Court directs a commitment to the Court of Session in investigation preliminary to commitment is not necessary—2 Weir 471.

An order of commitment passed by the Sessions Judge on appeal under this clause can be revised by the High Court under sec 439—*Ram Samraj v Emp* 11 O L J 748. 1 O W N 525. 25 Cr L J 1375.

Commitment to itself.—This section does not authorize a Sessions Court to commit a case to itself, but only empowers it as a Court of Appeal to direct a competent Magistrate to make a commitment to itself. Reading this section with sec 193 it is manifest that except in cases in which a Court of Session is expressly empowered to take cognizance of an offence as a Court of original jurisdiction, it has no power to do so unless a commitment has been made by a Magistrate duly empowered thus to do so—1907 A W N 178.

1145 Alteration of finding:—Where the accused were charged by the lower Court with several offences, and were convicted of the graver offences and acquitted of the minor charges the Appellate Court can alter the finding of the lower Court and convict the accused of the minor charges and acquit them of the graver offences—35 Mad 243 But in convicting an accused of an offence with which he was *not* charged in the lower Court, the Appellate Court can act only in accordance with the provisions of secs 237 and 238 of the Code—7 M L T 79, *Emp v Sakharan* 8 Bom L R 120 *G C Sircar v Emp* 3 Rang 68 4 Bur I J 29 Thus where on an appeal from a conviction of murder, the Appellate Court comes to the conclusion that the offence of murder is not proved but that there is evidence on the record to support a conviction for an offence against property, the Appellate Court ought to acquit the accused of murder, but it cannot alter the conviction of murder into a conviction of an offence against property because the latter offence is so widely different from the former that it is illegal under sec 237 or 238 to convict the accused of the latter offence when he is charged only with the former—*Hall v Crown* 4 Lah 373 *Queen Emp v Yusuf* 20 All 107 Where the Court of Session had convicted an accused of an offence under sec 409 I P C and the High Court on appeal found that the conviction was not sustainable under that section the Court refused to alter the finding into a conviction for some other offence (e.g. an offence under sec 161 I P C) for which the accused had not been charged or tried and which was of an entirely different nature from the offence with which he was charged—8 All 120 Where the accused was charged with and convicted of an offence under sec 457, I P C and on appeal the Sessions Judge altered the charge and recorded a conviction under sec 411, I P C, held that the Appellate Court had no power to so alter the charge as to make it necessary for the accused to meet an entirely different case from that with which he was charged in the trial Court—*Mula v Emp*, 23 A I J 924 26 Cr L J 1494 A I R 1926 All 33 But where the prosecution has established certain acts constituting an offence and the Court has misapplied the law to those acts by charging and convicting the accused for an offence other than that for which he should have been properly charged and it appears that in spite of such error of the Court, the accused has by his defence endeavoured to meet the accusation of the commission of those acts then the Appellate Court may alter the charge or finding and convict him for an offence which those acts properly constitute, if the accused is not at all prejudiced by the alteration of finding—26 Cal 863, 1890 A W N 86 Such an error is one of form rather than of substance and the alteration by an Appellate Court of the charge or finding into a more serious offence would not necessitate a retrial for that offence Therefore, where a person is convicted of an attempt to commit an offence, the Appellate Court if it thinks that the acts of the accused constitute the substantive offence itself, may convict him of the substantive offence without ordering a retrial—26 Cal 863

The Appellate Court in altering a finding under this clause cannot act in contravention of the provisions of section 239 of this Code Thus the petitioner and four others were tried jointly, the other four being

convicted of an offence under section 454 of the I P Code and the petitioner was convicted of abetment thereof. On appeal the Appellate Court acquitted the petitioner of the offence of abetment but convicted him under secs 411 and 414 I P C. *Held* that the conviction by the Appellate Court cannot be maintained, because under sec 239 the petitioner could not have been tried in the original Court jointly with the four accused under sections 411 and 414 of the I P C while they were being tried under section 454 I P C—1903 P R 38

Where an accused was convicted of a composite offence the Appellate Court may alter the conviction into one of the elements of the composite offence. Thus, where the accused was convicted of house breaking by night, under sec 457 I P C and the Appellate Court altered the conviction to one under sec 414 I P C, it was held that sec 457 I P C applied to a composite offence, and under sec 238 of this Code an accused may be convicted of any element of the composite offence, and that under this section it was competent to the Appellate Court to alter the finding—Ratanlal 293

Under this section, the Appellate Court can, in an appeal from a conviction, alter the finding of the Lower Court and find the appellant guilty of any offence of which he has been acquitted by that Court, notwithstanding the provisions of sec 403 of the Code—23 Cal 975, 34 All 115. Thus, where the Magistrate acquitted the accused under sec 148 I P C and convicted him under sec 325 I P C it was open to the Sessions Judge to alter the conviction under sec 325 into one under sec 148 I P C—34 Mad 545. Similarly, where in such a case the Lower Court has found only one of the accused guilty of murder and acquitted the others of murder but convicted them of other offences an appeal against the conviction of murder opens out the entire case and the Appellate Court may find all the three persons guilty of murder—*Dulla v Emp*, 16 A I J 918. Where in the trial Court the accused was charged with murder (sec 302 I P C) but was convicted of culpable homicide (sec 304) the appellate Court can convict the accused of murder—*On Shwe v Emp*, 1 Rang 436

If the Appellate Court finds that the sentence is illegal or inadequate, and does not think it expedient to order a new trial he may alter the conviction in order to legalise the sentence—3 L B R 112

In altering the finding of the Lower Court the Appellate Court is not bound by any preliminaries of complaint under sec 198. Thus, on an appeal from a conviction under sec 182 I P C the Appellate Court is competent to alter the conviction to one under sec 500 I P C notwithstanding that there was no complaint by the aggrieved party—25 All 534

The word 'finding' is not limited to a finding upon a point of law, as distinct from a finding upon a point of fact—3 P L J 565

1146. Alteration when improper:—(1) It is illegal for the Appellate Court to alter the finding so as to convict the accused of an entirely different character. Thus, under secs 237 and 238, it is illegal to alter a conviction into one under sec 366 I P C, because the charge

involves different elements and different questions of fact from the former—*Emp v Sakharani* 8 Bom L R 120, *G C Sircar v K. E.*, 3 Rang 68 4 Bur I J 29 26 Cr I J 1119 so also, it is illegal to alter a conviction under sec 379 I P C into one under sec 143 I P C.—27 Cal 660 So also it is improper to alter a conviction under secs 211 and 109 I P C into one under sec 193 I P C—3 C W N 367 or to alter a conviction under sec 468 I P C into a conviction under sec 471 I P C—*Ikbar v Emp* 8 N I J 87 26 Cr L J 1358 or to alter a conviction under sec 147 into one under secs 448 and 323 I P C—30 Cal 488 or to alter a conviction for wrongful confinement into one for assault—5 C W N 296 See Note 1145

(2) It would be improper and unfair to the accused for the Appellate Court to convict him of a more serious offence to which he had never pleaded at the trial, especially if the new offence was not cognate to the offence for which he was tried and convicted, and if there were circumstances of aggravation to which he had not pleaded guilty—26 Cal 863 3 I B R 232

(3) An Appellate Court is not competent to alter the finding of a Magistrate, so as to convict an accused person of an offence which the Lower Court is not competent to try—7 All 414

(4) When a person has been charged with a certain offence and has been convicted of that offence the Appellate Court cannot, on finding that the conviction is not sustainable, convict the accused of abetment of that offence—33 Mad 264 11 B H C R 240 See Note 771 under sec 238

Notice to appellant—If a Judge on appeal finds that the evidence recorded discloses a different offence, he may alter the finding of the Court below but in doing so, he ought to give intimation to the accused or to his pleader of what he proposes to do and thus give him an opportunity of showing cause against the new conviction—3 L B R 483 The powers conferred by this section on an Appellate Court are not intended to be used in such a way as to spring up a new case on the accused without giving him any notice of the charge he has to meet—16 Cr I J 599 (All)

Alternative conviction—The Appellate Court is not competent to alter a conviction for an offence into one for that offence or another offence in the alternative Thus it is improper to alter a conviction under sec 411 I P C into a conviction under either sec 349 or 411 I P C in the alternative, the accused not having been charged under sec 379 I P C in the Lower Court and having had no opportunity of meeting such a charge—Ratanlal 368

1147 Reduction of sentence:—Where the Lower Court passes only a single sentence on a conviction for two offences the Appellate Court, if it acquits the appellant of one of the offences ought not to maintain the sentence in its entirety but must make some reduction of sentence unless it thinks that the sentence ought not to be reduced, in which case it should refer the matter to the High Court for enhancement of the sentence—30 Mad 48, 2 Weir 4871 But no reduction of sentence by the Appellate Court is necessary, if the inference can be drawn that the trying

Magistrate did not intend to pass any sentence on the conviction which is set aside on appeal—7 M L T 81

Where a Magistrate in convicting a person of two offences passed a single sentence of imprisonment and fine, it was held that separate sentences ought to have been passed, and that the Appellate Court in reversing the conviction for one offence cannot regard the imprisonment as imposed for one offence and the fine for the other, and reduce the sentence by eliminating the fine—Ratanlal 409

1148 Clause (b) (3) —Enhancement of sentence:— *So as not to enhance the same* —No Appellate Court can enhance the sentence passed by the Lower Court—Ratanlal 618, 4 W R 20 The Code of 1872 gave power to Appellate Courts to enhance the sentence, but that power has been taken away by the Codes of 1882 and 1898, and is now vested only in the High Court in the exercise of its power of revision. See Sec 439 and 6 Al 622 And therefore if the Appellate Court finds the appellant to be guilty of a graver offence, the Court has no power to enhance the sentence and the proper course would be to let the conviction stand as it is or to have the case referred to the High Court—2 Weir 486

What amounts to enhancement of sentence —(1) Where an accused is convicted and sentenced by the Lower Court on two separate charges, and the Appellate Court reverses the conviction on one of the charges, the Appellate Court cannot return under the whole sentence but must reduce the sentence, the retention of the sentence has virtually the effect of an enhancement of sentence—22 Bom 760 Ratanlal 618 1887 P R 45, 24 Cal 316 1916 I R 31 30 M L 48 3 N L R 67 Thus, where a person was convicted by a Magistrate of rioting and theft and was sentenced for the first offence to four months and for the latter offence to two months rigorous imprisonment and the District Magistrate on appeal acquitted the accused of rioting but upheld the conviction for theft and the sentence of six months rigorous imprisonment it was held that the effect of the order was to enhance the sentence for theft which he had no authority to do under this section—24 Cal 316 But where only one offence has been committed, and the Magistrate erroneously splits it up into two offences and passes two sentences the Appellate Court can join the two offences into one offence and maintain the whole of the original sentence such maintaining of sentence does not amount to an enhancement of sentence (because no conviction has in fact been reversed)—3 N L R 67

(2) Where the accused was convicted of robbery and hurt and sentenced to six months imprisonment for robbery and one day's imprisonment for hurt, and the Sessions Judge on appeal aside the conviction for robbery, but confirmed the conviction for hurt and sentenced the accused to six months imprisonment, it was held that the Sessions Judge had no power to pass such sentence but the High Court could confirm such sentence if it would meet the ends of justice—24 Cal 317 (Note)

(3) Where an Appellate Court reduced a sentence of 4 months rigorous imprisonment into one of 3 months, but added a sentence of fine of

default six weeks' rigorous imprisonment, such sentence amounted to an enhancement of the original sentence, and was in excess of the powers of the Appellate Court—17 All 67, *Empress v Meda* 1887 A W N 100 So also where the first Court passed a sentence of six months' imprisonment but the Appellate Court altered it to a sentence of four months imprisonment and a fine of Rs 100 or in default 2 months' imprisonment, held that the sentence of the Appellate Court amounted to an enhancement, because the accused even after he had undergone the two months imprisonment in default of payment of fine would still be liable to pay the fine—A E v *Sakada* 23 All 497, 3 A I R 90, so also where one week's imprisonment awarded by the first Court was altered by the Appellate Court into a fine of Rs 50 and in default one week's imprisonment, it was held that it amounted to an enhancement of sentence—1916 P W R 5 Where the Court of first instance sentenced the accused to rigorous imprisonment for 2 months and to a fine of Rs 50 or in default one month's rigorous imprisonment, and on appeal the Appellate Court changed the sentence to one of one month's rigorous imprisonment and a fine of Rs 200 or in default 2 months' rigorous imprisonment held that the Appellate Court's sentence amounted to an enhancement of the sentence passed by the trial Court, for supposing the fine was not paid, the accused would still have to undergo three months' rigorous imprisonment and still be liable to pay the fine—*Bhola Singh v A E* 3 Pat 638 (639) 5 P L T 622 25 Cr L J 1186 A I R 1924 Pat 563 (*Contra*—23 Bom 439) [But now see the proviso to section 386 which lays down that if the accused has undergone the full term of imprisonment awarded in default of payment of fine the fine will not be levied] If the aggregate sentence of imprisonment (i.e. the substantive sentence of imprisonment plus the imprisonment in default of fine) imposed by the Appellate Court is less than the period of the original sentence, the imposition of fine does not amount to an enhancement of sentence—30 Mid 103, 27 Cal 173, 36 All 485 1915 P R ~

(4) A sentence of fine is always considered lighter than a sentence of imprisonment—23 Bom 439 therefore the alteration of a sentence of fine into one of imprisonment is an enhancement of the sentence within the meaning of this clause, and the Appellate Court has no power to alter a sentence in this way—18 All 301, 18 Bom 751

(5) Where the Lower Court imposed fine and imprisonment, and the Appellate Court, in lieu of imprisonment, imposed an additional fine, thus increasing the amount of fine imposed by the Lower Court, it amounted to an enhancement of sentence—2 Weir 487

(6) The addition of imprisonment by the Appellate Court to a sentence of fine only imposed by the Lower Court is an enhancement of sentence The appellant was convicted of causing simple hurt and was sentenced to fine only, on appeal, the Appellate Court altered the conviction to one of causing grievous hurt (which is punishable with imprisonment and fine) under Sec 325 I P C and in order to make the sentence legal under that section, recorded a sentence of one day's rigorous imprisonment It was held that the Appellate Court had no power to so enhance—2 Weir 486

(7) The addition of a sentence of whipping by the Appellate Court, although the sentence of imprisonment is reduced, amounts to an enhancement of the sentence—2 Weir 487 But in 15 W R. 7 it has been held that the alteration of a sentence of whipping into one of imprisonment may amount to an enhancement of punishment In this case their Lordships expressed a doubt as to which sentence was the more severe "The Legislature has not supplied us with any data from which the comparative severity of the two sentences of whipping and rigorous imprisonment can be determined, and it is impossible to say how many lashes would be equivalent to a sentence of rigorous imprisonment for a specified period"—Mitter J The two sentences are of so dissimilar a nature that they do not admit of comparison, and it is advisable for the Appellate Courts not to substitute the one for the other

(8) Where in a criminal appeal, the terms of imprisonment are reduced but a punishment of solitary confinement is imposed, such an imposition of solitary confinement, though the imprisonment is lessened, is an enhancement of the sentence—1890 A W N 170

(9) The substitution of rigorous imprisonment in place of simple imprisonment amounts to an enhancement of sentence—*Emperor v Muhammad Yakub Ali* 45 All 594

(10) The Appellate Court, in altering a sentence, cannot award a sentence which the original Court could not have passed If it does so, it will amount to an enhancement of sentence See Note 113b ante

What does not amount to enhancement—(1) An additional order passed by the Appellate Court directing the accused to furnish security to keep the peace does not amount to an enhancement of sentence—1905 P R 21, 20 Cr L J 302 (All) 20 Cr L J 760 (Nag) Such power has been expressly conferred on a Court of Appeal by section 106 (3) and a Judge is competent in appeal to demand such security—*Ibid*

(2) An order passed by the Appellate Court directing the accused person to pay the cost of the complaint under sec 31 of the Court Fees Act (now 546A of this Code) does not amount to an enhancement of sentence, because the order of costs is not a penalty or sentence passed in the case but is an incidental order under clause (d) of this section—*Emp v Karuppanna* 29 Mad 188, *Thimiah v King Emp*, 47 Mad 914 (915) Although the fees ordered to be paid are to be recovered as if they were fines, still there is no warrant for treating the same as part of the fine imposed as punishment for the offences—*In re Vemuri Seshanna*, 26 Mad 421, *Thimiah v A E*, 47 Mad 914 (915)

If conviction is confirmed some sentence must be passed—If the Court of appeal affirms a conviction, it should, if it disapproves of the sentence passed by the Lower Court, pass some other sentence, even though a nominal one It cannot reverse the sentence absolutely while upholding the conviction Every conviction must be followed by sentence—*Ratanlal* 545

1149 Clause (d)—Amendment:—Under this clause the Court can make any amendment that may be just or proper Thus, where the accused was convicted under section 325 I P C, and on appeal the parties

applied to compromise the case, the High Court acting under section 423 (d) amended the order of conviction by substituting for it an order that the offence should be compromised—32 All 151 Where the Sessions Judge had directed certain property to be handed over to the Magistrate as unclaimed property, the High Court amended the order by directing that the Magistrate should dispose of the property according to law—189 A W N 26 The Sessions Judge can amend the order of the Magistrate by directing a greater amount of property to be restored to the complainant than the amount restored by the Magistrate—3 A L J 770

Amendment means amendment of the main order of the Court below and the Appellate Court cannot make any amendment when there has not been an appeal against the main order of the lower Court Thus where the Magistrate in passing a judgment of acquittal has made some unfavourable remarks about the credibility of certain witnesses, the High Court cannot amend the judgment by directing those remarks to be expunged from the judgment when there has been no appeal to the High Court against the main order of acquittal—44 All 401 But this is no longer good law in view of sec 561A which empowers the High Court to expunge remarks from the lower Courts judgments, irrespective of the fact whether there has been an appeal against the main order or not See Note 1214 under sec 439 But the ruling in 44 All 401 would apply to lower Appellate Courts and those Courts would have no power to expunge remarks from the lower Courts judgment unless there be an appeal from the main order in the case.

1150 Incidental or consequential orders:—(1) An order under sec 104 demanding security from the appellant is an incidental order Sec 104 (3) gives the Appellate Court power to pass such order in appeal even where the original Court was not competent to do so

(2) An order under sec 106 passed by the Original Court may be set aside in appeal and the appellate order setting aside the order for security is an incidental order within the meaning of this section—*Abdul Hakeem v Amir* 30 Cal 101

(3) An order under sec 471 (1) directing the accused to be committed to a lunatic asylum, is clearly an order which the acquitting Court, whether original or appellate not only has the power to make, but is bound to make under sec 423 (d)—8 L B R 290

(4) An order under sec 517, 520 or 522 of the Code is a consequential or incidental order within the meaning of this clause and can be passed by the Appellate Court—29 Cal 724 46 Mnd 162 (164) Therefore an order in a case of criminal misappropriation, directing restoration of property which is found to have belonged to the complainant, is clearly a consequential or incidental order and one which is under the circumstances just and proper—3 A L J 770

An order of the Appellate Court setting aside an order passed by the Lower Court under sec 522, is an incidental order within the meaning of this clause—19 C W N 990 See also 29 Cal 724 Where the accused was convicted under secs 35- 111 448 I L C and the convicting Magistrate passed an order under sec 522 of this Code restoring posses-

sion of the property (which was the subject matter of the offence under sec 448 I P C) to the complainant, but the accused was afterwards acquitted on appeal, it was held that the Appellate Court had power, under section 423 (d) and sec 522 read together, to order restitution of the property to the accused—27 All 415

(5) Under this clause the Appellate Court can exercise the powers conferred by sec 562 of the Code—24 All 306 The Court before which he is convicted' in sec 562 is not limited to the Court of first instance, but includes the Court of appeal—29 Mad 567 This is now expressly provided by sub-section (2) of section 562

(6) An order by the Appellate Court directing the accused to pay the costs of the complainant under sec 31 of the Court Fees Act (now 310A of this Code) is no part of the penalty or sentence passed in the case and therefore not an enhancement of sentence, but is an incidental order under this clause—*Emp v Karuppana* 29 All 188 *Thimiah v A P* 47 All 914 (915) The contrary view taken in *Q E v Tanavelu* 22 Mad 151 decided under the Code of 1882 which did not contain clause (1) is no longer correct

(7) Where a case was tried by a Bench of Honorary Magistrates and the judgment was signed by one of them only the District Magistrate on appeal without in any way interfering with the order of the Bench of Magistrates sent back the case so that the judgment might be signed by the other Magistrates—41 All 217

Orders which cannot be passed—The only consequential incidental orders which fall within the purview of this clause are orders which follow as a matter of course being the necessary complement to the main order passed, without which the latter would be incomplete and ineffective (such as directions as to the refund of fines paid by acquitted appellants or on the reversal of acquittals any direction as to the restoration of compensation paid under sec 250) for which no separate authority is needed Therefore where the Magistrate in acquitting the accused has made certain remarks in his judgment about the credibility of a certain witness, the High Court cannot expunge those remarks from the record such expunction not being consequential or incidental to the main order viz the order of acquittal of the Court below, especially where there has not been an appeal against the order of acquittal of the lower Court—44 All 401 But see Note 1143 above and Note 1214 under sec 431 An Appellate Court can not award compensation under sec 250 because such order is not a necessary complement of the main order of acquittal only the Magistrate by whom the case is heard in the first instance can pass such order—28 All 625, 39 Cal 157 An order of confiscation under the Indian Forests Act VII of 1878 cannot be regarded as an order incidental on a conviction under that Act, under sec 34 of that Act, the confiscation is regarded as a punishment in addition to any other punishment prescribed for the offence Therefore an Appellate Court cannot pass such order—27 Cal 450 The High Court cannot award the costs incurred in a revision petition filed against an order passed under Ch XII—*Varappa v Indramani* 48 All 262 See this case cited in Note 478 under sec 148

1151 Sub-section (2):—Interference with verdict of jury—The High Court cannot alter or reverse the verdict of the jury unless it is of opinion that the verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by the Judge—32 Mad 179 *Emp v Smither*, 28 Mad 1, 10 Bom L R 565, 27 Bom 626. When the Court is of that opinion, it can reverse the verdict, but the power ought not to be exercised lightly, especially when the verdict is one of acquittal and unanimous—10 Bom L R 565. The High Court cannot, on an appeal from the unanimous verdict of the jury interfere with it, in the absence of a misdirection by the Judge, when there is some circumstantial evidence of the guilt—46 Cal 635.

'Erroneous'—To enable the Appellate Court to interfere with the verdict of the jury, the verdict must be erroneous. The effect of this clause is to prevent the High Court from reversing the verdict of the jury, on account of any misdirection by the Judge or misunderstanding of the law by the jury, unless such misdirection or misunderstanding is on points material to the verdict, so that the verdict may be said to be tainted with error in the process in which it has been arrived at—21 Cal 955. The word 'erroneous' is not to be read as meaning 'wrong on the facts'. It must be read in connection with the words that follow, as meaning that the verdict has been vitiated and rendered bad or defective by reason of misdirection or misunderstanding of the law—21 Cal 955, 27 Bom 626, *Rational* 452. It is the duty of the Appellate Court to ascertain whether the process or method which the Judge directed the jury to follow as to the acceptance or discarding of evidence or as to the view taken of the law, was erroneous on any material point but it is not the duty of the Appellate Court to determine for itself whether the verdict is a conclusion of fact was right or wrong. To hold the latter view would be tantamount to holding that an appeal would lie upon the facts from the verdict of a jury, in the face of the provisions of sec 418—21 Cal 955. Moreover the High Court will not be justified in setting aside the verdict of a jury even though it be erroneous unless the Court is satisfied that the prisoner is prejudiced by the error and that there has been a failure of justice—5 W R 80, 25 Cal 230, 25 Cal 561, 5 B H C R 85. When there is no error in matter of law, and there was some evidence to go to the jury, the High Court cannot interfere—5 W R 13, 14 Cal 164.

'Misdirection'—See notes under sec 297.

'Misunderstanding'—There must be misunderstanding by the jury of the law as laid down by the Judge, the verdict will not be set aside on the ground that the counsel for the accused (and not the jury) had misunderstood the expressions used by the Judge, specially when it appeared that the expression used by the Judge was perfectly intelligible and could not have the meaning suggested by the counsel for the accused—10 Cal 1079.

'Verdict must set aside in its entirety'—The term 'verdict' in this sub-section means a verdict on all the charges, and not merely the verdict upon each charge separately. Therefore if in a trial there are several charges

in which there is an acquittal on some and a conviction on the other charges, and the verdict is found to be erroneous on appeal, the Appellate Court must set aside the verdict in its entirety. Where the Appellate Court in such a case reverses the verdict of the jury and orders a retrial, the retrial, unless the Appellate Court has limited the scope, must be taken to be one upon all the charges originally framed—22 Cal 377, 16 C W N 909, 1904 P R 12

1152 Power of High Court upon interference with verdict:—

The High Court, on setting aside a verdict of the jury on the ground of irregularity, has jurisdiction to order a retrial—*Bani Madhab v Emp*, 46 Cal 212. Once the verdict of the jury is set aside under this subsection, there is no restriction on the power of the Appellate Court to deal with the case, of which it has complete seizure, in any of the manners provided in this section. Its power is not restricted to directing a retrial, and it may also reverse the finding and sentence and acquit or discharge the accused, or order him to be retried, or alter the finding and maintain the sentence, or, without altering the finding, reduce the sentence—*Taju Pramanik v Q E* 25 Cal 711. After reversal of the verdict of the jury, in an appeal against an acquittal, the High Court may under clause (a) order a retrial or further inquiry or commitment or may find the accused guilty and pass sentence on him according to law—*Emp v F H Smither*, 26 Mad 1. It is open to the High Court to order a new trial of the accused by a new jury when it is found that the verdict of the jury is tainted with prejudice and is based on rumours as to the prisoner's previous conduct—2 Weir 384.

It is doubtful whether the High Court has power to decide the case itself. When a case has been tried before a jury, and the conviction has been set aside on the ground of misdirection, the accused is entitled to have his case retried *before a jury* and as a matter of procedure and in justice to the accused this course should be adopted—4 C W N 576. Where a verdict is erroneous owing to a misdirection by the Judge the Appellate Court has no option but to set aside the verdict and order a retrial. Were the Appellate Court to go into the facts in such a case, it would be substituting the decision of the Judges of that Court for the verdict of the jury, who have the opportunity of seeing the demeanour of the witnesses, and weighing the evidence with the assistance which this affords, whereas the Judges of the Appellate Court can only arrive at a decision on a perusal of the paper evidence—21 Cal 955, 22 Cal 377, 39 All 348.

Power to go into facts—From the above remarks it is evident that the High Court is not competent to go into the facts of the case, and the appeal must be limited, as laid down in section 418, to points of law—39 All 348. Even the High Court is not competent to go into the facts to ascertain whether the verdict of the jury is actually erroneous on the facts—25 Cal 230. It is not competent for the Appellate Court to look at the evidence with a view to see whether another jury might not have arrived at a different verdict—39 All 348. *Contra*—26 Mad 1, where it has been held that in order to determine whether the verdict is erroneous

it is absolutely necessary for the High Court to go into the facts and to consider the evidence in the case before passing orders on it.

The powers of the High Court under section 307 are however, wider than the powers under this section. When a reference is made under sec 307, the power of the High Court is not restricted, as under this section only to cases where there has been an error of law in the proceeding below, but the High Court is authorised under that section to go into the facts—see 21 Cal 955, 9 All 420.

424 The rules contained in Chapter XXVI as to the judgment of subordinate appellate Courts shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court.

Provided that unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.

1153 Appellate Judgment.—When an appeal is dismissed summarily under sec 421, no judgment is required to be written. See Note 1132 under Sec 421.

But if the appeal is dismissed not summarily but under sec 423 after notice given under sec 422 the Court must deliver a judgment that would fulfil the conditions laid down in sec 367. Omission to write a judgment is not an irregularity cured by sec 537 (1) of the Code—17 Bom L R 1089.

Contents of judgment.—The judgment must fulfil the requirements of sec 367, that is it must contain the point or points for determination raised by the memorandum of appeal, the decision thereon and the reasons for that decision—17 Bom L R 1083, 37 Cal 91, 4 N I R 84. See Note 1031 under sec 367 under heading 'Appellate Judgment'.

If the appellate judgment is not in accordance with law, the High Court may remand the appeal for rehearing and delivery of a proper judgment—7 C W N 30, 37 Cal 104, 1912 P W R 43, 2 Bom L R 223.

425 (1) Whenever a case is decided on appeal by the High Court under this Chapter, it shall certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed. If the finding, sentence or order was recorded or passed by a Magistrate other than the District Magistrate, the certificate shall be sent through the District Magistrate.

(2) The Court to which the High Court certifies its judgment or order shall thereupon make such orders as are con-

formable to the judgment or order of the High Court; and, if necessary the record shall be amended in accordance therewith

426 (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended, and, if he is in confinement, that he be released on bail or on his own bond

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced

1154 *Pending an appeal* —A sentence cannot be suspended until an appeal has been actually preferred and is pending. Where a Magistrate postponed the execution of the sentence for a stated period, at the request of the accused, to allow him to appeal it was held that the suspension of the sentence was bad in law—12 W R 47. A sentence can not be suspended in the absence of an appeal—5 M H C R App 1

“ Appellate Court —The power conferred by this section to suspend the sentence can be exercised only by the Appellate Court—2 Weir 536. The sentence cannot be suspended by the Magistrate or Judge who passed it—12 W R 47. 4 M H C R App 1. So also, a Sessions Judge has no power to suspend the execution of a sentence passed by a second Class Magistrate, because the appeal from that Magistrate will not lie to the Sessions Judge—2 Weir 536

Sentence —An order of detention passed by a District Magistrate under sec 10 of the Reformatory Schools Act (VII of 1897) is not a sentence within the meaning of this section, nor is it a punishment enumerated in sec 53 of the Penal Code. A Sessions Judge has therefore no power to suspend its operation under this section—16 Cr I J 134 (Mad)

Release on bail —The Appellate Court can exercise the powers conferred by this Section and release the accused on bail, whether the offence is bailable or not—5 M H C R App 1

Exclusion of time —It is only when the convicted person has been released (and not where his sentence has been illegally suspended) that the term during which the sentence is suspended shall be excluded in computing the sentence—2 Weir 536

427 When an appeal is presented under Section 417,

Arrest of accused in the High Court may issue a warrant appeal from acquittal directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail.

The warrant of arrest is not an order to the prejudice of the accused within the meaning of Sec 439 (2) and can therefore be issued without previous notice to him—8 I B R 290

428 (1) In dealing with any appeal under this Chapter,

Appellate Court may the Appellate Court, if it thinks additional evidence to be necessary, shall take further evidence or direct it to be taken record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate

(2) When the additional evidence is taken by the Court of Session or the Magistrate it or he shall certify such evidence to the Appellate Court and such Court shall thereupon proceed to dispose of the appeal

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken but such evidence shall not be taken in the presence of jurors or assessors

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXX, as if it were an inquiry

Powers of Civil and Criminal Courts compared—A Civil Court has ordinarily no power to take evidence of its own motion it has to decide the case on the evidence induced by the parties. But a Criminal Court stands on a different footing. Section 540 enables the Magistrate at any stage of the inquiry or trial to examine any witness he may find necessary in order to come to a proper conclusion. Section 428 also in general terms empowers the Appellate Court to take additional evidence—8 M I T 418

1155 Object and scope of section—The object of this section is the prevention of a guilty man's escape through some careless or ignorant proceedings of a Magistrate, or the vindication of an innocent person wrongfully accused where the Magistrate through the same carelessness or ignorance has omitted to record the circumstances essential to the elucidation of truth—18 W R 31, *Ikhtar v A F* 6 P I T 431 26 Cr I J 1171 A I R 1925 Pat 526

The power under this section can be exercised only by the Appellate Court. A Sessions Judge or a District Magistrate not acting as an Appellate Court is not authorised to take additional evidence or order it to be

taken—6 C I J 231. But the High Court acting as a Court of revision, under Sec. 439 has the power of an Appellate Court to direct evidence to be taken—Ibid.

A proceeding under section 125 is neither appellate nor revisional consequently this section has no application to an order under section 125. Therefore, when a District Magistrate finds that an order directing the furnishing of security is irregular, he should set it aside, he has no jurisdiction to remand the case in the Magistrate for further evidence—20 Cr L J 221 (Pat).

Enquiry by Police.—This section does not warrant an Appellate Court setting a case to the Police for investigation if it had been originally started by a complaint in Court—1900 A W N 130.

1156 When additional evidence should be taken, and when not:—Additional evidence may be taken under this section only if the Appellate Court thinks it to be necessary and the necessity for taking such evidence must be apparent from something on the record and cannot be derived from external information—3 I B R 114. The mere fact that some fresh evidence has been discovered after the filing of the appeal does not empower the Appellate Court to allow the fresh evidence to be adduced unless the Court thinks it necessary—*Gurnamurthi v Read* 9 M I T 323. When the Original Court has taken all the evidence produced by the prosecution which had ample opportunities to do so and that evidence has failed to sustain the charge an Appellate Court will not except in every exceptional circumstances direct that additional evidence should be taken—5 All 217. This section does not empower an Appellate Court to take additional evidence in a case where there is no evidence legally capable of sustaining the charge. But where the conviction by the lower Court has been based upon some *prima facie* evidence which might legally sustain the charge, but which in the opinion of the Appellate Court is not quite satisfactory the Appellate Court may under this section direct additional evidence to be taken—18 W R 31. Where the Lower Court has refused to examine certain witnesses for the defence and the accused has been prejudiced in his defence by such refusal, the Appellate Court may direct the Lower Court to take the evidence of such witnesses and to certify the same to it—1 Mad 375. 3 P I J 632. Similarly where the prosecution had preferred to adduce evidence and the Magistrate had prevented them from doing so the Appellate Court could call for fresh evidence under this section—*Jiremath v Las* 36 Mad 45. 22 M L J 73. 12 Cr I J 585. Where the Appellate Court thinks that the evidence of some more witnesses who were not examined, in the lower Court is necessary it cannot order a retrial on that ground but should proceed under this section by summoning and examining those witnesses—16 A I J 325. 31 Cal 710. See also 1 P I J 99.

The Appellate Court will take additional evidence to supply a defect in formal proof (e.g. proof as to whether the sanction for the prosecution was granted by the proper authority), when the conviction for a serious charge is sedition which is otherwise sustainable, is likely to be upset for want of such proof—*Lakshirajulu Varlu v King Emp* 42 Mad 585.

Recording reasons—Before taking additional evidence the Court must record its reason for so doing—42 Mad 885, 8 M 1 T 418. But omission to do so is a mere irregularity curable by sec 531—9 M 1 T 406.

Revision of order allowing additional evidence—The powers of an Appellate Court to take additional evidence should not be unduly restricted. The scope of sec 428 is *prima facie* not limited by any consideration save that the Appellate Court should be of opinion that additional evidence is necessary and should record its reasons. In India the onus is placed upon the Court not merely to listen to the evidence but to inquire to the utmost into the truth of the matter and so to secure justice. Accordingly if any restriction is to be placed upon the power conferred on the Appellate Court by sec 428 it certainly cannot be that negligence or inadvertence on the part of the prosecution is to be allowed to effect a miscarriage of justice. On the contrary the enactment is directed to the attainment of justice even at a late stage of the proceedings by the introduction of further materials which the Court considers to be essential to a just decision of the case. Consequently the Court of Revision will not always interfere with the order of the Appellate Court allowing additional evidence, even where the Court of Revision might itself, in the exercise of its discretion as an Appellate Court have declined to admit such evidence. To justify interference in revision the Court must be satisfied that the Appellate Court committed an error of law which has prejudiced the accused on the merits—*Akhatar v Emp* (P) T 431 26 Cr I J 1171 A I R 1925 Pat 326.

1157 Procedure—This section empowers an Appellate Court to merely call for additional evidence and not to call upon the Lower Court to give its finding upon such evidence. Where the Appellate Court calls for such finding of the Lower Court the order of the Appellate Court will be set aside—9 M 1 T 406 1914 M W N 778. When the subordinate Court is directed to take additional evidence, it shall merely certify the evidence to the Appellate Court and is not entitled to give any finding on such evidence, such duty being left to the Appellate Court—3 B I R A C 62, and if the Magistrate gives any finding on such evidence, the Appellate Court cannot accept such finding but must form its own conclusion upon the evidence so taken—14 Cr I J 797 (Mad) 1914 M W N 778.

The accused persons were convicted by the trial Court without any examination under sec 342 and the Appellate Court directed as follows:

'The lower Court will examine the accused under sec 342 and call upon them to adduce any defence evidence. If they choose to give any and if examination of the defence witnesses be well submitted the record to this Court. The appeal will then be heard by me on the merits.' It is that the Appellate Judge's procedure was erroneous. He appears to have followed the provision of the Civil P Code rather than of the Crim P Code. He should have set aside the convictions and sentences and remanded the case to the first Court for that Court to deal with the case on the merits. If in compliance with sec 342, as if it were before that Court again for the first time—*Uthman Samad v R* 40 C I J 319 26 Cr I J 313 A I R 1925 Cal 172.

This section does not provide that the accused should be re-examined under sec 342 after the evidence of the witnesses for the prosecution is taken on remand. The examination of the witnesses after remand may be made even in the absence of the accused and the provisions of sec 342 do not apply to sec 428—*Mohiuddin v Emp* 4 P L J 288; 1 P L J 154; 26 Cr L J 811; A L R 1925 P L J 414.

1158 Power of Appellate Court after taking additional evidence:—The Appellate Court cannot consider and determine a new case disclosed by the additional evidence except in so far as to affirm or modify or set aside the sentence under appeal or to act as otherwise provided by sec 423 (b). An Appellate Court cannot under this section pass a fresh sentence, which may be subject to further appeal. Under the 1898 Code the Appellate Court is directed to dispose of the appeal finally and not to pass a new judgment sentence etc. (is under the old Code of 1861) which may be further appealed against—27 Cal 372 (overruling 2 W R 13).

The Appellate Court can rehear the appeal after obtaining the additional evidence. Both under the Criminal Procedure Code and under sec 107 of the Government of India Act of 1925 the High Court has full jurisdiction and power in criminal revision to direct the Lower Appellate Court to rehear on appeal after obtaining additional evidence certified by the trial Court—*Mahomed v A P* 3 P L J 632.

1159 No further appeal:—An appellant whose appeal is dismissed by an Appellate Court, after it has taken additional evidence under this section, has no further right of appeal. According to sec 420 except in certain cases, judgments and orders passed by an Appellate Court upon appeal are final—27 Cal 372; 8 W R 51; 15 W R 33. If additional evidence is taken, it does not entitle a party to appeal from a finding upon such evidence to the High Court upon the merits, treating it in substance as an original judgment—6 B H C R 14.

1160 Sub section (3)—In only one instance is a Court of Session authorised to record evidence in the absence of the jury or the assessors and that is when additional evidence is called for by the Appellate Court. But in no other cases can the presence of the jurors be dispensed with and therefore, where in a trial for murder the Sessions Judge, relying on a statement made by the deceased, convicted the accused and the necessary evidence to prove that statement was not recorded by the Judge until after the assessors had been discharged, it was held that the error vitiated the trial and it was not covered by the provisions of sec 537—15 All 136.

429 When the Judges composing the Court of Appeal
 Procedure where Judges are equally divided in opinion, the case of Court of Appeal are with their opinions thereon, shall be equally divided. laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

1161 Scope of section:—This section applies not only to appeals but to revision proceedings as well. Therefore, if two learned Judges differ in a Criminal Revision case, section 439 read with sec 429 requires the case to be decided by a third Judge—40 Mad 276, 27 Cal 892 (at p 910) 27 Cal 501 (at p 505). See sec 439 (1).

The principle of this section applies also to a reference under sec 37. In case of difference between the Judges on a reference under sec 37 the rule of this section is to be followed—15 Bom 452.

A third Judge to whom a case has been referred under sec 429 does not constitute a Division Bench, and therefore he cannot make a reference to a Full Bench—*Islim v Hinday* 29 C W N 475 41 C L J 35-26 (Cr L J 915).

Case:—Where upon a difference of opinion between two Judges the case is laid before a third Judge, the whole case is referred to the third Judge and not merely the point or points on which the Judges differed and it is the duty of the Judge to whom the case is referred, to consider all the points involved before he delivers his opinion, and it will be recorded in the opinion of such Judge that the judgment will follow—38 Cal 204. But in a later case of the same High Court it has been held that the third Judge cannot differ from the referring Judges on a point on which both the referring Judges agreed unless there are strong grounds for doing so—22 C W N 445. In other words it lays down that the third Judge can consider only the points on which the referring Judges have disagreed, and not all the points. To remove this conflict of opinion it was proposed by the Select Committee of 1916 to add the following proviso to this section: 'Provided that if either of the Judges composing the Court of appeal so require the appeal shall be reheard before them and another Judge or if the Chief Justice so directs, before three other Judges, and the judgment or order shall follow the opinion of the majority of the Judges so rehearing the case.' But the Joint Committee of 1922 deleted this proviso as it was disapproved of by many Judges and also because the difficulty which the amendment intended to meet was of rare occurrence. A similar proviso was intended to be added to section 378 and it was omitted by the Joint Committee for the same reason. See clauses 98 and 113 of the Report of the Joint Committee of 1922.

But there can be no question that where there are two accused, and the Judges are agreed in opinion with regard to one of them but are divided in opinion as regards the other the case which is laid before the third Judge is only the case of the prisoner with regard to whom the Judges are divided in opinion—38 Cal 202.

430 Judgments and orders passed by an Appellate

Court upon appeal shall be final

Finality of orders on appeal except in the cases provided for in

Section 417 and Chapter XXXII

See 27 Cal 372 and 6 B H C R 64 cited in Note 1153 under sec 48

1162 A sentence is said to be final when it cannot be set aside or

interfered with by any Court or authority, whether on appeal or otherwise—12 Cal 536

Where the Sessions Judge rejected a criminal appeal on the ground that it was barred by limitation, the rejection was final and the Sessions Judge was not competent, on a later representation by the prisoner, to admit the appeal again—19 Bom 732 1887 P R 24 An order of summary rejection of an appeal is final, it is immaterial whether the order is passed before or after the papers are called for—4 Bom 101 An order passed by a Sessions Judge declining to interfere with a sanction granted by the Lower Court is final and is not open to review or revision except in the manner laid down in Chapter XXXII—23 Bom 50 But an order rejecting an appeal summarily for non appearance of the appellant is an improper order and it is open to the Court to rehear the appeal and deal with it—7 M H C R App 29, 46 Mal 382 (403) 5 N I R 76

431 Every appeal under Section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant

1163 The Code has made no provision for the continuance of the appeal by the heir or devisee or executor of the deceased convict or by any other person The appeal abates on the appellant's death—2 Bom 564, 19 Bom 714 But an exception is made as regards an appeal from a sentence of fine An appeal against a sentence of fine should not abate by reason of the death of the accused, because it is not a matter which affects his person, but one which affects his estate—*Select Committee's Report* (1898) See also 1919 P R 8

The principle of this section applies also to revisions, and therefore where a fine inflicted upon an accused was a heavy one and its recovery from the estate would entail hardship on the widow, it was held that the application for revision filed by the accused did not abate on his death as regards the sentence of fine and the High Court in revision remitted the fine—*Daulat Ram v Crown* 1919 P R 8

Compensation awarded under Section 250 is recoverable as if it were a fine, therefore an application for revision against an order of compensation does not abate on the death of the applicant, but can be prosecuted by his legal representatives—1908 P R 24

CHAPTER XXXII

OF REFERENCE AND REVISION

432 A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises in the hearing of any case pending before

Reference by Presidency Magistrate to High Court.

him, or may give judgment in any such case subject to the decision of the High Court on such reference and, pending such decision, may either commit the accused to jail, or release him on bail to appear for judgment when called upon.

1164 This section empowers only a Presidency Magistrate to refer a question of law. No other Magistrate has power to make a reference. A District Magistrate cannot refer. He can only bring a case before the High Court by way of revision—1 S L R 4. A Sessions Judge has no power to refer a case to the High Court on a point arising in an appeal pending before him—13 A I J 477.

Under this section there can be a reference to the High Court only on a question of law and not on a question of fact—Ratanlal 838, Ratanlal 539. And the High Court, upon a reference under this section, can deal only with the particular points of law referred to it, it cannot deal with the facts of the case, nor any other objection against the proceeding of the Court of the Presidency Magistrate—33 Cal 113.

The Magistrate can refer a question which has arisen in the hearing of the case. He cannot make a reference on a question of law where the accused has been merely placed before him and the hearing of the case has not begun—1 Bom L R 521.

433 (1) When a question has been so referred, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order.

(2) The High Court may direct by whom the costs of such reference shall be paid.

1165 In a reference by a Presidency Magistrate to the High Court as to whether on the facts stated any offence has been committed by an accused person, the prosecution has to make out that the accused has committed the offence, and therefore the counsel for the prosecution has the right to begin—19 Cal 380.

The order passed by the High Court on a reference under section 432, is conclusive both as to the merits of the case and as to the quantum of punishment—1890 A W N 225.

The High Court sitting in appeal cannot review an order passed by it under this section—Ratanlal 638.

434 (1) When any person has, in a trial before a Judge of a High Court consisting of more Judges than one and acting in the exercise of its original criminal jurisdiction, been convicted of an offence,

Power to reserve questions arising in original jurisdiction of High Court

the Judge, if he thinks fit may reserve and refer for the decision of a Court consisting of two or more Judges of such Court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial.

(2) If the Judge reserves any such question the person convicted shall, pending the decision thereon, be remanded to jail, or, if the Judge thinks fit, be admitted to bail, and the High Court shall have power to review the case or such part of it as may be necessary, and finally determine such question and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass judgment or order as the High Court thinks fit.

1166 Reference discretionary—The words 'may reserve and refer' show that it is in the discretion of the single Judge whether or not he will reserve a point of law for the opinion of the High Court consisting of two or more Judges—in B II C R 75 and thus discretion of the single Judge is not reviewable under clause 26 of the Letters Patent—*Ibid*.

When reference can be made—A reference can be made when the point of law has arisen in the course of the trial where a point is raised before the accused is called upon to plead it cannot be referred to the Full Bench, because the point cannot be said to have arisen in the course of the trial—28 Cal 211.

Right to begin—Where on the application of the prisoner's counsel, a question of law has been reserved for the decision of the Court under this section the counsel for the prisoner has the right to begin—8 Bom 200.

1167 Sub-section (2)—*High Court's power to review the case*—The High Court in considering a point of law reserved under this section can review the whole case if it is of opinion that any evidence has been improperly admitted or rejected and can affirm or quash the conviction—1 Cal 207, 3 B II C R 358 17 Cal 642 4 C W N 433 2 Bom 61, 32 Bom 111.

This is the only section which enables the Division or Full Bench of the High Court to review the judgment of a single Judge exercising original criminal jurisdiction. The powers of a single Judge in a matter with which he has jurisdiction to deal are the powers of the Court and cannot be in any way controlled (except as under this section) by a Division or Full Bench of the Court. As no appeal lies, no revision lies—1909 P R 1. In the absence of any reservation of a question of law by the trying Judge, the High Court is precluded from re-opening a question which has been decided by the single Judge presiding at the trial—32 Bom 111.

The High Court can review the judgment or order of a Judge passed in the exercise of his *original jurisdiction*. A Division Bench of the High Court has no power to alter or review the order of a High Court pro-

mounted in the exercise of its *revisional* jurisdiction—7 All 672, 10 Bom 176, 5 W R 61, 23 Bom 50, 19 Bom L R 695

The Code does not include any provision for reviewing the judgment of subordinate Courts. The High Court can only revise such judgment under the ample powers conferred by section 437—19 Bom 732

435 (1) The High Court or any Sessions Judge or

District Magistrate or any Sub-di-

visional Magistrate empowered by the

Local Government in this behalf may

call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record

Explanation—All Magistrates whether exercising original or appellate jurisdiction shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of s. 437

(2) If any Sub-divisional Magistrate acting under Sub-Section (1) considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate

(3) *Omitted*

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them

Change:—The italicised words at the end of sub-section (1) and the *Explanation* have been added and sub-section (3) has been omitted by s. 116 of the Crim. Pro. Code Amendment Act XVIII of 1923. Sub-section (3) stood as follows:—

“(3) Orders made under sections 143 and 144 and proceedings under Chapter XII and section 176 are not proceedings within the meaning of this section

By reason of the omission of this sub-section the above orders and proceedings are now subject to revision under this Code. See notes under sss. 143, 144, 145-148, and 176

In moving for this amendment, i.e., the omission of subsection (3), Dr Gour observed :—The intention of this amendment is to preserve to the High Courts revisional jurisdiction in cases disposed of under sections 144, 145, etc. Honourable Members are aware that not only the Chartered High Courts but all the non-chartered High Courts such as the Chief Courts and the Courts of the Judicial Commissioners do, under various local Acts possess a statutory power of revision in such cases.

Now, sir, I ask the House a simple question. If it is a fact that all the Courts, chartered and non-chartered possess this power, then I say clause (3) of section 435 is superfluous—may mislead. If it is a fact that they do not possess that power in that case I ask the House to endorse my opinion that this power is both salutary and necessary. It will not be denied that this power has in fact been exercised under section 107 of the Government of India Act and other Local Acts. If so this clause conflicts with the express provisions of section 107 of the Government of India Act. It creates utter confusion. If the High Courts have power under section 107 of the Government of India Act to exercise the general power of superintendence over the subordinate Courts, what object is served by inserting this clause that orders under sections 143, 144 and 145 shall not be open to revision under section 435. I have therefore confidence that this House will vote for my amendment and place the powers of all the High Courts beyond any shadow of doubt. And I hope that the Government out of sheer consistency will accept my amendment.—*Legislative Assembly Debates* 8th February 192, pages 206—207.

1168 To whom application should be made.—The revisional jurisdiction of the District Magistrate and Sessions Judge is concurrent with that of the High Court. But although the three tribunals have concurrent powers the aggrieved party should in the first instance seek his remedy before the lower tribunal and not in the High Court direct. In the matter of applications in criminal revision to the High Court, it is a recognised rule of practice that a previous application to the Lower Court (District Magistrate or Sessions Judge) should be considered an essential step in the procedure irrespective of whether such lower Court has or has not power to grant the relief claimed, and that failure on the part of the applicant to submit his application to the Lower Court will operate as a bar to the application being entertained by the High Court.—43 All 437, 14 Cal 88, 36 Cal 643, 48 Cal 534, 50 Cal 423, Ratanlal 491, 14 Bom 331, C. P. D. L. 47, 1887 A. W. N. 105, 1890 A. W. N. 164, 41 All 367, 28 All 268, 30 All 116, 3 P. L. J. 302 (1923) M. W. N. 837, 18 I. W. 236. *Sat Narain v. Emp.* 25 O. C. 37. A person invoking the revisional jurisdiction of the High Court is bound according to the rules of that Court to apply first to the Sessions Judge or District Magistrate. If the latter considers that a case for revision is made out he reports the matter to the High Court under section 438 with a view to the High Court exercising its revisional powers under sec. 439. If the Sessions Judge or District Magistrate considers that the application should not be entertained he rejects it, leaving the aggrieved party to apply to the High Court direct.—*Ibdu Wahid v. Abdullah*, 45 All 650 (661, 662). Thus, where the District

Magistrate dismisses a complaint under the provisions of sec 203, the High Court will not entertain an application by the complainant asking for further inquiry under s 436, when no application for that object has been made to the Sessions Judge—28 All 268 But when an application to the High Court for revision has already been heard and the rule granted the High Court will not afterwards discharge the Rule on the ground that the petitioner ought to have moved the Sessions Court in the first instance but will proceed to dispose of the Rule on the merits—*Hidal Matlob v Nanda Lal* 30 Cal 432 So also, the High Court will not allow a point to be raised for the first time before it, when such point was not taken by the petitioner in his revision application presented to the Sessions Judge. The object of requiring an application for revision to be presented first to the Lower Appellate Court is that the High Court in dealing with the matter may have before it the reasoned opinions of two Courts on the points at issue and this object will be largely defeated if applicants are allowed to take in the High Court points which they did not press in their application in revision in the Court below—*Emp v Hurul Mal* 45 All 526 (528)

1169 Call for record—The powers of a Sessions Judge to call for and examine the records under this section are powers which can be exercised at all times—Weir 538 Records may be called for even after the prisoner has served out his sentence—7 All 135 Even after the death of the prisoner pending an appeal before the Lower Appellate Court the High Court has the right to call for the records and make such order thereon as it may deem to be due to justice—2 Bom 564 When records are called for under this section the inferior Courts must forward the original records and not merely copies thereof—*Raunlal* 128

The Courts enumerated in this section have power to call for the records of subordinate Courts for the purpose of satisfying themselves as to the correctness, legality or propriety of the orders passed by the lower Courts. The object of the Legislature in this section is to set right some patent defect or error. In the absence of some well founded suspicion it is inexpedient for the High Court to scrutinize orders of discharge or other orders passed by the lower Courts which upon the face of them bear token of careful consideration and appear good and lawful. This section does not give the High Court a roving commission either in the direction of stamping with approval the proceedings of a Lower Court or in the direction of questioning about and looking to see if possibly under a fair record there lies some trace of possible error—*Emp v Dukes* 1809 A W N 135

"Any Proceedings"—Under the Code of 1872 the words were 'judicial proceedings' and the High Court could call for and examine the records of a judicial proceeding only but now the High Court can call for and examine the record of any proceeding e.g. an order by a Magistrate under section 517—2 Weir 538

It is competent to the High Court to call for the record of any proceeding of an inferior Criminal Court and revise the same whether it is of a preliminary or final nature—1891 A W N 102 Hence, where

the District Magistrate passed a preliminary order calling upon a witness who gave evidence before him to show cause why he should not be prosecuted for perjury, the High Court was competent to revise the order—14 A L J 85.

1170. Power of revision after prior refusal.—An accused person has no right to come in revision more than once. Where his first application for revision has failed the Court has a discretionary power not to entertain a second application at all based on the same point as the first—*Furp v Kohna Puri* 45 All 11 (12). In 5 Bur I T 3rd it has also been held that when a Magistrate has already dealt with a case in revision and decided that there was no cause for interference he cannot subsequently direct further inquiry, because such an order would be one reviewing the prior order and is prohibited by sec 369. The Madras High Court also holds that once a criminal revision case has been dismissed by the High Court for default of payment of printing charges, it is a final disposal and it is not competent to the High Court to rehear the case or entertain a fresh application for revision because there can be no review of the prior order of dismissal—44 M I J 27. So also if a revision petition is dismissed for default of appearance of the pleader who filed it the High Court is not competent to restore to its file such a petition—*In re Ranga Rao* 23 M I J 371. But the Calcutta High Court holds that there being no provision in the Code for dismissing a revision petition for default of appearance the order of dismissal is no 'judgment' at all within the meaning of sec 369 and the High Court is not debarred from rehearing the revision petition—46 Cal 60.

The Allahabad High Court has laid down in a recent case that if a matter has once come before the High Court in revision not on the application of the accused but on the motion of the Sessions Judge who has referred the matter to the High Court and the High Court looks into the matter and comes to the conclusion that there is no ground for revision the accused is not thereby deprived of his right to apply to the High Court in revision—*Furp v Kohna Ram* 45 All 11 (12). The Burma Chief Court likewise holds that where a Sessions Judge of his own motion called for proceedings in which a Magistrate had discharged certain accused persons but finding on record no cause of interference returned the proceedings to the Magistrate without taking further action and where subsequently the complainant applied to him to have the case reopened and the Sessions Judge holding himself to be barred from taking further action returned the application to be presented to the Chief Court it was held that the mere fact that he Judge had declined to interfere suo motu on a prior occasion did not preclude him from hearing the complainant and if the arguments led him to do so from altering his view—*Tun Mying v Kaul San* 81 B R 377.

1171. Inferior Criminal Court.—*Inferior*.—The term 'inferior' must be constructed to mean judicially inferior, i.e. a Court over which the Court proceeding under sec 435 has appellate jurisdiction—10 Cal 268. 'Inferior' means one who is statutorily incompetent to hold or exercise equal powers. It carries with it the idea of subordination.

which means 'inferiority in rank'—9 Bom 100. The term 'inferior' in this section includes the term 'subordinate' as used in section 436. The reason for the employment of the term 'inferior' in Sections 435 and 437 is that in both these sections the Court of Session and the District Magistrate are combined and the Magistrates other than the District Magistrate though subordinate to him are not directly subordinate to the Court of Session. It was therefore necessary to employ a term applicable to the relation of the Magistracy both to the supervising authority and to the appellate tribunal—8 Mad 18.

The District Magistrate is competent under this section to call for and deal with the record of any proceeding before any Magistrate of whatever class in his own district—12 Cal 473. A first class Magistrate is subordinate to the District Magistrate for the purposes of this section—1894 P R 10, ~ All 853. The District Magistrate can call for and examine the record of any first class Magistrate within the district even though the latter has been appointed as an Additional District Magistrate—1908 P R 25. *Contra*—12 Bur L J 46, where it has been held that a District Magistrate cannot call for the record of any proceeding before an Additional District Magistrate. But now see the new sub-section (3) of section 10 under which the Additional District Magistrate is deemed to be inferior to the District Magistrate.

A District Magistrate is not competent to refer the proceedings of a superior Court (Sessions Court) to the High Court—41 Bom 47, 46 All 851 (855), 28 All 91, 36 All 378, 10 All 146, 9 All 362, 18 Cal 180, 6 C L R 345, 23 Cal 250, 2 N I R 149. If, therefore, the District Magistrate considers that there has been a miscarriage of justice in the Sessions Court, he should ask the Public Prosecutor to move the High Court—9 All 362, 12 All 434, 1 S I R 40, 1912 M W N 812, 2 N I R 149, 6 Bom 1 R 1099, 8 M L J 88. See Note 1198 under sec 438.

As a Court of revision the District Magistrate is not inferior to the Sessions Judge. But where he passes an order as a Court of original jurisdiction, he is inferior to the Sessions Judge—*Emperor v. Balwant* 24 Cr L J 616 (Oudh), 13 O C 108, 12 Cal 473, 1889 A W N 100. This is now made clear by the *Explanation* newly added. Even a District Magistrate empowered under sec 30 is also inferior to the Sessions Judge—*fallon v. Crook* 1904 P R 13. The *Explanation* further makes it clear that "for the purposes of this section a Magistrate exercising appellate jurisdiction is inferior to the Court of Session. The point was previously open to doubt"—*Statement of Objects and Reasons* (1914). The District Magistrate sitting as a Court of appeal is an inferior Criminal Court to the Sessions Judge and the latter can refer an appellate judgment of the former to the High Court—3 Lah 23, *Dardari v. Emp.*, 23 A I J 894, 26 Cr L J 1282.

The Court of a Presidency Magistrate is an inferior Criminal Court in respect of the High Court, and the High Court can call for the proceeding of such Court—*Malik Pratap v. Khan Mahomed* 36 Cal 994 (997), *Charoobala v. Barendra* 27 Cal 126 (129). A Municipal Magistrate

appointed to deal with offences against the Calcutta Municipal Act is an inferior Court in respect of the High Court—*Ram Gopil v Corporation of Calcutta*, 52 Cal 962 29 C W N 898 26 Cr 1 J 1533

A single Judge of the High Court is not inferior to the Division or Full Bench of the High Court for the purposes of this Section—1909 P R 4, 1909 P R 8 but he may be so only for the purposes of Sec 434 See notes under Sec 434

'Criminal Court'—The High Court, etc., cannot, under the provisions of this section, revise an order passed by any Court other than a Criminal Court. A Magistrate hearing an appeal under Sec 86 of the Bombay District Municipalities Act is not a Criminal Court within the meaning of this Section—9 Bom L R 1147. A Court acting under section 3 of the F B & Assam Disorderly Houses Act is a Criminal Court within the meaning of this section, and the High Court has jurisdiction to interfere under secs 435 and 439—*Rajani Akhmtawali v Primatha* 37 Cal 287. The Secretary to the Government of Bengal issuing a warrant under the Goondas Act (Beng Act I of 1923) is such Secretary is not an officer or Court possessing criminal jurisdiction, and is not an inferior Criminal Court within the meaning of sec 435 of this Code, although under sec 4 (2) of the Goondas Act he is given all the powers of a Presidency Magistrate therefore the High Court cannot interfere, under sec 439, in the matter of the warrant issued by him—*Bhimraj Benia v Emperor* 51 Cal 460 (467 468) 26 Cr 1 J 10 A I R 1924 Cal 698. The term inferior Criminal Court in this section does not include a Civil Court exercising its powers under sec 476 *infra*—16 A L R 23

1172 Orders which are not open to revision—The proceedings which are open to revision are the proceedings of a Court. Therefore executive orders are not liable to revision under this section.

The following orders being executive (and not judicial) orders are not open to revision—

(1) A Magistrate's order directing the observance of Municipal By-laws which prohibit the slaughter of votive animals in private houses—1885 A W N 258

(2) An order under Sec 36 of the Legal Practitioners Act—1909 P R 11

(3) An order passed by a District Magistrate forbidding certain petition writers to practise within the precincts of his Court—1907 A W N 175

(4) An order of a Collector fixing a Mulhtar in a *fulana* proceeding for making certain false statements—10 C I R 14

(5) An order by a District Magistrate under Sec 3 of the Sind Frontier Regulation—5 S I R 54

(6) An order passed by a Magistrate under Sec 41 43 or 44 of the Bombay District Police Act (IV of 1890)—15 S I R 126, *Ritanlal* 1622 *Ritanlal* 540, 12 Bom L R 1039

(7) A general order by a District Magistrate prohibiting unregistered pleaders from practising in the Criminal Courts in his district—L J 566

(8) A Magistrate's order under Sec 17 of Act V of 1861 appointing certain persons as special constables—20 O C 229

(9) An order by a District Magistrate for execution of a warrant issued by a Political Agent under Sec 7 of the Extradition Act—42 Cal 793

1173. Orders which are open to revision:—The following orders being judicial orders, are open to revision—

(1) An order by a Magistrate under Sec 94 of this Code, refusing to order the production of certain documents—19 Cal 52

(2) An order passed by a Magistrate under Sec 419 of the Calcutta Municipal Act—31 Cal 287, 34 Cal 341

(3) An order passed by a Magistrate under Secs 514 and 515 of this Code—1905 P R 15

(4) An order under Sec 517 of this Code—2 Weir 538

(5) An order by a Magistrate under Sec 113 of the Railways Act (IX of 1890)—1891 P R 13

(6) An order by a Magistrate under F B and Assam Disorderly Houses Act—37 Cal 287

(7) An order purporting to have been made under Sec 283 of the Cantonment Code (1899)—1909 P R 9

(8) An order passed by a Magistrate under Sec 161 (2) of the Bombay District Municipalities Act (III of 1901)—43 Bom 864

(9) An order passed by a Magistrate under Sec 2 of the Workmen's Breach of Contract Act directing either the return of the advance or specific performance of the contract—43 Bom 607

(10) An order passed by a Magistrate under the Upper Burma Ruby Regulation 1897 is open to appeal or revision under the Cr Pro Code, although under the Regulation no specific provision appears to have been made for appeal or revision—*Haung Po Loon v A F*, 2 Rang 123 (123)

When an order is passed by a judicial officer in a matter coming within the purview of law and justice and within the scope of the authority of the Courts, the mere fact that the officer passing the order states that he is acting not as a judicial officer but in his executive capacity does not oust the revisional jurisdiction of the High Court—1908 P R 4

Powers of High Court in revision:—See notes under sec 439

1174 Powers of other Courts in revision:—A Sessions Judge or District Magistrate cannot, after calling for records under this section take fresh evidence—1882 A W N 146 3 Bom I R 677

The powers of a Sessions Judge under this section may be put in force not only on matters coming before the Judge in Court, but also on matters coming to his knowledge on reliable information—2 Weir 538

A District Magistrate cannot take cognizance of a case by way of revision against a prisoner who has not appealed. Thus A and B were tried together and convicted of the same offence by a 2nd class Magistrate. A alone appealed but in hearing his appeal the District Magistrate took cognizance of the case against B also and set aside the conviction and sentence of both the accused, and ordered their retrial. *Held* that the District Magistrate had no jurisdiction to reverse the conviction and sen

tence as regards B or to take cognizance of the case against him except by reporting it to the High Court—*Rational* 358 3 Bom I R 677

A Magistrate who calls for and examines the calendar of a case tried by a Subordinate Magistrate under this Section, does not act in a judicial proceeding and therefore cannot order the prosecution of any person under Sec 476, if the matter was not brought before him in a judicial proceeding—7 Mad 560, 15 M I J 489 But see sec 476 as now amended

Sessions Judges and District Magistrates when exercising their powers under this section should pay particular attention to the following points in the proceedings of the inferior Criminal Courts (1) the rash issue of process (2) the dealing with disputed claims of right under colour of a charge of criminal trespass or mischief, and convictions held of the former offence without a finding as to the criminal intent, (3) the indiscreet imposition of fines beyond the means of offenders (4) the light punishment by inferior Courts of offences requiring severe punishments in cases which ought to have gone up to a superior Court for enhanced punishment, (5) the imposition of heavy fines in addition to imprisonment with a view, in default of payment, to extend the term of imprisonment beyond the ordinary powers of the Magistrate to inflict (6) the exaction of excessive bail or excessive security for keeping the peace or for good behaviour (7) unnecessary delay in the trial of cases—*Mad II C Rul 1st 12 1884 para 17*

Suspension of sentence Release on bail—By the italicised words added at the end of Subsection (1) power is given to suspend a sentence or to release an accused on bail pending the examination of the record, thus avoiding the result should delay occur, that the sentence may have been served before orders are passed—*Statement of Objects and Reasons (1914)*

1175 Sub section (4)—The intention of the Legislature in enacting this clause is to prevent the Sessions Judge and the District Magistrate from simultaneously exercising their powers of revision and to prevent them from exercising their powers in such a way as would amount to one of them as it were hearing in appeal from or reversing an order passed by the other—4 O C 119

Under this section the District Magistrate and Sessions Judge have co-ordinate powers and therefore after an application for revision has been made to the District Magistrate no further application can be entertained by the Sessions Judge even though the Sessions Judge was not asked to revise the order passed by the District Magistrate in revision, but only to call for the record and report the Magistrate's order to the High Court—17 M I J 153 nor can the Sessions Judge act *suo motu* to call for the records under this section, after an application has been made to the District Magistrate—1912 P R 10 Where a complaint having been dismissed by the Dy Magistrate under sec 203 a fresh complaint was made before the District Magistrate in revision, who again dismissed the complaint it was not open to the Sessions Judge to order further inquiry into the complaint—*Sheik Suddiq v Sheikh Chakuri*, C W N 451 Similarly, the District Magistrate is prohibited by this section from entertaining an application for a direction to com

accused, after a similar application to the Sessions Judge has been refused the reason for the prohibition being the avoidance of a conflict between the orders of the two District authorities having co-ordinate powers in the matter—26 Mad 477. But where an application for revision preferred to the Sessions Judge has been dismissed for want of prosecution the District Magistrate is competent to entertain a second application for revision and exercise his powers under this section—4 O C 119.

Where a District Magistrate called for the record of a case in which the accused had been discharged, and where the complainant subsequently presented an application to the Sessions Judge to have the order of discharge of the accused set aside and the Sessions Judge sent for the proceedings and after a perusal of them ordered the commitment of the accused for trial, it was held that the Sessions Judge's action was not illegal since no application was made to the District Magistrate, and as the District Magistrate's action in calling for the record was not equivalent to entering an application—8 I B R 365.

436 On examining any record under section 435

Power to order in or otherwise, the High Court or the
 quiry Sessions Judge may direct the District
 Magistrate by himself or by any of the Magistrates subordinate
 to him to make, and the District Magistrate may himself
 make or direct any subordinate Magistrate to make, further
 inquiry into any complaint which has been dismissed under
 Section 203 or sub section (3) of Section 204, or into the case
 of any person accused of an offence who has been discharged

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made

Change:—This is the old section 437 and the old section 436 has been renumbered as sec 437. The reason is that the words "instead of directing a fresh inquiry" occurring in the old section 436 (now 437) refer to the inquiry which can be directed under the old section 437 (now 436) and it is therefore necessary to put the latter section first.

The words "person accused of an offence" have been substituted for the words "accused person" occurring in the old section. There have been different rulings as to whether the expression accused person in this section means any person accused of an offence and it is now made clear that it does.—*Statement of Objects and Reasons (1914)*. The proviso has been newly added. "We have added a proviso to this section to give effect to the rule laid down by the Courts that a fresh inquiry should not be made into the case of a person who has been discharged unless he has had an opportunity of showing cause"—*Report of the Joint Committee (1912)*.

1175A Scope:—This section does not speak of *Presidency Magistrates* and the High Court has no power under this section to direct further inquiry into a case of dismissal of complaint or discharge of accused by a Presidency Magistrate—*Kedae Nath v Khetranath* 6 C L J 705. *Debi Bux v Jutmal*, 33 Cal 1282 *Charubala v Barendra* 27 Cal 120 But the High Court can exercise such power under sec 439 see 36 Cal 994 28 Cal 652 and 26 Cal 746 cited in Note 182 under sec 203

1176 Who can direct further inquiry:—The mention of the three tribunals together, the High Court, the Sessions Judge and the District Magistrate shows that the Legislature intended them to have the same power with regard to the matter dealt with under this section—15 Cal 608 32 Cal 220 But though the powers of the three tribunals are co-ordinate still as a matter of procedure the application should be made at first to the lower tribunal. Thus where a District Magistrate has dismissed a complaint under sec 203 the High Court will not entertain an application for revision under this section unless a previous application has been made to the Sessions Judge. The High Court will interfere only as a Court of last resort—28 All 268 1904 1 W N 232 So also where the District Magistrate and Chief Court have concurrent jurisdiction, an order under this section will be more conveniently made by the District Magistrate than by the Chief Court—1888 P R 7

Since the District Magistrate and the Sessions Judge have co-ordinate powers under this section to direct further inquiry it follows therefore that where a District Magistrate has directed an inquiry into a case and decided upon it the Sessions Judge is not competent to order further inquiry under this section—*Shank Sidiq v Shank Chakuri* 17 C W N 451 See Note 1175 under sub sec (4) to Sec 435 In like manner, when the Sessions Judge has made an order for further inquiry under this section, the District Magistrate cannot make a contrary order, but should submit the matter to the High Court through the medium of the Public Prosecutor—*Queen Empress v Prithi* 12 All 434 When a further inquiry has been refused by one of the officers it should not be ordered by the other if the Sessions Judge is of opinion that the order of the District Magistrate for further inquiry is wrong it is open to the Judge to refer the matter to the High Court under sec 438 but he has no power to review the order passed by the District Magistrate under this section—22 Cal 573

A District Magistrate can make or can direct a subordinate Magistrate to make further inquiry into a case in which an order of discharge may have been passed by himself or by a subordinate Magistrate—28 Cal 102 1902 P R 9

A Deputy Magistrate placed in charge of the current duties of the District Magistrate is not thereby invested with the jurisdiction of a District Magistrate unless this section—11 Cal 236

Further inquiry after prior refusal—When a District Magistrate has once decided under this section that there is no case for further inquiry he cannot subsequently order further inquiry such an order would be an order reviewing the earlier one and is prohibited by sec 309—5 Bur L T 37 So also, where a District Magistrate refuses to direct further in

quiry, it is not competent to his successor in office, in the face of his predecessor's order, to direct a further inquiry—*Ratta Singh v. Kart Singh* 4 C W N 100. But a District Magistrate, who has once declined to order further inquiry on the ground that there was no cause for interference, is competent to order further inquiry on a new information being brought to his notice—*O F. v. Krishnaji Ratanlal* 522 (523).

1177 Who can be directed to make further inquiry.—The District Magistrate may be directed to make further inquiry, even though he exercises enhanced powers under section 30 of the Code—1904 P R 13. The District Magistrate may direct a subordinate Magistrate to make the further inquiry under this section. For the purposes of this section a first class Magistrate is subordinate to the District Magistrate—7 All 833, 8 Mad 18. The District Magistrate has a discretion in selecting the particular Magistrate who is to make the further inquiry under this section and this discretion is vested in the District Magistrate and not in the Sessions Judge—10 Cal 20.

The further inquiry should ordinarily be made by the same Magistrate who held the first inquiry except in case of death or removal of such Magistrate in which case it may be conducted by another Magistrate—8 Mad 270, 8 Mad 351. See also 36 All 129 and 36 All 53. Where the further inquiry involves the taking and weighing of additional evidence, the function will generally be best performed by the same Magistrate who made the previous inquiry but it is desirable that the further inquiry should be entrusted to a different Magistrate because it is quite possible that the Magistrate who held the first inquiry might have been prejudiced against the accused—*Ratanlal* 38, 4 L R R 233. Thus where the Magistrate who held the first inquiry had already expressed an opinion that it was impossible to affix the guilt to the accused, the High Court ordered the further inquiry to be made by another Magistrate—*Ratanlal* 66. Where the Magistrate who had held the first inquiry had dealt with the case in a most unsatisfactory way it was held to be a good ground for directing the further inquiry to be made by a different Magistrate—5 Mad 220.

But the District Magistrate cannot direct the further inquiry to be held by a Magistrate inferior to the Magistrate who held the first inquiry. Where a case has been tried by a Magistrate specially empowered under section 30, and has ended in a discharge the District Magistrate should order the further inquiry to be made by the same Magistrate or by another Magistrate equally empowered, but not by a Magistrate who is not empowered under sec. 30 and who is therefore in a sense a Court of inferior jurisdiction to the Court which ordered the discharge—*Lado v. Emp.*, 12 N L R 64.

When the District Magistrate has sent the case to a subordinate Magistrate for further inquiry under this section, the Sub-divisional Magistrate cannot withdraw the case to his own file from that of the subordinate Magistrate—*Ratanlal* 315. But when a case is sent to the Sub-divisional Magistrate for further inquiry he can transfer the case to a 2nd class Magistrate subordinate to him—2 Weir 563.

1178 In what cases can further inquiry be ordered:—
Dismissal of complaint:—Further inquiry may be ordered when a complaint is dismissed under sec 203 or 201 (3)—18 J P R 14, 2 Weir 563, 11 O C 261 1 N I R 18 But if a complaint was made in respect of an offence and the accused was convicted further inquiry cannot be directed in respect of another offence for which no charge was made in the complaint—27 Cal 138 Where a case was taken up not upon a complaint but upon a police report a Magistrate's order directing the case to be struck off is not a dismissal of complaint, and cannot be revised by the Sessions Judge—Ratanlal 521 No further inquiry can be directed when no complaint was made against a person and no regular process was issued against him—39 Cal 238 Where a complaint has been dismissed under sec 203 the revisional jurisdiction of the District Magistrate may be exercised even though there may have been some irregularity on the part of the officer taking cognizance upon the complaint This section also contemplates that where a complaint has in fact been dismissed under sec 203, the revisional jurisdiction of the District Magistrate may be invoked irrespective of the consideration whether the dismissal is legal or illegal—3 P I J 346 Where a complaint which contained several charges was dismissed in respect of one of the charges and the complaint was dismissed merely on the report of the President of a Panchayet without giving the complainant any opportunity to substantiate his case, it was held that there should be a further inquiry into the complaint—23 C W N 575 When a complaint has been dismissed under sec 201 by a Magistrate, a fresh complaint can be entertained by the same Magistrate or by some other Magistrate even though the order of dismissal has not been set aside nor a further inquiry has been directed by a Superior Court See Note 681 under sec 203

1179 Discharge of accused:—The District Magistrate may direct further inquiry where the accused has been discharged But it is not in every case of discharge that a further inquiry may be directed Where the order of discharge is not perverse or foolish and where the Magistrate has dealt at length with the evidence and recorded what appears as sound reasons for the discharge interference under this section is illegal—1902 P I R 394 1916 P W R 20, 3 Lah I J 97 21 Cr L J 571 (Lah), Khan Zaman v Emp 26 Cr I J 1357 (Lah) Although the word 'improperly' which occurs before the word discharged in sec 437, is omitted in this section still it is illegal to direct a further inquiry unless the order of discharge was improper i.e manifestly perverse or foolish or was based upon a record of evidence which was obviously incomplete—Emp v Kari 1911 P R 10 12 Cr I J 364 1916 P W R 20 Saurav v Crown 26 P I R 291 26 Cr L J 1393 24 Cr L J 369 (Lah) 24 Cr I J 622 (Lah) 20 Cr I J 592 (Lah) Nadi Baksh v Crown 1 Lah 216 Gopal Das v Maghi Kam 26 P L R 353 26 Cr L J 1508 7 Lah I J 252 21 Cr I J 571 Sheo Charan v Emp 21 N I R 88 12 N I R 94 18 V I J 1235 4 Lah I J 411 An order of discharge passed by a trial Court after full enquiry and after considering and recording all the evidence produced by the complainant, should not be lightly interfered with—Latif Muhammad v Crown 7 Lah

L J 216 26 P L R 198 26 Cr L J 1328, *Khan Zaman v Emp*
26 Cr L J 1357 (Lah)

Where a person has been improperly discharged, no reference to the High Court is necessary, the District Magistrate can himself order a fresh inquiry—*Ratanlal* 213, 988 The intention seems to be to give revisional jurisdiction to the Sessions Court or District Magistrate in cases of improper discharge concurrently with that of the High Court, and thereby to obviate the expense and inconvenience which the necessity to resort to the High Court might in some cases entail—*Q F v Bilasunatalambi* 14 Mad 334 (338) *Contra*—8 Mad 336

No formal order of discharge is necessary, to enable the District Magistrate to direct further inquiry When an order is one of discharge in substance, though not in form, the Sessions Judge or District Magistrate is competent, upon motion being made by the complainant, to make an order for further inquiry—8 C W N 456 Where after the issue of warrant against certain persons, the Magistrate does not think it proper to proceed further and stops further proceedings the termination of the proceedings is in effect an order of discharge and is therefore subject to revision under this section—4 C W N 242 Where an accused was charged with offences under sections 323 and 307 I P C, and the Magistrate framed a charge under section 323 only and said nothing about section 307, held that this was equivalent to saying that there was no evidence against the accused of an offence under section 307 I P C and that in effect the accused was discharged of that offence The Court of revision could therefore order further inquiry in respect of that offence—42 All 128

This section applies where the accused has been discharged or discharged under sec 209 253 or 259 of the Code—33 Mad 83 and not where he has been acquitted No further inquiry can be directed when the accused has been acquitted by a Magistrate—20 Cal 633 8 Mad 296 4 C W N 346 5 C W N 72 7 C W N 403 Thus where a complaint in a summons case has been dismissed for default, the order is one under sec 247 acquitting the accused Such an order does not fall within the purview of sec 436—*Bindra v Bhagunata* 25 Cr L J 359 (Oudh) Even if an order of acquittal was passed in a warrant case without any charge having been framed or evidence for the defence taken still it cannot be a subject of revision under this section—1 A I J 415 If the order is in substance one of acquittal though the Magistrate styles it an order of discharge, no further inquiry can be ordered—1900 P L R 31, 17 Cr L J 95 (Mad) Thus, where in a summons case, the Magistrate follows the procedure of a warrant case and discharges the accused the order of discharge is one of acquittal and no order under this section can be passed—8 M L J 78 Similarly, after a charge has been framed in a warrant case the accused can only be acquitted under sec 258 and not discharged, and if the Magistrate erroneously passes an order of discharge, still there can be no order for further inquiry—38 Mad 585 Where after a full trial the accused persons were discharged the discharge was for all practical purposes as good as an acquittal and there should be no order for further inquiry—4 Lah L J 331

No further inquiry can be directed where the proceedings have been stopped under sec 349 and the accused has been released—1913 P R 9

No further inquiry can be directed in a case where the accused has been convicted. If in fact in such a case the Sessions Judge thinks that further inquiry is necessary he must report the matter to the High Court which alone can direct further inquiry in such a case—Ratanlal 407

Where the order is neither one of dismissal of complaint nor one of discharge of accused, no order for further inquiry can be passed. Thus, where on the acquittal of an accused the other accused against whom processes of arrest had been issued surrendered before the Deputy Magistrate, and he passed an order directing that the accused should not be proceeded against and that the warrant and other processes issued against him be withdrawn, the order was neither one of dismissal of complaint nor one of discharge of the accused, and the District Magistrate had therefore no jurisdiction under this section to set aside the order and direct the retrial of the accused—17 C W N 68

1180 No further inquiry where no accusation of 'offence'.—Further inquiry can be directed only in the case of an accused person the term 'accused' means a person accused of an offence and not a person against whom proceedings are taken under Chapter VIII—27 Cal 662 33 Cr 1 8. Therefore section 436 does not enable a Court to order further inquiry to be made in a case of discharge of a person against whom security proceedings were taken under Chapter VIII because such a person was not in the position of an accused person and could not be said to have committed an 'offence'—27 Cr 1 662 33 Cal 8, *Emp v Roshan Singh* 46 All 235, 1003 P R 42 *Young Khan v A E* 2 Rang 30 (31), 33 Mad 85 2 Bur L J 285 1911 P R 6 (*Contra*—21 All 107, 24 All 148 36 All 147, 16 Bom 661, 35 Bom 401 2 I B R 80). The word 'discharged' in section 119 means only 'permitted to depart' and does not mean the discharge of an accused as contemplated by this section therefore further inquiry cannot be directed in a case of discharge under sec 119—33 Mad 85 U B R (1914) 1st Cr 3 (*Contra*—36 All 147 1899 A W N 203 1903 P R 24 20 Cr I J 704). This is now made clear by the present amendment by the use of the words 'accused of an offence'. The contrary rulings cited above within brackets are now rendered obsolete. If a District Magistrate on examining the record of a security case, is of opinion that the person discharged by the subordinate Magistrate ought to be proceeded against he can, under sec 438 report the result of his examination of the record to the High Court, which will then pass the necessary orders. But he cannot direct further inquiry under sec 436—*Emperor v Roshan Singh*, 46 All 235

This section also does not apply to proceedings under sec 133 of the Code, since the person proceeded against under that section is not said to have committed an 'offence'. A Sessions Judge or District Magistrate acts without jurisdiction if he directs further inquiry into proceedings under that section—24 Cal 395 25 Cr 1 425, *Prithpal v Emp*, 2 O W N 549 26 Cr 1 J 1251. The only action which a Sessions Judge or District Magistrate can take in such case will be under sec 438—*Prithpal v Emp*,

2 O W N 549 Similarly, proceedings under sec 144 do not refer to any offence, and no further inquiry can be directed in a case under that section—27 Cal 158 So also this section does not authorise a Magistrate to direct further inquiry into a case under sec 145, as that section has no reference to any offence at all—20 Cr L 729 So again, the District Magistrate cannot direct further inquiry into cases under sec 488, since refusal of maintenance is not an 'offence' and the application for maintenance is not a complaint of an offence—17 C P I R 127, 5 Cal 536

1181. When further inquiry may be directed:—1 Sessions Judge or District Magistrate has jurisdiction under this section to direct further inquiry or a rehearing upon the same materials which were before the subordinate Magistrate, though there is no further evidence forthcoming—*Haridas v. Virulhi* 15 Cal 608 *Q. E. v. Balasubramaniam* 14 Mad 334 10 Bom 131 *Q. E. v. Chaita* 9 All 52, *Dayanand v. Emp.* 23 A L J 20, 26 Cr L J 736 1891 P R 14, 5 C P L R 20, *Haider Khan v. A. F.* 25 Cr L J 66 (Outh) 3 I R R 97 The expression "further inquiry" in this section does not mean that additional evidence must be forthcoming. Any mistake of law or irregularity in the proceedings will justify the District Magistrate in setting aside an order of discharge—*Emp. v. Dabidas* 14 C P L R 161 Further inquiry under this section does not in all cases mean taking of additional evidence, but may mean rehearing and reconsideration of the evidence already taken—1901 P R 2, 1901 P I R 32 *Sheocharan v. Imp.* 21 A L J 88 26 Cr L J 1537, 10 S L R 68 But in 1887 P R 63 and 8 Mad 336 it has been held that further inquiry in this section means the taking of additional evidence and not a mere rehearing of the same evidence which is the same thing as retrial and therefore where there has been a full inquiry by a competent Court and the accused has been discharged the Sessions Judge has no power under this section to direct a further inquiry unless further evidence has been disclosed—1900 P I R 31 And in a recent case the Calcutta High Court has also held that in cases where the trying Magistrate has discussed the evidence carefully and has given sufficient reason for the discharge of the accused and no fresh evidence is likely to be produced on further inquiry the superior Court should hesitate before exercising its powers under this section to order further inquiry, unless there are palpable errors in the decision of the lower Court—*Ibid* *Rashid v. Momta* 38 C L J 206

The District Magistrate is not competent to direct further inquiry in any and every case falling under this section. This section is limited by the words "on examining the record under sec 435" and that section lays down that a Court may call for and examine the record for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceeding of such inferior Court. And therefore a District Magistrate cannot set aside an order of discharge and direct further inquiry, if he finds no irregularity, illegality or impropriety in the proceedings—*Pran Khan v. A. E.* 16 C W N 1078 13 Cr L J 764

Where a Magistrate has discharged the accused without considering

the necessary evidence, the Sessions Judge ought to direct further inquiry in the case—13 Bom 376

Want of time is not a sufficient ground for refusal to order further inquiry, if the Court feels that an offence has been committed which should be inquired into—*Birbhukhan v Jaurao* 23 Cr 1 J 745 (Nag)

The power of ordering further inquiry under this section should be used sparingly and with great circumspection. Therefore where an accused person has been three times subjected to a Magisterial inquiry it would be in oppression on the accused to send him a fourth time before the Magistrate for inquiry on the same evidence which has been thrice pronounced to be insufficient and untrustworthy—*Ritnalal* 328 Where a complaint has been dismissed by the Magistrate after fully considering the police report and the evidence of the complainant and his witnesses and after finding that no offence has been made out and the Sessions Judge ordered further inquiry and upon the order of the Magistrate held that the Judge should not lightly set aside the order of dismissal but should do so only when it is clear that there has been miscarriage of justice—*Jangal v Radha Kishen* 26 Cr 1 J 866 A I R 1923 Pat 447 Sessions Judges and District Magistrates should use the powers under this section sparingly and with great caution and circumspection, especially in cases where the questions involved are mere matters of fact—1886 A W N 281 *Q E v Chatur* 1 All 52 The Divisional Court ought not to ordinarily interfere with an order of discharge passed by the trying Magistrate unless it is possible to come to only one conclusion on the evidence viz. that the accused is guilty—10 J W 630 3 Lah 1 J 9, Further inquiry cannot be directed on the bare possibility of an offence being disclosed on further evidence being taken. There must be something on record to indicate that such an offence was committed or there must be something to show that further evidence is available which has not been taken and which would support a charge for that offence—*In re Ibrahim* 43 M 1 J 564 Further inquiry ought not to be directed where there is no prospect of any public advantage from the case being reopened—*In re Krishna Pillai* (1923) M W N 56 The powers conferred by this section are not to be exercised promiscuously in all cases wherever the District Magistrate who has not seen the witnesses forms a different opinion of the value of their evidence from that which was formed by the Magistrate who has seen them—19 Bom 1 R 350 3 Lah 1 J 97 *Umrao Khan v Fulp* 21 A L J 194, 44 All 691, 4 Lah 1 J 411 When the nature of the case is such that Courts are liable to take different views of the evidence and of the probabilities such a case is not one in which further inquiry ought to be ordered specially when the Civil Court and a Magistrate have disbelieved the evidence for the prosecution—*Chaudan v Kallu* 8 A I J 45 *Biudeshri v Fulp* 18 A I J 1135 A District Magistrate cannot set aside an order of discharge passed by a Subordinate Magistrate and direct further inquiry solely on the ground that the latter has misappreciated the evidence—31 Mad 133 But see 10 S I R 68 and 4 Lah 1 J 411

A District Magistrate is not authorised to direct further inquiry under this section, when the essence of the matter between the parties is of a

civil nature and the question is in reality one which ought to be fought out in a Civil Court—1 Bom J R 852

1182 Powers of Courts directing further inquiry.—(i) This section does not authorize a Sessions Judge or District Magistrate to take evidence or direct it to be taken supplementing the evidence given in the Lower Court. He is authorised to direct further inquiry, but not to take evidence or direct evidence to be taken. Under section 428 an Appellate Court dealing with an appeal may direct additional evidence to be taken and itself record such evidence. The High Court under section 439 has all the powers of an Appellate Court and can direct evidence to be taken. But no such powers are given to the Sessions Judge or the District Magistrate under the present section—6 C I J 251

(ii) The District Magistrate directing further inquiry cannot direct that the accused be put on his trial. All that he can do is to direct further inquiry, leaving it entirely to the inquiring Magistrate to determine whether or not the evidence justifies the accused being charged and put on his trial—2 Bom L R 586, 1905 P L R p 65. An order for retrial should not be made in the guise of an order for further inquiry—2 C P L R 82

(iii) The District Magistrate directing further inquiry cannot suggest that the accused be committed to the Sessions; he must leave it to the judgment and discretion of the Sub Magistrate who is to make the inquiry and cannot fetter the Sub Magistrate's judicial discretion by any suggestion or direction—15 Mad 39. The District Magistrate is wholly wrong in directing a Subordinate Magistrate that he should pass such and such order in a case pending judicially before him—1918 P W R 10. In making an order for further inquiry it is improper for the Superior Magistrate to write a judgment which is practically a mandate to the Subordinate Magistrate—12 N I R 94

(iv) The Sessions Judge or the District Magistrate cannot, when directing further inquiry under this section, himself frame a charge or order the Sub Magistrate to frame the charge and try the accused. He might of course make the inquiry himself and frame a charge in course of it—32 Mad 220

1183 Powers and duties of the Magistrate making the inquiry.—(i) If the inquiry is directed to be held by a Magistrate other than the officer who held the first inquiry, he should take the evidence *de novo* and cannot proceed on the evidence already taken—9 A L J 310, 6 All 36, 4 L B R 233

(ii) The Magistrate can take further evidence which he had omitted in the first inquiry—13 Bom 376

(iii) The Magistrate is not bound to try the accused for the very offence for which he was originally discharged but is competent to try him for any other offence which may be established by the evidence—7 Mad 454

(iv) When further inquiry is ordered into a complaint dismissed under s c 203 the Magistrate cannot again act under sec 203, but must proceed under sec 204 and inquire into or try the case—11 C W N 316

After an order of further inquiry is passed, the complainant is entitled to produce and the Magistrate is bound to receive the whole evidence for the prosecution, and he is not authorized to again dismiss the complaint under sec 203 simply on a Police report—1918 P W R 10 But in a recent case of the Calcutta High Court it has been held that a Magistrate holding a further inquiry into a complaint which has been once dismissed under sec 203 can again dismiss the complaint under sec 203—25 C W N 312

(r) The Magistrate making the inquiry has jurisdiction to enquire as to whether a *prima facie* case has been made out against the accused and having been satisfied that a *prima facie* case has been made out he has jurisdiction to try and dispose of the case himself—5 P L J 47

(i) The Magistrate who is directed to make further inquiry is not competent to question the propriety of the order directing the inquiry but is bound to carry it out—to Bom 131

1184 Notice to accused—See the proviso newly added Although no notice to the accused was necessary under the old section still it was held in numerous cases that a Court did not exercise a proper discretion if before proceeding under this section he did not give the accused an opportunity by service of a notice to show cause against an order directing further inquiry—15 Cal 608 2 C W N 196 3 C W N 249, 1901 P R 2 1919 I L R 17 1 141 216 4 I L L J 411 5 Bom L R 877 1893 P R 17 L B R (1897-1901) 100 6 Bom I R 479 8 Bom L R 694 19 Bom L R 908 4 P L W 220 2 Weir 245 11 C W N 173 11 C W N 316 40 All 416 *Unirao v Emp* 21 A L J 194 *Ganpaty* 19 A I J 71 *Jaswant* 19 A L J 985, 15 A I J 627 6 All 367 12 A L J 167 1890 A W N 147 20 All 339 9 All 52 1898 A W N 60 24 O C 142 Where a man has been discharged after full inquiry by a competent Court a Revisional Court will exercise proper discretion in allowing him an opportunity of showing cause before ordering a further inquiry or before directing re opening of the case It is a principle of British Criminal Law that an order to a man's prejudice should not be passed without due notice to him—8 Bur L T 133 This is now expressly laid down in the proviso

The opportunity to show cause may be given even after the accused is arrested and brought before the Court—12 C W N 822 32 Cal 1090 1891 P R 14 1895 P R 17

Under the old law the non service of notice to show cause was held to be merely an irregularity—6 All 367 and the omission could not be held to invalidate the order or action of the Court unless there was reason to think that the accused was prejudiced thereby—U B R (1897-1901) 100 4 P L J 456 Under the new proviso the service of notice is imperative

Notice is necessary only where the accused has been discharged No notice would be necessary under this section where the complaint was dismissed under section 203 since the order under section 203 dismissing the complaint was not passed with a notice to the accused person or in his presence, and therefore would probably be unknown to him—15 Cal 608, 29 Cal 457 37 Cal 1090, 32 C I J 44 20 All 339 30 All 52

2 Bom L R 586, 5 A I J 74, *Jagan v. Ram Pirbhan*, 35 All 78, *(Mray v. Imp)* 47 All 72 23 A I J 451 *Imp. v. Liaquat Husam* 40 All 138. But where the accused person was given an opportunity of being heard before the complaint was dismissed under sec 203, a further inquiry ought not to be directed without giving notice to him. As he was present from the very commencement of the proceedings, it is proper that he should be given an opportunity of being heard before an order is made under this section—*Jogesh Chandra v. Nilunja Behari* 27 C W N 552.

When notice is issued under this section, the accused is not legally bound to avail himself of the opportunity given to him to show cause, and he is at liberty either to appear and show cause or to stay away—1893 P R 15.

1185 Recording reasons:—Before making an order under this section a Sessions Judge or District Magistrate is bound to record his reasons and to state in what respect the trial Judge's conclusions are unsatisfactory—*Sutan v. Crown* 26 P I R 291 26 Cr L J 1393, 1830 A W N 147, 13 C W N 76. The wide jurisdiction to set aside an order of discharge cannot be properly exercised without having and assigning solid and sufficient reasons for doing so—15 Cal 608, 1913 A W N 638. The Magistrate should record his reasons for ordering further inquiry, because the High Court in the absence of such reasons cannot exercise supervision over the Magistrate's or Judge's proceedings, and also because it is fair to the person against whom the order is made that the reasons for directing such inquiry should be made explicit to him and that he should have notice of the grounds on which the further inquiry has been directed—L B R (1917) 2nd Qr 16 32 Cal 1090. Where the order of the Sessions Judge for further inquiry does not state any proper grounds it is liable to be set aside by the High Court—8 C W N 436, 3 S L R 7.

It is not ordinarily desirable that a District Magistrate in ordering a further inquiry should make a detailed examination of the evidence and give elaborate reasons because that might prejudice the trial afterwards, but it is desirable that he should give enough in the shape of reasons to show that his order is proper—32 Cal 1090. In a Burma case however where in an order for further inquiry the Sessions Judge simply stated "I have translated and considered the whole of the record, and the conclusion I have arrived at is that there should be a further inquiry" it was held that it contained ample reasons for the order—4 L B R 233.

1186 Interference by High Court:—An order of a Sessions Judge or a District Magistrate setting aside an order of discharge is liable to be reviewed by the High Court as a Court of Revision. If in any case the High Court were to find that the District Magistrate or Sessions Judge had set aside an order of discharge on insufficient grounds or that while there were good grounds for setting it aside, the District Magistrate or Sessions Judge had made an order inappropriate to the facts of the case the High Court would be acting properly in revising the order—15 Cal 608. Where the order of the Sessions Judge did not state any proper grounds for directing a further inquiry, it was set aside by the

High Court in revision—8 C W N 456 But where the Sessions Judge after going carefully through the evidence was of opinion that the finding of the trying Magistrate was either perverse or in all probability wrong or manifestly at variance with the evidence which he has recorded, and directed further inquiry held that the order of the Sessions Judge was not illegal or improper and the High Court would not interfere with the considered opinion of the Sessions Judge—*Karthley v Jagannath* 11 O 1 J 611 1 O W N 342 26 Cr 1 J 959

437 When, on examining the record of any case under

Power to order com- Section 435 or otherwise, the Sessions
mitment Judge or District Magistrate considers

that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge or District Magistrate improperly discharged

Provided as follows —

- (a) that the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made
- (b) that if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused such Judge or Magistrate may direct the inferior Court to inquire into such offence

This is the old section 436 The old section 437 has now been renumbered as sec 436 For reason of this transposition see notes under the previous section

1187 Application of section—The words or otherwise do not mean in any other way whatsoever but in any other way provided by the Code—10 Cal 268 The reason for exercising the powers under this section must arise upon materials to be found on the record and not upon extraneous matter—1890 A W N 147 15 Cal 608

1188 Who can order commitment—The Sessions Judge and the District Magistrate have co-ordinate powers to order a commitment under this section—28 C 1 397 Ratanlal 85—A Sessions Judge may take action under this section though the District Magistrate has refused to call for the record and to direct a commitment of the case—43 Mal 350

The District Magistrate may act of his own motion quite independent of an order from the Court of Session—8 W R, 61

The word 'District Magistrate' in this section includes a District Magistrate specially empowered under sec 30 of this Code—1904 P L R 234 Also, a District Magistrate can, under this section, revise an order of discharge passed by a subordinate Magistrate of the First Class invested with powers under sec 30 of the Code, in a case which is triable exclusively by the Court of Session—12 V I R 94

The Joint Sessions Judge cannot exercise the powers of a Sessions Judge under this chapter and cannot order a commitment to the session in a case discharged by a Magistrate—*In re Musa*, 9 Bom 164

Secs 436 and 437 do not apply to *Presidency Magistrates* a Presidency Magistrate can himself revise the complaint after he has discharged the accused without any order of the superior authority—1 C W N 49, 28 Cal 652

1189 "Exclusively triable by Court of Session": To give jurisdiction to the Sessions Judge or District Magistrate, the accused must have been charged with an offence triable exclusively by the Court of Session—1904 P I R 234 1 All 413 7 C L R 168 1897 P R 3 Therefore a Sessions Judge cannot direct commitment or order fresh inquiry in a case where the accused is discharged of an offence within the Magistrate's jurisdiction—Ratnalal 42, 1882 A W N 105, 20 Cal 633, 1 All 413 42 Mad 561 15 M I J 373 3 B I R 65

In a *Burmah* case, it has been held that the term "triable exclusively by the Court of Session" means either a case where the District Magistrate considers that the facts constitute an offence which is triable exclusively by the Court of Session or it might mean a case in which the District Magistrate considers that the sentence which the Magistrate could pass might not be sufficient and therefore it was a case which should be tried by a Court of Session—9 L B R 208 But the Allahabad High Court holds that a case does not come within this section merely because the offence could not in the opinion of the District Magistrate be adequately punished by a Magistrate—1908 A W N 189 Similarly the Madras High Court holds that the words are to be construed strictly and that it is not competent to the Sessions Judge to direct a commitment under this section if the offence is not exclusively triable by the Court of Session—42 Mad 561 This is also the view of the other High Courts See Ratnalal 42 20 Cal 633

Where the accused was charged with two offences, under sections 47A (triable exclusively by the Court of Session) and 408 I P C (not so triable) of which the principal offence was the latter one and the other was merely secondary, and the subordinate Magistrate refused to commit the accused to the Sessions and discharged him, held that the District Magistrate was competent under this section to direct the commitment of the accused even though the primary offence was not triable exclusively by the Court of Session because the two offences were intimately connected and formed part of the same transaction—16 Bom L R 80 So also, where an accused person appears to have committed culpable homicide, his conviction by a Magistrate of a minor offence does not prevent his trial for murder, etc The Sessions Judge, if he thinks there is a *prima facie* case,

may call on the accused to show cause why a commitment should not be ordered and may thereafter order his commitment under this section if satisfied that there is sufficient cause for it—Ratanlal 337

1190 "Improperly discharged":—A Sessions Judge may direct a commitment even where the District Magistrate himself discharges the accused—7 All 853

The mere fact that a Magistrate has discharged the accused in a case triable exclusively by the Court of Session without committing him to the Sessions, is not a ground of interference under this section—2 Weir 260. The District Magistrate or Sessions Judge before ordering the committal of the accused to the Sessions Court must come to a finding with reference to the evidence that the accused has been *improperly discharged*—1 P L J 97. The mere fact that the charge is in the opinion of the District Magistrate of such an important character that it should be considered by a Court of Session is not a sufficient reason for interfering with the order of discharge—1 P L J 97

It is the duty of the Sessions Judge in considering whether the accused person has been improperly discharged to consider all the grounds upon which such order of discharge has been passed including a consideration of the evidence which has not been believed or held to be sufficient to establish a *prima facie* case. Then only can he pass an order for the commitment of the accused or for further inquiry—7 C W N 77. The Sessions Judge has to consider whether it was open to the Magistrate to come to the conclusion to which he did come on the materials before him. That a different view could be taken on the evidence would not justify the Sessions Judge in ordering commitment. He must come to the conclusion that the finding of the Magistrate is not only wrong but perverse—*Rubhanjan v P P* 6 P L T 50 26 Cr L J 886. A I R 1925 Pat 599

The Sessions Judge can direct the committal of an accused person improperly discharged by the sub-Magistrate though no express order of discharge has been recorded by that Magistrate—10 L W 521

The section applies where the accused person has been *discharged* and not where he has been *acquitted*—20 Cal 633 23 Mad 225 where the Magistrate has in fact discharged the accused though he has used the expression *acquitted and released*. The Sessions Judge is competent to order a committal under this section—8 W R 41. Where on a complaint in respect of a sessions offence the Magistrate finding that no sessions offence had been committed tried the accused of a non-sessions offence and acquitted him it was held that this section did not apply. Even the acquittal of the accused in respect of the minor offence could not be construed to amount to a discharge in respect of the grave offence and no order under this section could be passed by the Sessions Judge—20 Cal 633. But in 24 Mad 136 this case was dissented from, and the acquittal of the accused in respect of the minor offence was held to be in substance a discharge of the accused in respect of the grave offence, and the Sessions Judge was therefore held justified in having made an order for further inquiry in respect of the grave offence and for committal

to the Sessions. In the more recent case of 22 C W N 117 upon similar facts the Judges were divided in opinion, Trunton J holding the same view as in the Madras case cited above, and Richardson J upholding the view of 20 Cal 633.

This section applies not only where the accused has been expressly discharged, but also where he has been *impliedly discharged*. Thus, where on a complaint for an offence under sec 302 I P C the Magistrate disbelieving the evidence did not frame any charge under sec 302 or 304 I P C but framed only charges under secs 147, 323, 325 held that the action of the Magistrate amounted to an implied order of discharge in regard to secs 302 and 304 I P C, and an order directing commitment in regard to sec 304 can be made by the Sessions Judge—43 Mad 330. But the Oudh Court holds that the word 'discharge' means *absolute discharge* and not a *partial discharge*. Therefore where the police challan mentioned offences under secs 147 and 304 I P C, but the Magistrate after hearing the evidence for the prosecution framed a charge under secs 147 and 325 the accused could not be said to have been discharged, and the Sessions Judge was not authorised to order commitment for an offence under sec 304 I P C—*Bilodar v A F* 3 O W N 201 27 Cr I J 417 1 I R 1926 Oudh 104.

By an inferior Court.—For the meaning of 'inferior', see Note 1171 under sec 435.

A Subordinate Magistrate of the First Class invested with powers under sec 30 is inferior to the District Magistrate, and the latter can revise an improper order of discharge passed by the former in a case triable exclusively by the Court of Session—12 N I R 94.

1191 Order for commitment.—Under this section the Sessions Judge can himself commit the accused. The words 'order him to be committed' do not mean more than 'pass an order for his commitment' and the intervention of a Magistrate for making the commitment is not necessary—10 Bom 310. There is nothing in this section to show that when a District Magistrate or Sessions Judge directs a discharged person to be committed for trial, the commitment must be made by the discharging Magistrate—*Ibid*. But of course it is not wrong to call upon the discharging Magistrate to make the commitment—9 Bom 100 28 Cal 397.

This section enables the Sessions Judge or District Magistrate to commit the accused person for trial only for the offence with which he was substantially charged in the complaint—19 W R 30. When the accused has been discharged by the subordinate Magistrate of one offence, the Sessions Judge is not competent to direct the accused to be committed for trial for another offence—2 Weir 549. Thus, where the police charge-sheet on which the subordinate Magistrate took cognizance of a case charged the accused with a minor offence and the grave offence of rape was not mentioned in it nor did the prosecution press for the framing by the Magistrate of a charge in respect of that offence and the Magistrate framed a charge only of the minor offence, it was held that the District Magistrate had no jurisdiction to direct the subordinate Magistrate to commit the accused to the Sessions for the higher offence—41 Mad 982.

ff on the evidence it appears that some other offence has been committed by the accused, the proper course is to order an inquiry under proviso (b)

Under this section, the Sessions Court has no power to commit when there is no legal evidence against the accused—24 W R 70.

A Sessions Judge, while directing a Magistrate under this section to make a commitment, has no power to direct the Magistrate to take the accused's defence or ask the accused to make a defence—4 N W P H C R 50

In ordering commitment, the Sessions Judge or District Magistrate should specify the offence for which the accused is to be committed for trial—21 W R 41

1192 Further inquiry, whether can be ordered—A District Magistrate proceeding under this section is not restricted to ordering commitment of the accused who may have been discharged by a subordinate Magistrate he can also direct a further inquiry prior to making an order for commitment—18 Cal 75

Where after the discharge of an accused person, fresh evidence comes to light, the District Magistrate should not direct a subordinate Magistrate to commit the accused for it will amount to a committal for trial on the evidence of witnesses whom the accused has not had an opportunity of cross-examining. The proper course for the District Magistrate is to direct a fresh inquiry—2 Weir 550

When commitment should be ordered and not further inquiry—Where in a case triable exclusively by the Court of Session the inferior Court has considered the whole of the prosecution evidence and there is no defect of procedure, and the Magistrate discharges the accused because in his opinion the evidence is insufficient or incredible then if the District Magistrate comes to a different conclusion upon the evidence his proper course is to make an order of commitment and not to direct further inquiry—12 N S R 94 Where in a case triable exclusively by the Sessions Court the Sessions Judge or District Magistrate is satisfied that on the evidence taken there is a clear case for committal and there is no reason for desiring a further consideration by the Magistrate it would ordinarily be his duty to commit under this section without ordering a further inquiry—15 Cal 608

1193 Proviso (a) —Notice to accused—It is an essential condition precedent to an order under this section that the accused should have an opportunity of showing cause against his commitment. An order made without issuing such notice is bad in law and not maintainable—1888 A W N 236, 1 C L R 93 24 W R 70 6 M L J 372 15 M L J 373 Where some of the accused were not made parties to the revision petition to the District Magistrate against the order of discharge, and no notice had been ordered to be served upon them, and they had no opportunity of showing cause against the order of commitment made by the District Magistrate, held that the order of commitment made by the District Magistrate was clearly wrong and must be set aside so far as these accused were concerned—In re Mania, 48 Mad 874 49 M L J 155 26 Cr L J

1570 Where, however, a District Magistrate ordered the subordinate Magistrate to make a commitment to the Court of Session, without giving the accused any notice, but the committing Magistrate issued a notice before doing so, the defect was cured by sec 537—*Ratanlal* 899 A.O., where no objection was taken to the want of notice and the omission has not occasioned a failure of justice, the High Court will not interfere—7 Cal 662

The opportunity to shew cause mentioned in this proviso does not mean any opportunity but that the accused must have a special opportunity. Where the Sessions Judge who was trying a case of false evidence suddenly asked a witness in the course of his examination to explain why he should not be again committed for a trial for murder in respect of an act for which he had been previously discharged, and on answers given by the witness to the above question, ordered his commitment for trial for murder, held that the order was illegal since the accused had not been properly called upon to shew cause—*Ratanlal* 588

If a notice is given to the accused under this proviso, he is not under any obligation to appear and shew cause. He may or may not avail himself of the opportunity as he chooses—1893 P R 15

1194 Interference by High Court:—Under sec 439, the High Court has power to revise an order of commitment passed under this section by the Sessions Judge or District Magistrate—12 C. W. N 117. In the exercise of the powers of revision the High Court can, on the merits of the case, cancel an order of commitment passed by the Sessions Judge under this section. As for instance, where the order setting aside a discharge and directing commitment is made on insufficient or unreliable evidence—7 C. W. N 327 or where there is no *prima facie* case for commitment—*Sheobhai v Emp* 9 C. W. N 820

The order of a Sessions Judge or District Magistrate under this section directing commitment can be quashed by the High Court in the exercise of its revisional powers under sec 439 and not under sec. 215—27 Mad 54. Sec 215 refers only to a commitment actually made, and not to an order directing commitment contemplated by section 437. Therefore the High Court, in considering the order of a Sessions Judge or District Magistrate passed under section 437, may consider the facts as well as the question of law involved and is not limited to points of law only as under sec 215—30 Mad 224, *Rash Behari v Emp*, 12 C. W. N 117, *Tin Kow v Emp*, 1 P. L. T 153, *Munshi Vander v Kori*, 6 P. L. T 146 25 Cr. L. J 1089

But though the High Court possesses the powers to revise orders of commitment, it should exercise those powers most sparingly, and only where it is manifest that the Sessions Judge's order is improper, e.g., where there is no evidence to prove the offence charged—30 Mad 224, *In re Mani Manicka*, 48 Mad. 874 49 W. L. J 155. It is evident from this section that the fullest and widest discretion has been given to District Magistrates and Sessions Judges, and when an order of commitment has been duly made, the High Court should be most unwilling to interfere except upon strong grounds and under exceptional circumstances—26 All 564, 13 A. L. J 211

438 (1) The Sessions Judge or District Magistrate may, *Report to High Court* *If he thinks fit, on examining under section 435 or otherwise the record of any proceeding report for the orders of the High Court the result of such examination and, when such report contains a recommendation that a sentence be reversed or altered, may order that the execution of such sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond*

(-) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by *or under any general or special order of the Sessions Judge*

Change—The italicised words have been added by section 118 of the Criminal Procedure Code Amendment Act XVIII of 1923. 'In order to provide for the absence of a Sessions Judge, we think it is necessary to empower him to make a general order authorising the Additional Sessions Judge to exercise all his powers. We have provided for it specifically by this amendment'—*Report of the Select Committee of 1916*

1195 Who can report—The only Courts which can make a reference to the High Court are the Court of Session and District Magistrate. An Additional Sessions Judge has jurisdiction to exercise the powers of a Sessions Judge only in respect of cases transferred to him by the Sessions Judge—1903 A W N 28. In the absence of such transfer an Additional Sessions Judge has not the powers of a Sessions Judge under this section—1 L B R 119. A Joint Magistrate cannot exercise the powers of the District Magistrate—14 W R 25.

If he thinks fit—These words indicate that the District Magistrate or the Sessions Judge is not bound to refer every case in which he may detect an error—20 W R 40.

1196 When reference may be made—A District Magistrate should refer all cases in which he considers the order of the Subordinate Court as illegal—2 Weir 564. When a Sessions Judge considers that the judgment or order is contrary to law or that the punishment is severe he may report the proceedings to the High Court—20 W R 60. *Empress v Akhbar* 1881 A W N 12. Where a District Magistrate is of opinion that a subordinate Magistrate has no jurisdiction to try a particular case the District Magistrate has no power to quash the proceedings of the Sub Magistrate but must report the case for proper orders to the High Court—23 Mad 540. So also if a Sessions Judge is of opinion that an order of a District Magistrate directing a further inquiry under sec 436 is wrong a reference to the High Court may be made under this section—22 Cal 573. A Sessions Judge cannot upon examining the monthly criminal return of a Magistrate order further inquiry under sec 436 into

the case of a person who has been convicted. If he thinks any further inquiry necessary he should refer the case to the High Court under this section—Ratanlal 407

1197 When reference cannot be made:—(1) This section allows a reference only when the Court of Session is of opinion that the judgment or order is contrary to law, or that the punishment is too severe or inadequate but not on the ground of the insufficiency or incredibility of the evidence—1881 A W N 12, 17 C P L R 36, 18 W R 7

(2) A necessity for altering a conviction from one section to another for a cognate offence, when the accused has not been prejudiced by any such error is not a sufficient ground for a reference to the High Court under this section—9 Cal 847

(3) When a District Magistrate or Sessions Judge has himself the power to make the order which he proposes in his letter of reference, a reference under this section is unnecessary—28 Cal 102 Thus a case which regularly comes to the Sessions Judge on the appeal of a prisoner, cannot be referred to the High Court under this section but must be disposed of by the Sessions Judge—9 W R 5 11 W R 24 1914 P W R 7 13 A L J 477 15 Cr L J 472 (Mad) 2 Weir 565 Where the accused was charged with theft and discharged by the first class Magistrate and the District Magistrate referred the case to the High Court it was held that the High Court need not interfere in a case of a mere discharge the District Magistrate being competent to take steps himself should he deem it necessary—Ratanlal 290

(4) Where an appeal is preferred to the Sessions Judge, he cannot without disposing of the appeal under sec 423 make a reference to the High Court under this section—1884 A W N 130

(5) A reference can be made if the District Magistrate is of opinion that there is a case for revision, upon examining the record of the Sub-Magistrate's proceeding and not merely on the representation of the complainant against the Subordinate Magistrate's decision—Ratanlal 340 nor a reference can be made merely on the report of a Jail Daroga—1891 A W N 80

Reference in cases of acquittal—In the case of an acquittal by a Subordinate Magistrate if the Government does not appeal the proper course for the District Magistrate, if he is dissatisfied with an order of acquittal, would be to move the Local Government for exercising its powers under sec 417 and not to make a reference to the High Court under this section—1902 A W N 89 *Ganga Singh v Ramzan* 26 Cr L J 337 (Lah) The High Court will not ordinarily entertain a reference from the District Magistrate in such cases—*In re Sheikh Aminuddin*, 24 All 346, 25 All 128 1907 P W R 13, *Crown v Achhar Singh* 5 Lah 16 (19) 25 Cr L J 931, 44 Cal 703, 15 Mad 36, 19 W R 55, 1910 M W N 517 12 A L J 255, 35 M L J 665, 38 Mad 1028

Reference in Police Proceedings—This section does not empower a District Magistrate to refer to the High Court the proceedings of a Superintendent of Police as the latter is not a Court subordinate to the Magistrate—Ratanlal 133

1198 Power to refer proceedings of Superior Court:—The powers of the Sessions Judge or District Magistrate under this section are limited by sec 435, which speaks of proceedings of an *inferior* Criminal Court (as to which see notes under sec 435), and therefore the District Magistrate has no power to question the propriety of an order of the *superior* Court (Sessions Judge's Court) and to refer the matter to the High Court—*Emp v Jannabai*, 28 All 91, 41 Bom 47, *Crown v Hissau* 5 Lrh 11 (14) 25 Cr L J 928 *Emp v Lobo* 18 Bom 1 R 796, 6 C L R 245, *Q E v Jahandi* 23 CrL 249, *Q E v Karamdi*, 23 Cal 250, 18 Cal 186, 23 O C 392, 2 N L R 149, 36 All 378, 46 All 851 (855), 10 All 146, *Emp v Faral Dad* 24 Cr L J 573 (Lrh). *Emp v Kassim* 17 S L R 268 26 Cr L J 177 The Magistrate's power of making a reference is restricted to the records and proceedings of a Court subordinate to him, and so a Magistrate cannot ask a Sessions Judge to report a case to the High Court in which he thinks that the acquittal on appeal by the Sessions Judge was wrong—1882 A W N 135 It is never intended that a Subordinate Court should have the power of questioning the propriety of an order passed by an Appellate Court, for revision, simply on the ground that it considers that the original sentence was a proper sentence and should not have been reduced—8 Cal 875 If the District Magistrate thinks that there has been a miscarriage of justice in an appeal heard by the Sessions Judge, or if he is dissatisfied with a sentence passed by the Session Judge, he should not report the case to the High Court for orders under Sec 438 but should communicate with the Public Prosecutor and invite his attention to it—9 All 362, 46 All 851 (855), 1 S L R 40, 18 Cal 186, 6 Bom L R 1099 24 Cr L J 573 (Lrh), *Ratanlal* 601, *Ratanlal* 623, *Emp v Kassim* 17 S L R 268 26 Cr L J 177

1199 Power to refer question of law.—This section empowers the Sessions Judge and District Magistrate on examining the record of any proceeding under sec 435, to report to the High Court for order the result of such examination which means that the Sessions Judge or District Magistrate is to report the incorrectness or illegality of the sentence or order and not that he should refer abstract points of law to the High Court—5 O C 316 There is no provision of law which enables a Judge to stop a trial already commenced and to refer to the High Court any questions of law arising on the merits in the case—*Ratanlal* 214 Where a Sessions Judge, after having asked the opinions of the assessors in a case tried before him, made a reference to the High Court on a question whether he had jurisdiction or not the High Court held that the Sessions Judge ought to have disposed of the question himself and that this section was never intended to be used for the purpose of sending questions to the High Court for opinion—2 All 771, see also O S C 71 The reference by the Sessions Judge in the Bombay and Allahabad cases cited above was contrary to law for another reason viz, that it was not made in respect of any proceeding of a Subordinate Court but in respect of a proceeding of his own Court

Where the Sessions Judge or District Magistrate does not really

from the actual decision arrived at by the trial Court, a reference to the High Court merely with the object of obtaining a ruling on a question of law ought not to be made—*Emp v Madho Singh*, 47 All 409 23 A L J 189 26 Cr L J 865

Power to take evidence—Neither section 435 nor this section enables the District Magistrate or Sessions Judge to take further evidence with a view to reporting the case—3 Bom L R 677, 12 A L J 461

1200 Contents of the reference—(1) A Sessions Judge before he refers the case to the High Court is bound to call upon the inferior Court for an explanation of the order passed and should submit such explanation to the High Court together with the record—8 Cal 644

(2) The reasons for the reference should accompany the record—1891 A W N 80

(3) The order of reference should set forth the points on which orders are required—O S C 64

(4) The reference should contain a recommendation that the sentence be revised or altered—27 All 25 and the District Magistrate should also give a brief abstract of the case and the grounds upon which he recommends that the order or sentence he considers to be incorrect should be set aside by the High Court—9 Cr L J 502 (Mad)

But the report should not contain any representation of the complainant protesting against the Subordinate Magistrate's decision—Ratanlal 340

1201 High Court's power in dealing with reference—Where a District Magistrate referred a case tried by a Subordinate Magistrate and recommended the setting aside of the order of the Sub Magistrate, being of opinion that the Sub Magistrate in conducting the trial did not honestly and impartially apply his mind to the actual evidence before him and took a grossly biased and distorted view of the case it was held that it would not be right for the High Court to take the expression of opinion of the District Magistrate and to rely upon that opinion without satisfying itself upon the evidence and upon the conduct of the proceedings generally that the District Magistrate's opinion was right that is, the High Court would have to investigate the whole of the facts before it would come to the conclusion whether it ought to interfere in revision—44 Cal 703 Where the trial Court has fully considered the evidence and discharged the accused the High Court will not interfere, on a reference by the District Magistrate, unless it is shown that the order of the trial Court was either pervers or unreasonable—*Emp. v Jagdamba* 11 O L J, 334 1 O W N 245 25 Cr L J 1026

439 (1) In the case of any proceeding the record of

High Court's powers of revision which has been called for by itself or which has been reported for orders, or which otherwise comes to its know-

ledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections* *423, 426, 427, and 428 or on a Court by section 338, and may

enhance the sentence, and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate or Magistrate of the first class.

(4) Nothing in this section applies to an entry made under section 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) *Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub section (2) of showing cause why his sentence should not be enhanced shall, in showing cause be entitled also to show cause against his conviction*

Change—This section has been amended by sec 111 of the Cr P C Amendment Act, XVIII of 1923. In sub section (1) the figure '195' has been omitted this is consequential to the amendment made in sec 112. Sub section (6) has been newly added for reasons see post.

1202 Scope of section—The series of sections 435-439 must be read together. Of these section 435 is the principal section dealing with the grounds upon which revisional jurisdiction may ordinarily be exercised—15 Cal 608. Secs 435-438 prescribe the method by which the records of any Criminal case come to the High Court and the power of the High Court to deal with the record is in Sec 439. Secs 435-438 provide the machinery and sec 439 gives the power to dispose of the record—36 Mad 275. The words 'the record of which has been called for by itself' refer to sec 435, and the words 'which has been reported for orders' refer to sec 438.

Section 439 must be read along with and subject to section 435 if a case is outside the scope of section 435 section 439 cannot apply to it.
4 Cal 438

'Any proceeding'—Under the old Code of 1872, the words used in this section were 'judicial proceeding' instead of the words 'any proceeding', and the High Court could call for and revise the record of a judicial proceeding only, but under the Code of 1882 (as well as under the present Code) the High Court can call for and examine the record of 'any proceeding' e.g., an order by a Magistrate under sec 517 below—2 Weir 538

High Court should not be moved in the first instance—See Note 1168 under section 435, under heading "To whom application should be made"

1203 Grounds of interference:—The controlling power of revision of the High Court in criminal cases is an extraordinary power and it must be exercised with due regard to the circumstances of each particular case, anxious attention being given to the said circumstances which vary greatly. This discretion ought not to be crystallized, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the Legislature has committed to them. This discretion like all other judicial discretions ought as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case—28 Bom 533. No hard and fast limitation should be placed on the exercise of the powers of superintendence of the High Court over the proceedings of inferior Courts. There is no species of injustice which the High Court would be powerless to correct, where its interference is called for—14 M L T 200 12 C W N 678. The circumstances which will justify the interference of High Court have not been and cannot be laid down with precision. While the Judges have repeatedly held that only when exceptional grounds exist the High Court ought to interfere the decided cases shew that no hard and fast rule can be laid down but that when in the interests of justice the High Court's intervention becomes necessary it ought not to be refused—*Ramanathan v Subrahmanya* 47 Mad 722 (125)

(1) Sections 435 and 439 give the High Court power to control the propriety as well as the legality of a finding sentence or order of any inferior Criminal Court. That necessarily imports a power to regulate or revise the proceedings leading up to any such finding sentence or order. If therefore a sentence has been passed or confirmed by a Court which could not legally try or should not properly have tried the case the High Court has a discretion to interfere—9 N L R 81

(2) When an illegal order is passed and action taken by a Magistrate which involves matters coming within the purview of law and justice and within the scope of authority of the Court, such authority cannot be ousted by the mere plea of the Magistrate that he was not acting as a judicial officer but in his executive capacity, and the High Court can interfere in revision—1908 P R 4

(3) The High Court can interfere in revision on the ground of misreading of documentary evidence and fundamental errors in principle which vitiate the conduct and disposal of the case—*Emp v Bal Gangadhar Tilak* 28 Bom 479

(4) The High Court will interfere with an order of a Magistrate

passed without jurisdiction under a certain Act, even though that Act provides that the conviction under it shall not be open to appeal or revision—2 S L R 20 Thus, although sec 15 of the Extradition Act ousts the jurisdiction of the High Court to inquire into the propriety of a warrant issued under Chapter III of that Act yet where the order was made clearly without jurisdiction, it is open to revision by the High Court at the instance of the party whose liberty is affected by it—14 Cr L J 673 (Cal), 7 Bom L R 463

(5) The High Court can exercise its power of revision even after the expiry of the sentence, and though it is not possible to interfere with the sentence because it has expired, the law does not prevent the High Court from interfering with the conviction—7 All 135

(6) The High Court has the power and the right to call for the record of a case and make such order thereon as it deems just *even though the applicant is dead*—2 Bom 564 [Contr—1893 P R 6, where it is held that an application for revision abates on the death of the applicant]. Sec 431 (as amended in 1898) allows an appeal from a sentence of fine after the death of the appellant, and similarly the High Court can exercise its power of revision, even after the death of the applicant, in a case where compensation has been awarded under section 250 such compensation being in the nature of a fine—1908 P R 24 see also 1919 P R 8 (cited under sec 431)

(7) The High Court has ample power to interfere, should it see fit to do so, in any case in which the Magistrate has either refused to exercise a discretion vested in him by the law or has exercised that discretion in an improper manner or on improper grounds—19 Cal 32 2 Cal 110 So also, where the Magistrate acted in his character as Magistrate believing he had power to do so, whereas in fact he had no such power, his act is liable to be set aside in revision upon the application of the party aggrieved—1866 P R 21 1870 P R 4

(8) The High Court can in revision reverse the proceedings of a Magistrate on the ground of disqualification of the Magistrate in a particular case, owing to personal or pecuniary interest or bias—1884 P R 40

(9) The High Court can interfere in revision where the procedure followed by the Magistrate has been improper and faulty e g where the Magistrate based his decision not upon the evidence recorded but on unrecorded evidence taken verbally subsequently on the spot—24 W R 14, or where the Magistrate negligently omitted to record the evidence of previous conviction and convicted and sentenced the accused—1874 P R 12, 1879 P R 28, or where the inquiry in the Lower Court has been faulty—12 Bom 377

(10) The High Court will interfere in revision when there is a *material error* in the proceedings, which means not an error in decision upon the facts, but some *error in law or procedure* which affects the decision—20 W R 41 Thus, where there is a substantial doubt as to the guilt of the accused, it is a material error not to give the accused the benefit of a doubt, and the High Court can interfere and acquit the accused—W R 27, 1915 P W R 341 1875 P R 6 Where the Court has

a wrong view of the facts through an error of law, e.g. where it places the burden of proof on the accused, contrary to the principles laid down in sec 101 of the Evidence Act, the High Court will interfere—*Ratanlal* 704 Where the evidence for the prosecution was weak and biased and it was possible that the accused did the act complained of (theft) under a bona fide belief that he had the right to the property, it was an error of law of the Magistrate not to have acquitted him and in revision the Chief Court set aside the conviction—1916 P W R 27 18 Cr I J 732 (Cal) An improper summing up by the Sessions Judge in which the Judge omitted to charge the jury as to the degree of credit to be given to a particular witness is an error in law which is a good ground for revision—5 W R 80 It is a material error to convict a person of being in possession of stolen property in the absence of evidence showing dishonest possession on the part of the accused especially where the theft is not recent—1875 P R 15 Omission to take a very material evidence offered by the accused is a material error which prejudices the accused, and the High Court can interfere—24 W R 60 Laxity and indifference on the part of the Sessions Judge in weighing and sifting the evidence is a material error which calls for revision—2 All 336 A defective investigation by the Magistrate is a material error which justifies interference of the High Court in revision—2 Weir 50

(11) The High Court will interfere where the order of the Lower Court was passed without recording sufficient evidence Where the evidence on record was insufficient to support a conviction the High Court in revision set aside an order of the Sessions Judge summarily rejecting the appeal and remanded the case for rehearing on the merits—10 C V 446 The High Court will also interfere where the Lower Court has failed to consider important evidence and has accepted certain other evidence without any critical examination 23 C W N 488

(12) The High Court can interfere with an order in a criminal case on the ground that inferences unfavourable to the accused and not warranted by the evidence had been drawn to the prejudice of the accused—18 Cr L J 116 (Bur)

1204 How powers of High Court can be invoked.—The High Court will interfere either by calling for the record under sec 435 or when the case has been reported to it for orders under sec 438, or when the case 'otherwise comes to its knowledge' The High Court may interfere in revision upon information in whatever way received—2 Mad 38 The powers conferred by this section are at all times to be exercised and they may be put in force not merely on matters coming before the Judge in Court but also on matters coming to his knowledge on reliable information—2 Weir 538 An official communication from Government for revision of a case is covered by the terms of this section, and the High Court can exercise its revisional powers when a case comes to the knowledge of the Court through an official communication direct from Government—188-1 W N 144 The High Court has power to interfere in revision on a matter being brought to its notice in any manner whatever, not necessarily by means of an application on the part of the person convicted It can

interfere on information contained in a news paper or a placard on a wall or an anonymous post-card, if it considers that sufficient grounds have been established to justify its so doing. But where the convicted persons who might have appealed did not appeal or apply in revision because they (being non-co-operators) refused to recognize the authority of any Court established by British authority in India, the High Court should be loath to take action on an application for revision presented by a third party on his own responsibility and without authority from the convicts on whose behalf it was presented—*In re Varam Prasad* 45 All 128 (129)

Although the Court has power under sec 439 of the Code to call for cases not only on judicial information but also to deal with a case which otherwise comes to its knowledge, yet in most circumstances it is a right practice that the Judges should be moved in open Court—*Ratanlal* 577, 16 Bom 380

The High Court may exercise its power of revision upon the petition of a private person occupying the position of a complainant in the case in which revision is sought—2 Mad 38 2 All 448 2 S L R 25, 4 P L J 435

The High Court may also exercise its power on its own initiative—1912 P W R 7 2 Bom 364. The revisional jurisdiction of the High Court can be exercised *suo motu* even though the accused does not desire it—17 S L R 245

In case of acquittal the High Court can exercise its powers of revision on the application of a private prosecutor—2 All 448. Though as a Court of Appeal the High Court can consider an order of acquittal only on an appeal by the Local Government yet as a Court of revision it can deal with an original or appellate order of acquittal either when reported under sec 438 or whenever it may otherwise come to its knowledge. It can do so even on the application of a private prosecutor—27 Cal 320. See also 38 Cal 280 18 C W N 1244 23 C W N 609 1915 P W R 18, and 6 S L R 121 where the High Court entertained an application for revision preferred by the private complainant against the order of acquittal. The High Court ought to interfere with an order of acquittal at the instance of a private complainant especially in a case like defamation where the offence is of so personal a nature that the Local Government would seldom be willing to appeal from the acquittal—20 Cr L J 708 (Nag), 42 Cal 612 at p 616 (per Jenkins C J), *Isutosh v Purna Chandra* 50 Cal, 159 (163), so also in a case of insult—11 C L J 113. The High Court will also interfere where the order of acquittal was passed under sec 247 for non appearance of complainant—26 O C 282

In some cases, however, it has been held that the High Court has no power to revise an order of acquittal, except at the instance of the Local Government. Where no appeal has been preferred by the Local Government, an application for revision by a private person should be discouraged on public grounds—14 Mad 363, 24 All 346 5 N L R 4, 2 Weir 570, 2 Weir 571, 3 Bom 150, 8 Bom 197, 15 Bom 349 6 All 484, 20 All 459, 27 All 359 8 Cal 895, 22 Cal 164, 42 Cal 612, 2 Pat 708, *v Han Charan*, 26 Cr L J 516 (Pat) *Damodar v Jugharsingh* 26

L J 1348 (Nag), 15 S L R 171, *Bathcha v Bathcha*, 12 O L J 63 2 O W N 50 In cognizable cases the private prosecutor has no position at all, and if the Crown decides to let an offender go, no other aggrieved party can be heard to object that he has not taken his full toll of private vengeance—*Siban Rai v Bhagwant*, 5 Pat 25 6 P L T 833 27 Cr L J 235 (per Mullick J) (But Macpherson J holds in this case that even in cognizable cases, the private prosecutor, if he has initiated the proceeding, can apply for revision of an order of acquittal) It is not proper and expedient for the High Court as a general rule to exercise its powers of revision against orders of acquittal on a reference direct from the District Magistrate under sec 438, where the Local Government has not appealed from the order of acquittal—24 All 346 44 Cal 703, *Emp v Mada Baksh* 25 All 128 15 Mad 36 12 A L J 255, 35 M L J 665 38 Mad 10-8 *Crown v Ichhar Singh*, 5 Lah 16 (19) The High Court should not entertain an application by a complainant to revise an order of acquittal, after the Local Government has declined to direct an appeal against it—8 L B R 356 Where no appeal has been preferred by the Local Government against an order of acquittal, the High Court does not ordinarily interfere in revision *suo motu* to set aside the acquittal—1 Rang 604 See Note 1219 under sub sec (4) as to the grounds on which the High Court will revise an order of acquittal

1205 When High Court will not interfere:—In the exercise of its revisional powers, the High Court will not interfere in revision unless it is satisfied that it is necessary to do so to prevent an otherwise irreparable injustice—9 Bom L R 706, 20 A L J 909, 39 Mad 561 The High Court will not interfere in revision if no prejudice is shown to have resulted to the accused—1906 P R 5 4 L B R 315 The High Court will not interfere even though the Court below is wrong in law or the trial in the Court below is illegal (and not merely irregular), if the accused has not been prejudiced by such error—1913 P W R 29 4 Bom L R 686, 1906 P R 5 An order that proceeds upon an error of law, but which apart from that error is a proper order in the case, ought not to be set aside in revision—*Sri Kishan v Devi Dayal* 2 O W N 823 26 Cr L J 1619 Where a case has been properly disposed of on the merits by the Court below, the High Court will not interfere in revision merely on the ground that the pleader on behalf of the accused was not heard in the Lower Court—1 Pat 589

The mere fact that the High Court sitting as a Court of appeal might have come to a different conclusion on facts from what the Magistrate arrived at, is not a sufficient ground for entertaining an application for revision—*Damodar v Jugharsingh* 26 Cr L J 1348 (Nag)

The High Court will not interfere when there is no error in law on the face of the record—4 Bom L R 686 Where a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the High Court in revision will neither inquire into the reasons nor interfere—*Gulli Bhagat v Varan Singh* 2 Pat 708 (10)

Where a Magistrate convicts an accused person of an offence falling within his jurisdiction, though the facts found would also constitute a

more serious offence not within his jurisdiction his proceedings are not void *ab initio* and the High Court will not ordinarily interfere unless the sentence appears inadequate or unless the accused has been deprived of his right of appeal—*Berhamdeo v K E*, 26 Cr 1 J 1559 (Pat), *Q E v Gundy* 13 Bom 502, *Emp v Iyyan* 24 Mad 675

The revisional powers of the High Court will not be exercised until all the other remedies (*e g* appeal) provided by law have been exhausted—1884 A W N 293 3 Cr 1 573 & All 276 1905 A W N 143 See Note 1220 under sub section (5) So also, the High Court will not interfere in revision while an appeal in respect of the same matter is pending before the Appellate Court—*In re Itakuri* 44 M L J 366

The High Court will not interfere in revision when the accused has pleaded guilty before the Lower Court except as to the extent or legality of the sentence—1907 A W N 204 4 I B R 315

The High Court will not interfere in revision when there has been long delay in applying for revision and the delay is not explained or accounted for by the applicant—27 All 468 8 All 514 6 All 484, 1907 A W N 204 1886 A W N 83 1 P L J 165

The revisional jurisdiction of the High Court will not be exercised in such a way that a right of appeal may practically be given in cases where such right is definitely excluded by the Code—36 All 403

The High Court will not allow a revision application when a remedy can be easily obtained from the Civil Court—6 C W N 469

1206 Orders which are subject to revision—(1) *Order of a Presidency Magistrate*—Under secs 423 and 439 the High Court has jurisdiction to set aside an order of discharge or dismissal of complaint passed by a Presidency Magistrate and to direct that the person improperly discharged should be committed for trial or to direct further inquiry into the complaint—27 Bom 84 20 C W N 1128 36 Cal 994, 26 Cr 1 746 28 Cal 652 In 27 Cal 126 6 C 1 J 705 and 33 Cal 128 it has been held that the High Court can interfere with an order of dismissal or discharge passed by a Presidency Magistrate not under this Code but under sec 15 of the Charter Act See Note 682 under sec 203

(2) *Non appealable orders*—The High Court's power of revision is not limited to orders from which an appeal would lie On the other hand, the High Court ought to rectify cases of injustice or illegality when the person affected is unable to appeal The High Court in revision can exercise its power of appeal with reference to any particular order, whether appealable or not—1885 P R 42

(3) *Order granting bail*—The proceeding in which it has to be determined whether the accused person should be admitted to bail is a judicial proceeding and is therefore cognizable by the High Court as a Court of Revision—6 Mad 63 But where a Sessions Judge, finding that there was no reasonable ground for believing that the accused was guilty, released him on bail under sec 497 the High Court would not interfere with such order in revision though it has power to do so—10 M L J 411 5 A L J 419 See notes under sec 497

(4) *Order refusing to grant copies*—Where the Magistrate refused

to grant to the accused the copies of papers which were necessary for his defence the High Court in revision set aside the conviction on that ground—14 W R 77

(5) *Preliminary or final order*—It is competent to the High Court to call for the record of any proceeding in an inferior Criminal Court, and if necessary or expedient, to revise an order passed by such Court, whether of a preliminary or final nature—14 A L J 851, 1892 A W N 10 23 Cr L J 429 (Lrb) Thus, where a District Magistrate called upon a witness who gave evidence before him to show cause why he should not be prosecuted for perjury, the High Court was competent to revise such order—14 A L J 851

So also, where a Magistrate, after dismissing a complaint without inquiry, passed an order calling upon the complainant to show cause why he should not be prosecuted for bringing a false complaint, the High Court revised the preliminary order, though no final order directing the prosecution of the complainant had yet been passed—22 Cr L J 81 (All)

(6) *Orders under Sections 88, 106, 110, 118, 143, 144, 145, 148, 476, 488, 514, 515, 517*, see notes under those sections

See also Note 1173 under sec 435

1207. Orders which are not open to revision:—(1) *Order under Press Act*—An order under sec 8 Press Act (Act I of 1910) for the deposit of security by the publisher of a newspaper is an executive order and not revisable by the High Court—17 C. W N 1245, so also an order under sec 3 (1) of the Press Act—39 Mad 1085 or an order of forfeiture passed under section 12 of that Act—41 Cal 466 (F B)

(2) *Order under the Extradition Act*—The Chief Court has no power under this section to interfere in respect of a warrant issued by a Political Agent in a Native State under Sec 7 of the Extradition Act (XV of 1903) either on the ground that there is no *prima facie* case against the petitioner or on the ground that the circumstances under which the officer was originally moved do not justify him in exercising his power under the said Act—1908 P W R 36 Where a warrant is issued by a Political Agent under sec 7 of the Extradition Act, its execution by the District Magistrate in accordance with the Act is an executive Act, and the High Court cannot interfere in revision with such execution But the High Court can interfere otherwise than by way of revision under sec 491—42 Cal 793

(3) *Order sanctioning prosecution under sec 19*—See Note 649 under section 197

(4) *Orders of the High Court itself*—A single Judge of the High Court has no power to revise an order passed by another single Judge in appeal, and to set aside the conviction even on the ground of discovery of new materials The only remedy is to refer the matter to the Local Government under Chapter XXIX of this Code—*Emp v Kole*, 45 All 143 (145) The judgment of the Division Bench of the High Court as well as the sentence is final, and the Court is *functus officio* as soon as the judgment is signed by the Judges, and the High Court or any Bench of it has no power to revise the sentence or interfere with it in any way—

14 Cal 4. So also, a Division Bench cannot revise an order of a single Judge of the High Court—1909 P R 4, 1909 P R 1, 7 All 672, 46 Mad 382. See notes under sec 369. The only exception is in a case under sec 434. See notes under that section, and 1909 P R 1 cited therein.

For other orders which are not open to revision see Note 1172 under sec 435.

1208 Powers of the High Court in revision:—Powers of an Appellate Court:—Sec 439 enumerates the powers which the High Court may exercise in revision, and it declares that in any proceeding the record of which has been called for by itself or reported for orders or otherwise comes to its knowledge, or on an application made by the complainant, the Court may in its discretion exercise any of the powers conferred on a Court of Appeal by certain preceding sections, among others by sec 423—27 Bom 84, 2 All 336 4 P F J 435. The nature of the powers that the High Court has in revision is the same as that which a Court of appeal has in the case of an appeal from any order against which an appeal is allowed by the Code—14 M L T 200. But a *Sessions Judge* or a *District Magistrate* cannot while sitting in revision exercise the powers conferred by the Court on an appellate Court. Appellate powers are in revision conferred by sec 439 only on the *High Court*—20 Cal 633. But the High Court sitting as a Court of revision will not exercise the powers of an Appellate Court except on very exceptional grounds—8 Bom 197. A High Court undoubtedly has jurisdiction to entertain a revision on grounds of fact but it is equally well established that this power should be very sparingly exercised. There is a well marked distinction between an application in revision and an appeal. It would be futile for the Legislature to grant the right of appeal in some cases and to withhold it in others, if the High Court under the guise of a revision were to allow conclusions of fact based on evidence to be canvassed and attacked on the footing of an appeal. Broadly speaking the rule is that the High Court will only entertain a revision on fact where either there is no evidence to support the finding or where the finding arrived at is perverse or such as no reasonable man could have arrived at on the evidence produced—*Ibdu'l Lahid v Abdullah*, 45 All (56) (661). Specially in a case where no appeal is allowed by the law, the High Court will not in revision exercise the powers of an Appellate Court except on very exceptional grounds—*Ratanlal* 244 9 Bom 1 R 706. The revisional jurisdiction of the High Court may be exercised in order to prevent gross and palpable failure of justice, but it should not be exercised in such a way that a right of appeal may practically be given in cases where such right is definitely excluded by the Code—*Ihsanullah v Mansukh Ram* 30 All 403. The High Court must not allow what would virtually be an appeal from the order of the Lower Court, in a non appealable case—10 N L R 177.

The High Court as a Court of revision has the power conferred on a Court of appeal by sec 423 to alter or return an order of the Lower Court—16 Cal 730. The High Court has also power to alter a conviction for one offence into a conviction for another offence, at the same time main

turning the sentence passed—1887 A W N 95, *et seq.* where the accused was convicted by a Magistrate for an offence triable exclusively by the Court of Session, the Chief Court interfered in revision and altered the conviction into one for an offence triable by a Magistrate—1869 P R 10 The High Court can *quash the proceeding* where there was an utter want of discretion on the part of the Magistrate in instituting the proceedings—1 C L R 268, or where no advantage would be gained by continuing the proceedings—16 A L J 734 The High Court *quashed the conviction* where it was not supported by any legal evidence, *et seq.* when the only evidence was the admission of a co-accused—1868 P R 14 The High Court can set aside a conviction where it was passed on an erroneous view of the law—27 Cal 320 But in setting aside a conviction which is bad in law, the High Court is not necessarily bound to go further into the question whether upon the facts established by the evidence a conviction of some lesser offence might not be recorded—41 All 587 But the High Court cannot interfere and set aside a valid conviction and sentence passed by a Court of competent jurisdiction after careful consideration—21 W R 47, 1884 P R 36, 20 W R 61

The High Court cannot direct the Subordinate Court to refrain from trying an accused person against whom such Court has issued process—*Jharu Lal v Mahanth Madan Das*, 2 Pat 257

The High Court in revision has power to *order a retrial*—5 M H C R App 10 But the High Court cannot as a Court of revision set aside the conviction and sentence passed by a Magistrate of competent jurisdiction with a view to direct a retrial on the ground that subsequent to the conviction it becomes known that the accused was previously convicted—1884 P R 36 Where evidence of the previous conviction of the accused for a similar offence was not adduced at the trial the High Court refused to interfere in revision and to order a retrial to enable the prosecution to supplement the record by producing fresh evidence bearing on the question of punishment—1905 P R 19 1874 P R 13 It would not be proper to order a retrial and thus to allow the prosecution to shape its case afresh, after the whole matter has been thrashed out and the defects in the prosecution case brought to light in the course of prolonged appellate and revision proceedings—*Hedar Nath v A. F.* 29 C W N 408 41 C L J 172 26 Cr L J 849

The High Court when acting as a Court of Revision can order a commitment for trial to the Court of Session after reversing the finding and sentence—15 All 205 Where the evidence discloses a more serious offence not within the jurisdiction of the Magistrate, the High Court may quash the conviction and sentence for the minor offence and direct a commitment for trial before a tribunal having jurisdiction for the graver offence—7 M H C R App 5 20 C W N 732, 23 C W N 1031 Where the accused has been improperly discharged, the High Court has power to set aside the order of discharge and to direct that the person improperly discharged be arrested and forthwith committed for trial—27 Bom 84, 6 All 40

The High Court has power under this section to set aside an order of commitment passed by the Sessions Judge under sec 423 (1) (b)—*Ram* .

Samugh v Emp 11 O I J 748 25 Cr I J 1375 *Emp v Lachman*
2 All 398

1209. Power to direct further evidence to be taken—Under this section the High Court has power to direct further evidence to be taken—3 Bom I R 677 19 W R 56 The High Court under sec 439 has power as an Appellate Court to direct evidence to be taken. No such powers are given to the Sessions Judge or the District Magistrate under sec 436—6 C I J 251 Where a Magistrate omitted to set out in the charges the previous convictions of the accused the Chief Court in revision directed that the charge should be amended by adding the previous convictions and also directed that evidence with regard to these convictions should be recorded—18,9 P R 19 1879 P R 28

The High Court has also power under this section to call for additional evidence upon which the High Court can itself come to a conclusion but this section does not give the High Court power to call for a finding of the Magistrate—17 Cr I J 767 (Mad)

1210. Power to go into the facts—The High Court in revision is not confined to questions of law alone but can also deal with questions of fact—18,34 A W N 207 20 A I J 276 If the Judges in revision think it right to consider the whole evidence they have power to do so—14 Cal 361, Ratanilil 908

The High Court can go into the facts when the Lower Court has totally misconceived the evidence and come to an obviously wrong conclusion—14 Bom 115 The High Court in revision does not decide the balance of credibility between two conflicting sets of witnesses or two conflicting issues of fact but it may be compelled to dissent from a finding of fact which is either perverse or has been arrived at contrary to well established principles of law—*United Sugar v Emp* 21 A L J 46, The High Court will interfere where the finding of fact is contrary to the mass of un rebutted evidence and there is a clear case of miscarriage of justice—*Emp v Sarju Prasad* 27 O C 290 11 O I J 330 25 Cr L J 1066 The High Court can go into the facts of the case where evidence which is not admissible has been wrongly admitted (1 P I T 121) or where the evidence has not been considered from the right point of view, e.g. where the evidence of accomplices was regarded as that of ordinary witnesses—2 C W N 672 Where the construction of a document upon which the guilt or innocence of the accused largely depends is erroneous the High Court has power to go into the facts fully—1905 P R 12 Where evidence against the accused is weak, suspicious and inconclusive the High Court can, on its revision side, examine and discuss the evidence on record and upset the findings of fact of the Lower Courts—1907 P W R 20 Where the Lower Courts have failed to scrutinize carefully the proof of corroboration of accomplice evidence the High Court in revision entered into the evidence and set aside the concurrent findings of fact of both the Lower Courts—1911 P W R 3 The High Court as a Court of Revision has power to re-examine the evidence if there are *prima facie* good grounds for doing so, especially where the accused has been given a non appealable sentence and

has no means of vindicating his character except in revision—19 Cr L J 666 (Nag) See also 45 All 656 cited under Note 1208 ante

Where the judgment of the Appellate Court is a *merger* one and shows that the Appellate Court has not gone thoroughly into the questions dealt with at the trial by the first Court, the High Court will in revision investigate the original trial to see whether the nature of the procedure and the decision arrived at were such as to leave no doubt that the accused had a fair trial and that the decision was given according to law—20 Cr L J 370 (All)

But though the High Court has power to revise findings of fact arrived at by the Lower Courts and the law imposes no limits to this jurisdiction (14 Bom 331 10 Cal 1047 10 Bom 131), still it is not bound to do so if it does not think fit and will not exercise such a discretionary power unless there appears on the face of the judgment or order complained of or on the record some ground to induce the Court to think that the evidence ought to be examined in order to see that there has been no failure of justice—22 Cal 998 The High Court is always averse to interfering on facts by way of revision as it would tend to remove the difference specifically laid down by the statute between appeal and revision—*Hafiz Khan v Emp* 1 Oudh W N 878 It is unusual in revision to disturb a finding of fact unless it is so manifestly erroneous that a miscarriage of justice would result from its being uncorrected—6 Bom L R 1096 *Id Zabur v A, E* 9 O L J 488 *Hiranand v Emp* 17 S L R 245 25 Cr 1 J 134 The High Court has the power to go into evidence in revision but it is the practice of the High Court not to go into evidence as a rule and the Court will not interfere unless there are special circumstances or unless there is an error of law—28 Bom 533 *Ratanlal* 244 Ordinarily the High Court will not in revision go behind the concurrent findings of the Courts below on a question of fact—24 Cr L J 476 (Mad) *Tabis v Emp* 26 Cr L J 393 6 Lah L J 326 When the Appellate Court has dealt with the evidence carefully and has not omitted to consider any relevant or important portion of the evidence the High Court will not interfere in revision with the finding of fact of the lower Appellate Court—*Gajo Singh v Emp*, 4 P L T 265 The uniform practice of the High Court is not to exercise its power of upsetting a finding of fact, except for some extraordinary reason and the circumstance that the High Court itself might have come to a different conclusion is not such a reason—14 Bom 115 The High Court in revision will not interfere with a finding of fact of the Lower Court where the decision of that Court on the facts is not shown to be clearly or manifestly wrong—14 Bom 331, 18 Cr L J 437 (Cal) The High Court will refuse to interfere in the exercise of its revisional jurisdiction with regard to findings of fact, except on very exceptional grounds such as a misstatement of evidence by the Lower Court or the misconstruction of documents, or placing by that Court on the accused the onus of proof contrary to the law of evidence—12 Bom L R 21 The jurisdiction of the High Court to go into questions of fact should be exercised in very exceptional cases such as where there has been a conviction of a clearly innocent person—8 Bom L R 851 When the High Court sets aside a conviction as being bad in law, it is not necessarily bound to go further into the question whether

upon the facts established by the evidence a conviction of some lesser offence might or might not be recorded—41 All 587

1211 Power to allow composition:—The High Court as a Court of Revision has power to give effect to the compounding of offences which the parties have agreed to after conviction—1904 P L R 252, 32 All 153, 45 All 17, 17 O C 92 Where the parties have lawfully compounded the offence, the High Court may set aside the conviction—13 O C 161 This is now expressly provided by the new subsection (5A) of Section 345 added by the Amendment Act of 1923 In 18 C W N 1212, 43 Cal 1143, 3 P L T 458, 39 Mad 604 11 A L J 13 15 A I J 467 and 1918 P R 35 it was held that the High Court had no power to allow composition in revision These cases are no longer good law

1212 Power to order restoration of property:—The High Court in its revisional jurisdiction has the power under section 423 (d) of making any amendment or any consequential or incidental order that may be just and proper An accused person may upon his acquittal by the High Court in revision be restored to possession of the property of which he has been deprived in favour of the complainant—27 All 415 The High Court may in the exercise of its revisional powers pass an order under Sec 517 to refund the money received by false pretences—15 Cr L J 555 (Bur)

1213 Power to consider case of non appealing accused:—Where two or more persons have been convicted by the Sessions Judge and one of them has appealed the High Court has power under Sec 439 to deal with the case of the accused persons not appealing against their conviction while considering and trying the appeal preferred by the other accused clause (5) of this section does not in any way affect the jurisdiction of the High Court to deal with the case of the non appealing accused—5 C W N 330 31 C L J 305 1893 A W N 51 *Raghu v King Emp* 5 P I J 430 1916 P W R 7 1909 P W R 14, *Allah Ditta v Crown* 25 Cr I J 435 (Lah) Where four persons were convicted and three of them were awarded non appealable sentences, and on appeal by the other the conviction of all of them is found to be wrong the High Court has power under this section to deal with and set aside the conviction even as regards those who have not appealed—1891 A W N 149, 39 All 549, 31 C L J 305 Similarly where there are several convicted persons and one only of them has applied for revision the High Court has power to deal with the convictions of all offenders who were tried together and convicted, though only one person has applied for revision—1909 P R 9 (1911) 2 M W N 170

1214 Power to expunge remarks from Lower Courts' judgment:—In a Bombay case a Sessions Judge in convicting the accused passed certain remarks about the complainant, a police officer, as a result of which he was dismissed from service He thereupon applied to the High Court to delete the remarks from the judgment of the Sessions Judge It was held dismissing the application that it would be an extraordinary exercise of the powers of the High Court, to expunge from the Lower Court's judgment the remarks complained of—19 Bom L R 912 In a recent case

of the Allahabad High Court it has been held that the High Court cannot do so even under section 423 (d) read with section 439 because the 'amendment' mentioned in section 423 (d) means an amendment of the main order, and the incidental or consequential order means an order incidental to and consequential upon the main order, that is, the High Court can make an amendment or pass an incidental or consequential order only when there has been an appeal or revision petition against the main order, but where the main order passed by the Lower Court has not been appealed against the High Court cannot entertain any application for expunging certain remarks made by the Lower Court in its judgment—44 All 401. But where there has been an appeal or revision petition against the order of the Lower Court, the High Court in dealing with the whole evidence of the case and considering the judgment can expunge any improper remarks made in it by the Court below. This will be evident from 2 C W N 221, 15 Cr L J 420 (Oudh), and 5 Bur L T 20. In 4 Bur L T 173 the Chief Court held that it had power to expunge the objectionable passage from the Lower Court's judgment, though it refused to do so.

But section 561A (newly added by the Amendment Act of 1923) gives inherent power to the High Court to make any order to secure the ends of justice, and thus to expunge any objectionable remarks from the Lower Court's judgment, irrespective of the fact whether there has or has not been an appeal or revision petition against the main order. Thus, in *Amar Nath v Crown* 5 Lah 476 (481) 26 Cr L J 463, where a Sessions Judge made certain unwarranted remarks about the testimony of a Police witness and that witness applied to the High Court in revision to expunge those remarks from the judgment of the Sessions Judge, the High Court directed those remarks to be expunged, although there was no revision petition in the main case in which that witness gave his evidence. So also, where one of two accused tried together by a Magistrate was acquitted and the Sessions Judge, in an appeal preferred by the other accused against his conviction passed certain remarks about the acquitted person impugning the correctness of the acquittal and that person applied to the High Court to expunge those remarks, the High Court ordered the remarks to be expunged, although no revision petition was made in the main case—*Ibdu'l Kar v Emp.* 25 Cr L J 1245 (Lah). The Bombay and Allahabad cases cited above must be deemed as overruled by sec 561A. See also, *Benarsi Das v Crown*, 6 Lah 166 26 P D R 315 26 Cr L J 1326, where the High Court expunged certain remarks in a Magistrate's judgment about a person who was not a party or a witness in the proceedings.

1215 Power to interfere in a pending case:—Under section 435 the High Court can call for and examine the records of any proceeding of an inferior Criminal Court not only to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order of such Court but also as to the regularity of any proceedings of that Court. Thus, section 435 does not deal merely with the finding, sentence or order but with proceedings generally, and the power of the High Court extends to calling for and examining the record of any proceedings for satisfying itself as to the regularity of such proceedings, and for that purpose it has power to inter-

fere at any stage of the proceedings in a pending trial. Thus it can interfere when the proceedings before the inferior Court have not proceeded any further beyond the issue of summons—*Pamanathu v Subrahmanya* 47 Mad 722 (723) 47 M L J 373 25 Cr L J 1009 *Q E v Nageshappa* 20 Bom 543 (545). The High Court can interfere with a case while it is still pending in the subordinate Court and can quash the proceedings if the materials before the Magistrate disclose no offence and no useful purpose would be served by continuing the proceedings—*Hari Charan v Girish Chandra* 38 Cal 68 (74) 13 C L J 43, 11 Cr L J 525 *Emp v Krishna Rao* 6 N L J 119. The High Court can interfere at as early a stage as when the accused has been summoned to show cause why sanction (under sec 193) should not be granted for his prosecution—*Q E v Jagan Singh* 1892 A W N 102, *Chadha v Emp* 14 A L J 831. The High Court can interfere with the proceedings of a Magistrate while they are in the interlocutory stage pending investigation, and may suspend such proceedings even without having the record before it—20 W R 23. The High Court can pending trial interfere with the interlocutory order of a Magistrate refusing to summon certain witnesses for the defence—1901 P L R 130. The High Court can interfere pending trial when the Subordinate Magistrate improperly declines to record any evidence tendered—1904 P L R 257. The High Court can interfere and set aside an Interlocutory order of a Magistrate refusing to let in evidence—8 S L R 238. The High Court can interfere when the case has reached the stage when a charge has been framed and only the defence of the accused remains to be heard—*Jagat Chandra v Q E* 26 Cal 786. If a charge is framed where no charge should have been framed the proceeding of the Magistrate becomes irregular and the High Court has power to interfere under this section as well as under section 561A during the pendency of the case to prevent the abuse of the process of the Court and to secure the ends of justice—*Gokul Prasad v Debi Prasad* 23 A L J 21 26 Cr L J 748 A I R 1925 All 311 *Harendra v Jotish* 40 C L J 283 26 Cr L J 545 A I R 1925 Cal 100. Where the trial was vexatious and protracted one, and in trial injury was thereby likely to be caused to the accused the High Court interfered during the pendency of the trial and set aside the charge—*In re Kuppaswami* 33 Mad 561 28 M L J 503 16 Cr L J 477. Where it was brought to the notice of the High Court that a person had been subjected over two months to the harassment of an illegal prosecution, it was the duty of the High Court to interfere during the pendency of the trial—*Chandi Pershad v Ibdur Rahman* 22 Cal 131. Where it was found that proceedings were instituted against a person under sec 110 for the third time though on both the previous occasions he was acquitted and no new evidence was forthcoming, the High Court interfered and quashed the proceedings—1910 P R 33 2 A L J 673. Where the notice and interlocutory order of a Magistrate under sec 112 were defective and could not form the basis of a proceeding under Sec 110 the High Court interfered and set aside the proceedings so far taken by the Magistrate—1910 P W R 18.

But though the High Court has power to interfere with pending pro-

ceedings at any stage, it will not do so except only under rare and exceptional circumstances—*Chaa Lal v Inant Parshad* 25 Cal 233, 1 S L R 30 39 Mad 561, *Mahomed v Md Idris* 26 Cr L J 1101 (Sind), *Madhab v Emp.* 26 Cr L J 1093 (Nag), and unless there is some manifest and patent injustice apparent on the face of the proceeding and calling for prompt redress—*Jagat Chandra v Q E.* 26 Cal 786, 20 Cr L J 764, 21 Cr L J 343 (Nag) The High Court will allow the proceedings in the Subordinate Court to go on and take their course and will not interfere with a pending proceeding (even though it is irregularly conducted) unless there is exceptional ground for interference—25 Cal 233, 20 Cr L J 30 (Cal) *In re Sami Goundan* 20 L W 937 26 Cr L J 421 Thus, the High Court will not interfere with the conduct of a case on the ground that the written complaint did not fully describe the offence, if the complainant stated in his deposition the description of such offence—1899 A W N 212 The High Court will not interrupt the course of a trial by interfering in interlocutory matters Thus, it will not interfere with a decision of a Magistrate that he has jurisdiction in a case If the High Court has to decide in the midst of the trial held in a Magistrate's Court as to whether he has jurisdiction or not it would be interfering in a most improper manner on a point which may conclusively have to be decided on appeal—*Lashi Ram v Dikshit* 3 O W N 104 27 Cr L J 191 The High Court will rarely interfere in the midst of a trial and order commitment, unless it is shown that the failure on the part of the Magistrate to commit is extremely improper—*Bilodar v A E* 3 O W N 201 27 Cr L J 417 The High Court will interfere with a pending trial only when it is satisfied that an interference is necessary and that any delay in the rectification of the error will cause waste of time or a miscarriage of justice—1904 P R 8

1216 Power to enhance sentence—This is a power which is not conferred by sec 423 and the High Court can exercise this power not as an Appellate Court but only in revision Thus, in an appeal against a conviction by a prisoner, the High Court dismissed the appeal as an Appellate Court, but enhanced the sentence as a Court of Revision—11 Cal 530

A private party is not entitled to apply to the High Court to enhance a sentence passed by a subordinate Court A District Magistrate or Sessions Judge or the Government Pleader may draw the attention of the High Court to a sentence with a view to its being enhanced The High Court may also of its own motion send for the record and take action with a like object *But it is not for a private complainant to apply to the High Court for this purpose* If he considers a sentence unduly lenient, he should draw the attention of the Government to the fact—*In re Nagji Dula* 48 Bom 358 (360) 26 Bom L R 181 25 Cr L J 966

Where an accused's revision petition from his conviction has been dismissed the High Court can entertain a second revision petition from the complainant or a reference from a District Magistrate (sec 438) for enhancement of the sentence The disposal of the first revision petition is no bar to the disposal of the second revision petition or reference, though arising out of the same original trial, because the Judge disposing of the revision petition filed by a convicted person against the propriety of his conviction

cannot be said to be adjudicating on the question of enhancing the sentence or that the matter of the second proceeding cannot be said to be of the nature of *res judicata*. It cannot be accepted as a sound principle that once the High Court has passed any order in a criminal revision it is *functus officio* and is precluded from entertaining any further revision petition or reference in the same case or from proceeding *suo motu*—*In re Sayed Anif* 26 Cr L J 583 A I R 1925 Mad 993

The High Court has power to enhance a sentence so as to alter its nature—6 All 622. The effect of secs 423 and 439 read together is that the High Court when hearing an appeal against a conviction may alter the finding under sec 423 and then as a Court of Revision may enhance the sentence under this section so as to make the sentence appropriate to the altered finding—37 Mad 119. Thus where a Sessions Judge convicted the accused of culpable homicide not amounting to murder and sentenced him to seven years rigorous imprisonment the High Court in revision altered the conviction to one of murder and sentenced him to transportation for life—1871 P R 11.

An enhancement of sentence is a serious proceeding and the High Court will not interfere as a Court of Revision in order to enhance the sentence if the sentence passed by the Lower Court involves substantial punishment, and should interfere only if the sentence is manifestly inadequate—1889 P R 7, 1898 P R 17, *Sitaram v Emp* 12 O L J 421 2 O W N 550 26 Cr L J 1364 10 S L R 207. And for this purpose the High Court should see whether there is matter on the record of the case showing that the sentence passed is clearly inadequate to the offence—*Emp v Mahadeo* 26 Cr L J 821 (Nag). The mere fact that the High Court would have inflicted a heavier punishment if the case had come before it for trial is not a proper ground for enhancement of sentence—1919 P R 7 *Sitaram v Emp* (Supra). It is not merely because circumstances occur to the High Court which would render necessary a more severe sentence or a different charge that the High Court will interfere there must be matter on the record of the case showing that the charge has been improperly framed or that the sentence passed is clearly inadequate to the offence—20 W R 22.

Where evidence of previous conviction was not adduced at the trial but was discovered after the conviction the High Court will not interfere and order a retrial in order to enable the prosecution to supplement the record by producing fresh evidence bearing on the question of punishment—1905 P R 19 1884 P R 36 1905 P R 43. Similarly, a valid conviction arrived at by the Magistrate will not be set aside simply because subsequent to the trial and conviction fresh evidence has been discovered which may tend to convict the accused of an offence other than that for which he was convicted—21 W R 47.

The High Court will not interfere in revision to enhance the sentence when the convicted person has undergone the full term of his imprisonment or has paid the fine imposed upon him even though the order of the Court below is clearly wrong in law—1913 P W R 29, 1909 P W R 14 1 Irb 453. The High Court is slow to interfere in cases where interference would involve the imprisonment of persons already d

from jail—1889 P R 7 The power of enhancement under this section should not be exercised in cases where the Magistrate's order was proper on the materials before him, and it is not fair to the accused to reverse the conviction and direct him to be committed to the Sessions after he has undergone the full term of imprisonment inflicted by the Magistrate, merely because his previous convictions were not known at the time of his trial by the Magistrate—9 S L R 93

The power of enhancement conferred on the High Court under sec 439 is limited only by clause (3) of this section. This clause does not regard the difference in the powers of the trying Magistrate under sec 32 but lays down that in cases of sentences passed by Magistrates not empowered under sec 34, the limit of enhancement shall be the sentence that might have been inflicted by a Presidency Magistrate or a Magistrate of the first class. Therefore the High Court has power to enhance the sentence of imprisonment to two years—9 S L R 82. The High Court has the power to inflict any punishment which might have been inflicted for the offence by a first class Magistrate and is not limited to the powers of the trying Magistrate—1 Lah 453. The words 'enhance the sentence' presuppose that a sentence has been imposed by the Lower Court. Therefore where no sentence has been passed by the trying Magistrate but the accused has been released on probation under sec 562 of the Code, the High Court cannot substitute a sentence of imprisonment or whipping in revision—20 Cr L J 99 (Oudh) 37 All 31.

Lastly, the power of enhancement of sentence can be exercised under this section where the sentence passed by the Magistrate is a legal one. A retrospective sentence of imprisonment for the period already passed by the accused in the lock up is not a legal sentence—1919 P R 27.

1217 Procedure if two Judges differ.—If two learned Judges of the High Court differ in a Criminal Revision case, sec 439 read with sec 429 requires the case to be decided by a third Judge, and precludes any further appeal under the Letters Patent or any reference to a Full Bench under the rules of the Court—40 All 976. But where an application is made to the High Court not under section 435 of the Criminal Procedure Code, but under sec 107 of the Government of India Act, Section 439 of the Code cannot apply and consequently sec 429 (which is referred to in sec 439) is also not applicable and therefore if in such a case there is a difference of opinion between the Judges, the provisions of sec 36 of the Letters Patent will apply, and the decision of the senior Judge will prevail—47 Cal 438.

1218 Subsection (2)—Notice to accused.—The language of this subsection is mandatory and it is clearly enacted as an exception to section 440. An order of enhancement of sentence is an order to the prejudice of the accused and if such an order is passed without giving the accused an opportunity of being heard, it is more than an irregularity and the order so passed is without jurisdiction—11 A Scia Naidu 47 Mad 428 (432). *King Emp v Romesh Chandra* 22 C W N 168 Ratnani 179. Where a case comes to the knowledge of the High Court by an appeal having

been filed against a conviction, it is not desirable, if the appeal is admitted, to issue a notice at the same time to enhance the sentence. It seems to be absolutely incongruous that the High Court in the same breath should admit the appeal of the accused, and issue notice calling upon him to show cause why the sentence should not be enhanced. The notice should issue after the appeal has been dismissed after being dealt with on the merits—*Mangil Varan v Emp* 49 Bom 420 27 Bom L R 355 26 Cr L J 968 A I R 1923 Bom 268. Where notice has been issued to the accused to show cause why his sentence should not be enhanced, and at the hearing neither the accused nor his counsel is present, the High Court cannot pass an order enhancing the sentence—*Parasram v Emp* 26 Cr L J 543 (Oult).

Where a complainant applied to the High Court under sec 439 to revise an order of a first class Magistrate ordering payment of compensation (under sec 250) to the accused, the High Court refused to pass any order where it appeared that the accused was dead and could not therefore be served with notice—*Ratind* 634.

A High Court may by virtue of sec 421 issue a warrant of arrest without previous notice to the accused because a warrant of arrest is not an order to the prejudice of the accused within the meaning of this subsection—8 L B R 290.

1219 Subsection 14)—Interference with orders of acquittal.—

As to the powers of High Court to revise orders of acquittal at the instance of a private prosecutor or on a reference under sec 438 see Note 1204 under heading. How powers of High Court can be invoked.

When the Government has not appealed the High Court will not interfere with an order of acquittal except in extreme cases and under exceptional circumstances whether it is moved by the District Magistrate or by a private party—42 Mad 109 *Jaita v Parshottam* 25 Bom L R 488 *Khem Chand v. Lahu* 3 Bur 1 J 323 26 Cr L J 511.

Though the High Court has jurisdiction to interfere in revision with an acquittal it shall ordinarily exercise this jurisdiction sparingly and only in serious cases where it is urgently demanded in the interests of public justice to prevent a gross miscarriage of justice—19 A I J 589, 42 Cal 612 *Natesu v Emp* 28 M I J 630 39 Mad 505 *Parakanakkan v Imur* 20 I W 32 26 Cr L J 249 45 Mif 913 19 A L J 382, 6 All 484 41 Bom 560 *Mehr v Nur Md* 4 P I R 644 26 Cr L J 1596 25 Cr L J 1266 (Pat) *Siban Rai v Thugwant* 5 Pat 25 6 P L J 833 U B R (1917) 2nd Qr 19. Thus the High Court will interfere on the application of a private complainant where a Magistrate acquitted the accused disregarding the uncontradicted evidence and facts admitted which proved the guilt of the accused and acted illegally in trying a warrant case as a summons case—15 M I J 225. Where the trying Magistrate, in his judgment of acquittal while laying great stress on all considerations that might affect the credibility of the witnesses for the prosecution, omitted to consider what might be advanced in their favour, and also failed to appreciate the corroborative value of an important witness for the prosecution the High Court set aside the order of acquittal and

directed a retrial—*Shah Haru v. Raika Singh* 18 C W N 1244 The High Court will interfere in revision and set aside an acquittal where the acquittal is the result of an alleged composition which turns out to be invalid—*Harnam v. Sam Das* 24 Cr I J 120, e. g. where the Magistrate acquitted the accused by allowing the parties to compound a non-compoundable case—24 Cr I J 186 (Oudh) The High Court will not hesitate to interfere where the acquittal is based on a manifest error in law appearing on the face of the judgment—*Ahmedabad Municipality v. Manganiyal* 9 Bom I R 156 6 A I J 758 1 All 139 The High Court will interfere where the order of acquittal was not passed on the merits but was made on account of the death of the complainant—*Jitan v. Domoo Sahu* 1 P L J 264 20 C W N 862 18 Cr L J 151 The High Court can in revision set aside an order of acquittal passed by the Lower Court where the judgment of that Court is very summary and contains no discussion of the case or distinct findings on the questions involved—*Nabin Chandra v. Rajendra* 18 Cr I J 519 (Cal) The High Court will exercise its power to set aside an acquittal, where there has been no trial or where there has been a denial of the right of fair trial—*Siba Rai v. Bhagwant* 5 Pat 25 6 P L T 833 27 Cr L J 235 Where there were grave irregularities in procedure and the trial was conducted in an atmosphere of prejudice the High Court interfered with an order of acquittal—25 C W N 609 (*Khoreal shooting case*) The High Court will interfere in certain exceptional circumstances where a matter of public importance is involved—24 O C 57 An application for revision against an order of acquittal may appropriately be allowed when legal points alone are involved—*Croan v. Thamman* 1918 P R 8 The High Court ought to interfere with an order of acquittal at the instance of a private complainant when the offence is of so personal a character (e. g. defamation, insult) that the Local Government will seldom be willing to appeal from the acquittal—20 Cr L J 708 (Nag) 11 C I J 113 But the mere fact that the High Court if it were sitting as a Court of Appeal would have come to a different conclusion of fact is no ground for exercising revisional jurisdiction upon a petition against an order of acquittal—39 Mad 503 35 M L J 518 When the acquittal of an accused is based on some such reason as is given in sec. 330 (p) or where an incurable irregularity has occurred or a failure of justice that the High Court can interfere—5 N I R 4 2 I W 1244 The High Court should not interfere with an order of acquittal when the question is merely as to the appreciation of doubtful evidence, and there is no patent error or defect in the order of acquittal passed by the Lower Court resulting in grave injustice—39 Mad 505 35 M L J 518 When the acquittal of an accused is based on a finding of fact the High Court will not interfere in revision—*Crown v. Harphul* 1 Lah I J 42 26 P I R 38 26 Cr I J 689 Where the trial Court has acquitted the accused after giving due weight to all the evidence on the record the High Court will not interfere—*Mehr Aur Md v. Nur Md* 7 Lah I J 367 26 P L R 644 26 Cr I J 1596 Where the Magistrate took one view of the oral evidence and the Sessions Judge took the opposite view and there was no legal point or question of

jurisdiction involved, held that there was no ground for interference with the order of acquittal—*Ahem Chand v. Lala*, 3 Bur L J 323, 26 Cr L J 511. A mere error of procedure is not by itself a good ground for setting aside an acquittal—25 Cr L J 1266 (Pat.), thus an omission by the Appellate Court to serve the notice of appeal on the complainant or on the officer appointed under sec 422 is not a ground for setting aside the order of acquittal passed by the Appellate Court—*Parakanakkan v. Amir*, 20 L. W. 327, 26 Cr L J 249. The High Court will not interfere in revision with an order of acquittal passed by a Magistrate of competent jurisdiction who has taken a correct view of the law (e.g., an order of acquittal passed by a Magistrate on a prosecution for an alleged offence under sec 225B I P Code, irregularly instituted on a report sent in by a Munsif which was treated as a complaint—*Emp v. Madho Singh*, 47 All 409, 23 A L J 189, 26 Cr L J 865).

The above remarks equally apply to cases of revision against an order of discharge under sec 253 and the High Court would be unwilling or very reluctant to interfere with an order of discharge based on a consideration of all the prosecution evidence, when no evidence has been shut out and there is no illegality or irregularity in the procedure adopted by the trying Court, even if the High Court should on the materials on the record consider that it was a fit case for the framing of a charge and putting the accused on his defence—35 M L J 518.

The High Court has power in revision to reverse an order of acquittal but cannot convert a finding of acquittal into one of conviction—9 All 134, 44 All 332 5 W R 2. When the lower Court has acquitted the accused when it ought to have convicted him, the High Court cannot convert the order of acquittal into one of conviction. After reversing the order of acquittal the proper order of the High Court must be one remanding the case to the lower Court and directing the retrial of the accused person—*Ramkishor v. Gobind*, 23 A L J 433, 26 Cr L J 970, 9 All 134, 22 Cr L J 97 (All), 19 A L J 389. Though the High Court, in exercising revisional powers against orders of acquittal, can go into the questions of fact still it cannot then and there convict but can only order a retrial—1908 P W R 22.

The only way of securing conviction in a case of acquittal is by an appeal by the Local Government against the order of acquittal—44 All 332.

An order under sec 471 is not an order of conviction. Therefore where the accused was acquitted by the Lower Court on the ground that he was insane, the passing of an order under sec 471 by the High Court in revision does not amount to an alteration of an order of acquittal into one of conviction within the meaning of this subsection—42 M L J. 72.

The acquittal contemplated by this subsection is a complete acquittal on all the facts and allegations charged, and not an acquittal on one charge and conviction on another. Therefore, where the accused has been convicted by the Magistrate of one offence and acquitted of another, in the same trial, the High Court has power in revision to convert the acquittal into conviction—*Bhola v. A. E.*, 1904 P R 12. Subsection (4) of sec 439 refers to a case where the trial has ended in a complete acquittal, and

on appeal, and afterwards as a Court of revision might set aside the sentence of 7 years' transportation and pass a legal sentence for murder
—5 W R 45

1221 Sub section (6);—This sub section did not exist in the Bills or Reports but has been added during the Debate in the Legislative Assembly on the motion of Mr Rangachari. It is intended to give a person, who has been brought to the bar of the High Court to answer why a sentence passed upon him should not be enhanced the right of showing by arguments *a fortiori* not only that the sentence should not be enhanced but that the whole conviction is wrong and should be set aside. This amendment enables the High Court not only to refuse an enhancement of sentence but also to set aside a conviction if the High Court finds that not only the sentence but the conviction also is equally unjustifiable.

The object of the amendment was thus stated by the mover: "Under the Code as it stands, the High Court has been given the power to enhance the sentence in case of persons who have been convicted by Lower Courts. Now, suppose the accused person takes the conviction and he does not care to appeal. Rather than undergo the expense of going to the High Court and appealing against the sentence, he rather suffers the sentence and keeps quiet. But the police are not satisfied with the sentence imposed by the Magistrate or Sessions Judge who tried the case. They say, he should have been given a longer sentence or a longer punishment, and therefore they drag the poor man to the High Court. When he appears before the High Court, it stands to reason that he should be able to say 'Well, I have been wrongly convicted, but you want to impose a heavier penalty now. I was content to let things alone, but here the police won't leave me alone they have dragged me to the High Court now let me establish my innocence. the case is not proved against me, the evidence is false. I want to establish that.' Sir, there are Judges and Judges. Here the luck of the accused depends upon the particular Judge who hears the particular case. If he is a Judge who is leniently disposed, he will say 'If you are not guilty, I am prepared to hear it', but there are other Judges who will say 'No, no, the conviction stands, you have not appealed or the time is up, you have got 30 or 60 days for you to appeal you have allowed the conviction to stand, now show cause why I should not inflict the heavier penalty which the police want. I have to ask you to show cause against enhancement.' Sir, it is an injustice to do that. We must not leave it to the sweet will and discretion of particular Judges to say whether they will hear that point or not. If the man is able to satisfy the revising authority that the man is entitled to acquittal, it is only right that the High Court should do so."—*Legislative Assembly Debates* 8th February 1923, page 2081.

Prior to this amendment, in cases that came up before the High Court for enhancement of sentence, it had been the practice to accept the conviction, and to consider the question of enhancement of sentence on that basis, see *Emp v Chinto*, 32 Bom 163 7 Cr I J 119 10 Bom 14 R 93. But this is no longer possible, the amendment is intended to give

the accused person who has been brought to the bar of the High Court to answer why a sentence passed upon him should not be enhanced, the right of showing by argument a *fortiori* not only that the sentence should not be enhanced but that the whole evidence is wrong and should be set aside—*Emp v Mahadga*, 26 Cr L J 821 (Ag). But where an accused's revision petition from his conviction has been dismissed and then the District Magistrate makes a reference under sec 438, for enhancement of sentence, it seems that the accused would be precluded in the proceeding of the reference from re-agitating the question of the legality of the conviction, because the Court cannot decide again what it has decided once—*In re Sayed Imf*, 26 Cr L J 383 (Mad).

An accused person when showing cause why his sentence should not be enhanced is entitled to show that the whole trial was illegal (e.g. as contravening the provisions of sec 234) though the question of illegality was not raised at the trial—*Emp v Valant* 49 Bom 892 27 Bom L R 1343 27 Cr L J 303 A I R 1926 Bom 110.

1222 Miscellaneous—*Limitation*—According to the practice of the High Court an application for revision in criminal cases must be presented within 60 days from the date of the order complained of exclusive of the time necessary for obtaining copies. This is not however an inflexible rule and in exceptional circumstances the rule may be departed from—43 Cal 1029.

Finding of fact—It is the practice of the High Court (Allahabad) in revision unless very strong ground for an opposite conclusion is found to exist to take the findings of the Lower Appellate Court and not of the first Court as the facts of the case—18 Cr L J 435 (All).

New plea in revision—An accused cannot be heard to urge a new plea entirely inconsistent with the one already raised by him during the trial unless he could establish that the case for the prosecution would not be believed and there is an element of doubt in it in which case the benefit of doubt must be given to the accused—18 Cr L J 435 (All).

Loss of record—The loss of a record after conviction is no ground for the acquittal of the accused in revision. In serious cases where the accused has been convicted and sentenced to a substantial punishment it may be that a retrial may be ordered—18 Cr L J 737 (Pat).

Rule to shew cause—A rule which is issued by the High Court in revision should be read with the judgments which were before the Court at the time it was granted and should be read reasonably in favour of the accused—2 C. W. N. 81.

How to shew cause—A Magistrate who is called upon by the High Court to show cause against a rule issued by the High Court must ask the Legal Remembrancer to appear for him and must not address the Registrar of the High Court by letter—4 Cal 20.

Duty of Magistrate showing cause—Though it is open to a Magistrate called upon to shew cause to submit his remarks in answer to the ground urged by the petitioner who obtained the rule, it is not open to

him to submit observation- with a view to supplement or add to his judgment—7 C W N 839

440 No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision

Optional with Court to hear parties

Provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect section 439, sub section (2)

1223 Scope of section—The rule in this section is the general rule provided by the Legislature and it must be taken as a legislative recision of the general principle that persons are entitled to be heard before any order affecting them to their prejudice can be made—10 Cal 268 Under this section it is open to the High Court to determine the question raised by a rule without hearing the counsel or pleader for or against the rule—10 C I J 80 The High Court can deal with the question whether the District Magistrate has properly exercised his power under sec 437 without giving notice to the accused or allowing him an opportunity of being heard—10 Cal 268

The provisions of this section apply only to revision and do not apply to the summary rejection of an appeal under sec 423 of this Code—12 C W N 248 This section does not apply to sec 437 (2), that is if an order is passed to the prejudice of the accused he must be heard either personally or by pleader

1224 No right to be heard—The revisional power of the High Court is exercised at its own discretion and no petitioner has a right to be heard—*In re Ranga Rao* 23 M L J 371 The accused is not entitled to be heard when an order under sec 436 is made directing a further inquiry into a summary rejection of complaint—14 Cal 608 (see also the other cases cited in Note 1184 under Sec 436) The High Court refused to hear counsel who appeared to support a petition for the revision of an acquittal—14 Mad 363 Where an accused person applied in revision to the High Court, and pending the revision he was let off on bail and thereafter he absconded held that the High Court would not hear his pleader in the revision application—*Har Narain v Emp* 24 Cr L J 240 (VII) In a reference under Sec 438 a counsel is not entitled to appear against the report—1 Bom 64 A private prosecutor cannot be allowed to appear on a reference to the High Court under sec 438 If he is heard at all he can be heard only with the permission of the Court—14 W R 51

But by virtue of the discretionary power given by the proviso the High Court always hears counsel in matters of importance—19 Cal 380 6 A L J 237

441 When the record of any proceeding of any Presi-

Statement by Presi-
dency Magistrate of
grounds of his decision
to be considered by High
Court.

High Court under section 435, the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue, and the Court shall consider such statement before over-ruling or setting aside the said decision or order

1225 A statement filed under this section takes away any irregularity in the proceedings of a Magistrate caused by the omission to record reasons before referring a case under sec 202 or dismissing a complaint under sec 203—5 M L J 79

A statement submitted by a Presidency Magistrate under this section must be regarded as a completion of the record and possesses a conclusive character as against affidavits—12 Bom 37

This section does not abrogate the terms of section 263 or 370. It merely allows the Presidency Magistrate to supplement the reasons which have been already stated under sections 263 and 370. It does not apply where no reasons whatever have been recorded by the Presidency Magistrate. A Bench of Presidency Magistrates imposing a sentence of imprisonment for an offence must record their reasons for the conviction. The omission to do so in a case where no record of the evidence was taken is a grave irregularity. But having regard to the reasons for conviction disclosed in the record submitted by the Presidency Magistrate under this section the High Court in this case did not set aside the order of the Bench on the ground of the irregularity—*In re Derwish Hossain* 46 Mad 233

442 When a case is revised under this Chapter by the

High Court's order to be certified to lower Court or Magistrate High Court it shall, in manner herebefore provided by section 425 certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed, and the Court or Magistrate to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision certified, and, if necessary, the record shall be amended in accordance therewith

1226 Scope of section.—This section deals with every case which is revised under this Chapter by a High Court in other words it applies to all revisions whether under sec 435 or sec 439 and it provides that it shall certify its decision or order to the Lower Court, but it contains no such provision that it will certify its decision to itself. This shows that the High Court cannot revise any judgment passed by itself—1909 P R 4

PART VIII.

SPECIAL PROCEEDINGS

CHAPTER XXVIII

SPECIAL PROVISIONS RELATING TO CASES IN WHICH EUROPEAN AND INDIAN BRITISH SUBJECTS ARE CONCERNED

This Chapter has been added by the Criminal Law Amendment Act VII of 1923.

The procedure for the trial of cases in which racial considerations are involved is included in a new chapter which takes the place of the old Chapter XXXIII of the Code.

As regards the new Chapter XXXIII it will be observed that it applies to offences punishable with imprisonment which are alleged to have been committed outside a presidency-town. The first step to be taken to secure that such a case shall be tried under the provisions of the Chapter is a claim to be made by the accused person before the Magistrate. Unless such a claim is made at one of the stages indicated for the trial of a summons-case or of a warrant case, or for the inquiry preliminary to commitment, the provisions of the Chapter will not apply. The Magistrate then makes such inquiry as he thinks necessary. As a guide to the Magistrate in coming to a finding as to whether the case should be tried under the provisions of the Chapter or not, it is provided that if the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects, he shall find that the case should be tried under the provisions of the Chapter. For other cases with which both European British subjects and Indian British subjects are connected the Magistrate must be satisfied that it is expedient for the ends of justice that the case shall be so tried. This it is observed is the same criterion as that now contained in clause (c) of sub-section (1) of section 526 of the Code of Criminal Procedure relating to the powers of a High Court to transfer criminal cases. If the Magistrate rejects the claim, the person has a right of appeal to the Sessions Judge whose decision is final, and if the claim is rejected by the Magistrate the Magistrate is required to stay the proceedings until the expiration of the period allowed for the presentation of the appeal, or, if an appeal is presented until it has been decided. The period allowed for the presentation of an appeal is fixed by Article 156A of the Indian Limitation Act, 1908 at seven days. The persons who will be included within the term "complainant" for the purpose of these provisions are then defined by the proposed section 444. Incidentally public servants and officers and servants of companies, associations or bodies to which the Local Government by general

or special order may declare the provisions of the section to apply, will not be included within the definition merely because they have made a complaint or given information in their official or "quasi" official capacity. The procedure in summons-cases punishable with imprisonment is then laid down. For warrant-cases which would normally be triable under the provisions of Chapter XVI of the Code if it is found that the case ought to be tried under the provisions of this Chapter a Magistrate is required if he does not discharge the accused to commit the case for trial to the Court of Session whether the case is or is not exclusively triable by that Court. Normally in the Court of Session the case will then be tried by a jury of mixed nationality, the majority of the jurors being either Indians or Europeans and Americans according as the accused person is an Indian or a European subject of His Majesty.—*Statement of Objects and Reasons* Para 11

443 (1) If here in the course of the trial outside a presidency town of any offence punishable with imprisonment, the accused person, at any time before he is committed for trial under Section 213 or is asked to show cause under Section 242 or enters on his defence under Section 256, as the case may be claims that the case ought to be tried under the provisions of this Chapter the Magistrate inquiring into or trying the case after making such inquiry as he thinks necessary and after allowing the accused person reasonable time within which to adduce evidence in support of his claim shall if he is satisfied—

- (a) that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects or
- (b) that in view of the connection with the case of both an European British subject and an Indian British subject it is expedient for the ends of justice that the case should be tried under the provisions of this Chapter,

record a finding that the case is a case which ought to be tried under the provisions of this Chapter or, if he is not so satisfied, record a finding that it is not such a case

(2) Where the Magistrate rejects the claim, the person by whom it was made may appeal to the Sessions Judge,

the decision of the Sessions Judge thereupon shall be final and shall not be questioned in any Court in appeal or revision

(3) *Where the Magistrate rejects the claim, he shall stay the proceedings until the expiration of the period allowed for the presentation of the appeal or, if an appeal is presented until it has been decided*

This section has been framed on the lines recommended in Part 27 of the Racial Distinctions Committee Report

1226A The mere fact of the accused person being an European British subject does not entitle him to the benefit of Chapter XXXIII. He must claim before the committing Magistrate to be tried under the special procedure, and the Magistrate must find that the necessary ingredients are present. If any such claim is made prior to commitment but there is no finding by the Magistrate, the question cannot be raised in the Sessions Court. If a claim is made and the Magistrate finds favourably to the accused the order is final and the Sessions Court cannot go behind it. If the finding of the Magistrate is adverse the party should appeal and the decision of the Sessions Judge would be final. The intention of the legislature is clear that the point should not be raised in the High Court.—*Hay v Emp* 28 O C 230 2 O W N 469 26 Cr L J 1217

A claim to be tried under the provisions of Chapter XXXIII is wholly different from a claim to be tried as an European British subject etc under sec 528A. So far as the former claim is concerned, the question of the status of the claimant does not always arise, as is evident from the provisions of clause (b) of sec 443. Whereas in a claim to be dealt with as an European or Indian British subject (sec 528A), the claimant has to prove his own status, in a claim to be tried under the provisions of Ch XXXIII the claimant may or may not have to do so.—*Martindale v Emp* 52 Cr L 347 29 C W N 447 26 Cr L J 401

This chapter does not apply to Presidency Towns. There is no provision in the Code for enabling a person to put forward a claim to be tried under Chapter XXXIII either before a Magistrate holding an inquiry or trial in a Presidency Town, or before the High Court during the trial of a case. It is unreasonable to suppose that the Legislature ever intended that when there was no knowing whether there would be a conviction or an acquittal (and both are open to appeal under sec 449) an inquiry might be asked for and the Court required to decide on the question as to whether if tried outside a presidency town the case would have been triable under the provisions of Chapter XXXIII. The only object of such an inquiry is that the result of it may be availed of for the purposes of an appeal by the accused in the case of a conviction and by the Crown in the case of an acquittal. The proper time to raise the question is when leave to appeal is applied for under sec 449 (c)—*Martindale v Emp*, (supra)

444 For the purposes of Section 44, 'complainant'

Definition of "com- means any person making a complaint,
plainant".

or in relation to any case of which cognizance is taken under clause (b) of Section 190, sub-section (1), any person who has given information relating to the commission of the offence within the meaning of Section 154:

Provided that a Public Prosecutor, a public servant, a member, officer or servant of any local authority, a railway servant as defined in Section 3 of the Indian Railways Act, 1890, or an officer or servant of any company, association or other body to which the Local Government may, by general or special order published in the local official Gazette, declare the provisions of this section to apply, shall not, by reason only of the fact that he has made a complaint of, or given information of an offence in his capacity as such Public Prosecutor public servant railway servant, member, officer or servant be deemed to be a complainant within the meaning of this section, nor shall a police officer be so deemed by reason only of the fact that a report under Section 173 relating to a case has been made by or through him.

This section has been added by the Bill and did not exist in the Report of the Racial Discriminations Committee.

445 (1) Where a Magistrate or a Sessions Judge

Procedure in Summons decides under Section 443 that a case
cases ought to be tried under the provisions

of this Chapter and the case is a summons case, the Magistrate trying the same shall direct that the case be referred to a Bench of two Magistrates and shall send a copy of such order to the District Magistrate who shall forthwith provide for the constitution of a Bench of two Magistrates of the first class, of whom one shall be an European and the other an Indian, for the trial of the case

(2) Where the Magistrates constituting the Bench by which a case is tried under this section differ in opinion, the case together with their opinions thereon shall be laid before the Sessions Judge, who may examine any party or recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and

thereafter pass such judgment, sentence or order in the case as he thinks fit and as is according to law.

(3) Any person convicted by a Bench under this section shall have the same right of appeal as if he had been convicted by a Magistrate of the first class, and any person convicted by a Sessions Judge under sub-section (2) shall have the same right of appeal to the High Court as if he had been convicted by the Sessions Judge at a trial by the Sessions Judge under this Code.

(4) In any case in which it is impracticable to constitute a Bench in accordance with the provisions of sub-section (1) in any district, the District Magistrate shall transfer the case for trial by a like Bench to such other district as the High Court may, by general or special order, direct.

(5) Notwithstanding anything contained in this section, the Local Government may, by notification in the local official Gazette, direct that all summons-cases tried under the provisions of this chapter in any district specified in the notification shall be tried as if they were warrant-cases in accordance with the provisions hereinafter in this Chapter laid down for the trial of warrant-cases.

Sub-sections (1) to (4) of this section embody the recommendations contained in para 28 of the *Racial Distinctions Committee Report*.

As regards sub-section (5), the reason is thus stated by the framers of the Bill. The Local Governments and High Courts were consulted on these proposals of the Committee (i.e. as regards the new section 445). From the opinions received it is clear that in many areas in India these proposals will be impracticable, and it is considered that in any case the adoption of the procedure proposed for similar warrant cases (see 446) namely, commitment to and trial in a Court of Session by jury, would not be more expensive than the proposals of the Committee. Accordingly it is proposed (in analogy with the powers given to Local Governments by sec 269) to permit Local Governments to direct that in particular districts such cases shall be triable according to the provisions laid down for the trial of similar warrant cases.—*Statement of Objects and Reasons, Para 6*

446 (1) If here a Magistrate or a Sessions Judge decides Procedure in warrant under Section 443 that a case ought to be tried under the provisions of this Chapter and the case is a warrant-case the Magistrate inquiring into or trying the case shall, if he does not discharge the cases

accused under Section 209 or Section 253, as the case may be, commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court

(-) Where an accused is committed to the Court of Session under sub-section (1) the Court shall proceed to try the case as if the accused had required to be tried in accordance with the provisions of Section 275, and the provisions of that section and the other provisions of Chapter XXIII, so far as they are applicable, shall apply accordingly

Provided that where the trial before the Court of Session would in the ordinary course be with the aid of assessors, and the accused, or of all them jointly, require to be tried in accordance with provisions of Section 284A, the trial shall be held with the aid of assessors all of whom shall, in the case of European British subjects, be persons who are Europeans or Americans, or, in the case of Indian British subjects, be Indians

This section embodies the recommendation of the Racial Distinctions Committee contained in Para 27 of their Report

1227 Trial to be by jury.—When an European British Subject is committed to the Court of Session under the provisions of section 446 (2) the trial must be in accordance with section 275 that is to say the accused must be tried by a jury the majority of whom shall if before the first juror is called and accepted the accused so requires consist of persons who are Europeans or Americans. But when the trial before the Court of Session would in the ordinary course be with the aid of assessors the accused has the right under the proviso to sec 446 to be tried with the aid of assessors all of whom shall be of the category within which the accused comes. By ordinary course is here meant the course which would be followed in the absence of a claim by the accused to be dealt with under the provisions of Chapter XXIII or in the absence of a Notification by the Local Government under the provisions of section 269—*Bray v Crown* 5 Lah 515 (517 518)

447 If at any stage of an inquiry or trial under this Code it appears to the Magistrate that the case is or might be held to be a case which ought to be tried under the provisions of this Chapter, he shall forthwith inform the accused person of his rights under this Chapter

Court to inform accused persons of their rights in certain cases.

The omission by the Magistrate to inform the accused of his rights to

be tried under this chapter is curable by the provisions of sec 534—
Zagrya v. Erip 3 Rang 220 4 Bur L J 44

448 For the purpose of the trial in Rangoon of any person under the provisions of this Chapter references to the Sessions Judge shall be construed as references to the High Court of Judicature at Rangoon

Special provisions relating to appeal

449 (1) Where—

(a) a case is tried by jury in a High Court or Court of Session under the provisions of this Chapter, or

(b) a case which would otherwise have been tried under the provisions of this Chapter is under this Code committed to or transferred to the High Court and is tried by jury in the High Court or

(c) a case is tried by jury in the High Court in a presidency town and the High Court grants leave to appeal on the ground that the case would, if it had been tried outside a presidency town have been triable under the provisions of this chapter

then notwithstanding anything contained in Section 418 or Section 423 sub section (—) or in the Letters Patent of any High Court an appeal may lie to the High Court on a matter of fact as well as on a matter of law

(2) Notwithstanding anything contained in the Letters Patent of any High Court the Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original order of acquittal passed by the High Court in any such trial as is referred to in subsection (1)

(3) In appeal under sub section (1) or sub section (—) shall, where the High Court consists of more than one Judge, be heard by two Judges of the High Court

See Para 7 (b) and (c) of the Statement of Objects and Reasons

1227A Appeal — Matter of fact & matter of law — The accused on appearing before the Magistrate who held the inquiry preliminary to commitment asserted his right to be tried as an European British subject and upon that the Magistrate being satisfied that he was one, passed an order that he was to be dealt with under sec 443 of this Code In the

trial before the Sessions Judge, the prosecution did not take any steps to have the Magistrate's order set aside, but had him charged and tried in the ordinary way. On appeal from the conviction held that the appeal lay on a matter of fact as well as on a matter of law under this section, and the accused could question the legality of the conviction, even though there might not be any foundation for his claim to be tried under this chapter—*Singleton v Emp*, 29 C W N 260 41 C L J 87 26 Cr L J 662

This section lays down that in cases tried by jury an appeal lies to the High Court on a matter of fact as well as on a matter of law. Therefore, in a case tried under this chapter, the finding of a jury on a question of fact is no longer final, according to the present Code and therefore to justify an interference by the High Court under sec 307 the finding of the jury need not be manifestly wrong or perverse—*Crown v Bimal Parshad* 6 Lah 98 26 P L R 263 26 Cr L J 1241 A I R 1925 Lah 401

Leave to appeal—It is desirable that an application for leave to appeal under clause (c) should be made to the Judge who tried the case. The right of appeal depends upon extraneous circumstances which have nothing to do with the guilt of the accused and the trying Judge is better qualified than any one else to decide whether these circumstances exist or not—*Martindale v Emp* 52 Cal 347 29 C W N 447 26 Cr L J 401 A I R 1925 Cal 14. But in another Calcutta case it has been held that it is desirable that the application for leave to appeal should be heard by a Division Bench rather than by a Single Judge who tried the case, since no appeal would lie against the decision of the Single Judge refusing leave to appeal it is better in the interests of justice that the application should be heard by a Division Bench—*Turner v Emp* 52 Cal 636 29 C W N 458 41 C L J 325 26 Cr L J 835

Application for leave to appeal should be made with notice to Crown but once the leave is granted without such notice it cannot be revoked on the ground of want of such notice—*Martindale v Emp* (supra)

This section gives the right of appeal against the decision of a High Court in three classes of cases. The first class are the cases tried by jury in a High Court under the provisions of this chapter and can only apply to High Courts outside a Presidency Town. The second class of cases are those which would otherwise be tried under the provisions of this chapter but are under the Code committed or transferred to the High Court and tried by jury in the High Court. In these two classes of cases, an absolute right of appeal is given. But in classes of cases referred to in clause (c) the right of appeal is dependent on the condition of granting of leave to appeal. The necessity for the insertion of the condition of granting leave to appeal in clause (c) appears to be due to the fact that in cases which come under clause (b) the question whether Chapter XXXIII is applicable or not has been decided before the case is committed or transferred to the High Court. But in cases which come under clause (c) this question has not arisen, and it was necessary for legislature to provide for a decision of the question. This question is

be decided by the High Court before leave to appeal is granted, and if that is decided in accused's favour, he is entitled as of right to an appeal—*Turner v Emb* (supra)

450-468. * * * *

Sections 453, 454, 455 and 459 are now re-enacted as section 581, 528B, 528C, and 528D, respectively. Sections 456-458 are incorporated in secs 491 and 491A. Section 460 is included in section 284A, sub section (2). Section 462 is now merged in section 326. The remaining sections (450, 451, 452, 461) are omitted.

Under the old Code, an European British subject had a right to claim to be tried by jury, that right was a *substantive* right and not a mere matter of procedure, and therefore where the commitment was made prior to the coming into force of the new Code of 1923, but the trial in the Sessions Court was held after its coming into force, *held* that the accused's right to be tried by jury was not lost, and he was not to be tried by the Judge with the aid of assessors—*Emb v Filenmaurice*, 6 Lah 262 A I R 1925 Lah 446 26 P L R 415

CHAPTER XXXIV

LUNATICS

464 (1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the Local Government directs and thereupon shall examine such Surgeon or other officer as a witness, and shall reduce the examination to writing

(1A) *Pending such examination and inquiry the Magistrate may deal with the accused in accordance with the provisions of Section 466.*

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case.

Change:—Sub section (1A) and the italicised words in sub section (2) have been added by sec 120 of the Cr P Code Amendment Act XIII

465 (1) If any person committed for trial before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the jury or the

Procedure in case of person committed before Court of Session or High Court being lunatic.

Court with the aid of assessors, shall, in the first instance, try the fact of such unsoundness and incapacity, and if the jury or Court, as the case may be, is satisfied of the fact, the Judge shall record a finding to that effect and shall postpone further proceedings in the case *and the jury if any shall be discharged*

(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.

Change:—The italicised words at the end of sub-section (1) have been added by section 121 of Cr P Code Amendment Act XVIII of 1923. This amendment provides for the discharge of the jury in the event of the Court of Session or the High Court being satisfied that the accused is of unsound mind and incapable of making his defence—*Statement of Objects and Reasons* (1914)

1229 Fact of insanity to be tried:—Where, after a trial has been once adjourned on account of the prisoner's insanity, the Zillah Surgeon reports that the prisoner is capable of making his defence, the Judge should find with the aid of assessors whether the prisoner is capable of making his defence, and cannot act merely on the letter of the Zillah Surgeon—2 Weir 582

The question of unsoundness of mind must be tried by the Judge and jury, and not by the Judge himself personally—19 W R 15

Again, the question of the unsoundness of mind must be tried in the first instance. The issue as to the unsoundness of mind of the accused is a preliminary issue, and must be submitted to the jury first before proceeding with the trial—19 W R 26, 42 All 137. Where in the course of his examination under sec 364 the accused said that he was not in his senses when he tried to rob it was held that the Court of Session should have acted under this section and tried the fact whether on the date the accused was called upon to plead he was or was not of unsound mind and capable or incapable of making his defence—*Jaydeo v Emp*, 15 A L J 239. When the accused committed to the Sessions appears to be of unsound mind, the Sessions Judge is bound to try the fact of insanity first and should not try it along with the trial for the offence—*Woods v W*, 2

If in a case committed to the Sessions, objection is taken on behalf of the accused that he is of unsound mind, and the Civil Surgeon when examined as a witness on behalf of the accused states that the accused is a person of unsound mind and therefore not in a fit state to understand the proceedings and to stand his trial, the onus lies on the prosecution

to prove that the accused is of sound mind. In such a case it is improper for the Sessions Judge to charge the jury that it is for the defence to satisfy the Court that he is of unsound mind. But such a charge to the jury, though improper, does not amount to a misdirection so as to make the verdict of the jury on this point unacceptable specially if the verdict is unanimous—*Shib Das v Emp* 51 Cal 584 (586 587) C

In a trial at the Sessions if a plea is taken on the prisoner's behalf under this Section, that he is of unsound mind and incapable of making his defence, it is for the Crown to establish the soundness and capacity of the accused. The inquiry as to the soundness or unsoundness of the mind of the accused is a preliminary inquiry which is conducted for the satisfaction of the Court, and in that view the prosecution ought to commence and give their evidence—*Emp v Gopi Mohan Saha* 51 Cal 87 (828) (*Day Murder Case*) 26 Cr 1 J 276

Doubtful Cases—Where a Court entertains doubts as to the sanity of the accused the Court should not merely put questions to the accused but should try the fact of such unsoundness of mind by examining the Civil Surgeon or some other medical officer and by taking such evidence as might have been procurable from the village at which the accused resides, with the view of ascertaining whether the accused had at any time prior to the commission of the crime exhibited symptoms of sanity—1 B H C R 33

Where in a doubtful case the Sessions Judge convicted the accused the High Court set aside the conviction and ordered an inquiry under this Section before retrial on the charge—1905 P R 54. Where on a reference for confirmation of a sentence of death the High Court entertained doubts as to the accused's sanity, the case would be referred to the Sessions Judge for further inquiry—2 W R 33

1230 Postponement of trial—Where the prisoner is found to be insane the Sessions Judge should postpone the trial and proceed under sections 466 and 467 instead of proceeding with the trial and acquitting the accused—9 W R 23 1 W R 11 3 W R 70 3 W R 57

A Sessions Judge has no power to stay proceedings and direct an inquiry to be made into the state of the accused's mind, where it appears to him problematic whether the accused is capable of making his defence. The proper procedure to be followed is that prescribed by Secs 465 and 466—2 Weir 582

1231 Sub section (2)—The preliminary inquiry held under this section is not a trial in the sense of ascertaining whether the accused is guilty or not of the offence charged—3 P I J 291

466 (1) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court as the case may be, *whether the case is one in which bail may be taken or not,*

Release of lunatic pending investigation or trial

release him on sufficient security being given that he shall

properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf

- (2) If the case is one in which bail may not be taken, or if sufficient security is not given, the Magistrate or Court shall report the case to the Local Government, reminding the accused to custody pending orders, and the Local Government may order the accused to be confined in a lunatic asylum, jail or other suitable place of safe custody, and the Magistrate or Court shall give effect to such order
- (2) If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit and shall report the action taken to the Local Government. Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912

Change.—This section has been amended as shown by the underlined words by Sec 122 of the Cr P C Amendment Act VIII of 1923. The section is so amended as to allow bail to be granted at the discretion of the Court in any case in which the accused is a lunatic, and the amendment also permits the accused to be kept in custody. The object in view is to delegate the power of the Local Government and to do away with the existing distinction in procedure between bailable and non-bailable cases.—*Statement of Objects and Reasons* (1914)

1232 Where a Magistrate or Sessions Judge instead of proceeding under this section, tries the accused and acquits him on the ground of insanity the order of acquittal is illegal.—188 A W N 106 10 W R 37 9 W R 23 3 W R 70

When the accused is confined in a lunatic asylum or jail or some other place of safe custody according to the order of the Government, the Magistrate has power over the accused ceases from such confinement, and he cannot release him on security later on. He can deal with the accused only if

the accused is sent back to him under sec 473 on a certificate that the accused is capable of making his defence—2 CrI 356 But under the present section as amended the Court itself will have power to detain the insane accused in a place of safe custody, and in such a case it will not cease to have control over the accused, but will be able to release him afterwards on sufficient security being given

467 (1) Whenever an inquiry or a trial is postponed under Section 464 or Section 465, the Resumption of Inquiry or trial Magistrate or Court, as the case may be, may, at any time, resume the inquiry or trial and require the accused to appear or be brought before such Magistrate or Court

(2) When the accused has been released under S 466, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence

When a trial is postponed under sec 465 on the ground of insanity of the accused it should not be resumed at the point at which it was previously stopped but should be commenced *de novo* when the Court find him capable of making his defence—2 Weir 582

468 (1) If, when the accused appears or is again brought before the Magistrate or the Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed

(2) If the Magistrate or Court considers the accused to be incapable of making his defence the Magistrate or Court shall again act according to the provisions of section 464 or section 465 as the case may be *and if the accused is found to be of unsound mind and incapable of making his defence, shall deal with such accused in accordance with the provision of section 466*

Change—The italicized word at the end of the section have been added by section 123 of the Cr P C Amendment Act VIII of 1923 This amendment is consequential to the amendment of sec 466

The inquiry or trial should commence *de novo* See 2 Weir 58 c under sec 464

468 When the accused appears to be of sound mind at the time of inquiry or trial, and the

When accused appears to have been insane

Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and if the accused ought to be committed to the Court of Session or High Court send him for trial before the Court of Session or High Court, as the case may be.

The Magistrate shall proceed with the case etc.—Where the Magistrate is of opinion that the accused is of sound mind at the time of trial but was of unsound mind at the time of committing the offence, the Magistrate cannot discharge the accused on that ground, but should proceed under secs. 470 and 471—2 Weir 582.

A Magistrate can commit an accused to the Sessions, whom he finds to be sane at the time of the preliminary investigation, although at the time of committing the offence he was insane—9 W. R. 23.

Whenever a Magistrate acting under this section shall send for trial before the Court of Sessions an accused person regarding whose sanity at the time of committing the offence he entertains any doubt, he shall at the same time inform the jail authorities of the supposed state of the accused in order that he may be placed under careful surveillance prior to his trial before the Court of Session—*Don H. C. Cr. Cir.* p. 18.

Presumption—The law presumes every person who has attained the age of discretion to be sane, unless the contrary is proved, and where a lunatic has lucid intervals the law presumes the offence to have been committed during such interval unless it is proved that the act was committed during mental derangement—*Ratanilil* 172.

470 Whenever any person is acquitted upon the ground that at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind,

Judgment of acquittal on ground of lunacy

incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

1233 *Acquittal on ground of lunacy*:—The fact of unsoundness of mind must be clearly and distinctly proved before any jury is justified

in pronouncing a verdict of acquittal under sec 84 I P C Every man is presumed to be sane until the contrary is proved—70 W R 70, Ratanlal 172 Where the prisoner killed his brother in law apparently without any enmity or quarrel, and the only motive given out by the prisoner was that he might be hanged by the authorities and go to heaven, it was held that the opinion of a medical witness as to the state of the accused's mind would be necessary—2 Weir 583

If the Magistrate finds that the accused is of sound mind at the time of trial, but was suffering from temporary insanity while he committed the offence he should not discharge the accused but acquit him and proceed under this section and sec 471—2 Weir 582 17 C P L R 113

471. (1) Whenever the finding states that the accused person committed the act alleged, the Person acquitted on such ground to be kept in safe custody. Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence, order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit, and shall report the action taken to the Local Government.

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912

(2) The Local Government may empower the officer in charge of the jail in which a person is confined under the provisions of Section 466 or this section, to discharge all or any of the functions of the P w r of Local Government to relieve Inspector-General of certain functions.

Inspector-General of Prisons under Section 473 or Section 474

1234 Change—The word *finding* has been substituted for the word judgment and the word *detained* for the word *kept* the words "and shall report the action taken to the Local Government" and the proviso have been newly added by sec 124 of the Cr P C Amendment Act XVIII of 1923

Previously the words at the end of subsection (1) were 'and shall report the case for the orders of the Local Government' so that the Court could not itself send the accused to a lunatic asylum or jail but had to report the case to the Local Government and the latter gave orders for sending the accused to an asylum or jail See 43 Bom 134 But those words have been omitted by the Repealing and Amending Act V of 1914 and its effect is that Magistrates and Courts are no longer required to report the case for the order of the Local Government but are themselves com-

to direct the detention of the accused in an asylum or jail or some other place prescribed for the reception of criminal lunatics—*Emp v Aga* 8 L B R 290, *Emp v Maiku*, 22 O C 269. But it does not deprive the power of the Government to detain the accused in some other place of custody, under the provisions of the Indian Lunacy Act (IV of 1912). The Government have powers, in spite of this section, to decide the future fate of the lunatic—*Emp. v Iman Hasau* 25 Bom L R 286 26 Cr L J 348.

1235 Application of section:—This section should be applied not only where the accused are insane persons, but also where the accused persons, though not insane, labour under defects which render their trial impossible. In such cases they should be treated as insane persons and confined during the King's pleasure, in accordance with English practice—1889 P R 37. Thus, where a *deaf and dumb* person, who is unable to understand the proceedings of the trial, is found guilty of murder, the proper course to be taken is to treat him as a lunatic and to proceed under section 471—*Crown v Dost Mahammad*, 1911 P R 13. This section does not compel the Court to send the accused to the lunatic asylum, all that is necessary is to see that such safeguards are taken as would keep him from mischief—*In re Mahammad* 42 M L J 72.

Where the Court below while acquitting an accused on the ground of insanity omitted to pass orders under section 471, the High Court in revision can pass the necessary orders. The passing of an order under sec 471 by the High Court, after an acquittal by the Court below, cannot be said to alter a finding of acquittal into one of conviction within the meaning of sec 439 (4)—42 M L J 72.

If a person is acquitted under section 470 he ought not to be made over to his relatives for safe custody but should be detained in custody under this section—2 Weir 580. But the Local Government can deliver the lunatic to the custody of his relatives under sec 475.

472 [*Repealed by the Indian Lunacy Act, 1912.*]

473 If such person is detained under the provisions of Section 466, and in the case of a person detained in a jail, the Inspector-General of Prisons, or, in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or Court, as the case may be, at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions of Section 468; and the certificate of such Inspector-General or visitors as aforesaid shall be receivable as evidence.

Procedure where lunatic prisoner is reported capable of making his defence

Section 466, and in the case of a person detained in a jail, the Inspector-General of Prisons, or, in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or Court, as the case may be, at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions of Section 468; and the certificate of such Inspector-General or visitors as aforesaid shall be receivable as evidence.

The word 'detained' has been substituted for 'confined,' and the itali-

The word 'detained' has been substituted for 'confined,' and the itali-

cised words have added, by section 125 of the Cr P C Amendment Act, XVIII of 1923

474. (1) If such person is *detained* under the provisions of Section 466 or Section 471, and such Inspector-General or visitors shall certify that, in his or their judgment, he may be *released* without danger of his doing injury to himself or to any other person the Local Government may thereupon order him to be *released* or to be detained in custody, or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum, and in case it orders him to be transferred to an asylum, may appoint a Commission, consisting of a judicial and two medical officers.

Procedure where lunatic confined under S 466 or S 471 is declared fit to be discharged

(2) Such Commission shall make formal inquiry into the state of mind of such person taking such evidence as is necessary, and shall report to the Local Government, which may order his *release* or detention as it thinks fit

The word 'detained' has been substituted for 'confined,' and the word 'released' for 'discharged,' by sec 126 of the Cr P C Amendment Act, XVIII of 1923

475 (1) Whenever any relative or friend of any person detained under the provisions of Section 466 or Section 471 desires that he shall be delivered to his care and custody, the Local Government may, upon the application of such relative or friend and on his giving security to the satisfaction of such Local Government that the person delivered shall—

Delivery of lunatic to care of relative or friend

- (a) be properly taken care of and prevented from doing injury to himself or to any other person, and
- (b) be produced for the inspection of such officer, and at such times and places, as the Local Government may direct, and
- (c) in the case of a person detained under Section 466, be produced when required before such Magistrate or Court,

order such person to be delivered to such relative or friend

(2) If the person so delivered is accused of any offence the trial of which has been postponed by reason of his being of

unsound mind and incapable of making his defence, and the inspecting officer referred to in sub-section (1), clause (b), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court; and, upon such production, the Magistrate or Court shall proceed in accordance with the provisions of Section 468 and the certificate of the inspecting officer shall be receivable as evidence.

Change:—The whole section has been re-drafted by sec 127 of the Cr P C Amendment Act XVIII of 1923. Clause (c) and sub section (2) are entirely new. Clause (b) was formerly sub-section (1).

"The new sub section (2) simplifies the procedure under which a person accused of an offence whose trial has been postponed by reason of his unsoundness of mind is again produced before the Court on the certificate of the inspecting officer as to his recovery"—*Statement of Objects and Reasons* (1914)

CHAPTER XXV.

PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

476 (1) When any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in Section 195 and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class, and may send the accused in custody, or take sufficient

476 (1) When any Civil, Revenue or Criminal Court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in Section 195, subsection (1), clause (b) or clause (c), which appears to have been committed in or in relation to a proceeding in that Court, such Court may after such preliminary inquiry, if any, as it thinks necessary,

security for his appearance, before such Magistrate; and may bind over any person to appear and give evidence on such inquiry or trial.

record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate, or, if the alleged offence is nonbailable, may, if it thinks necessary so to do, send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate

Provided that, where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint

*For the purposes of this subsection a * * Presidency Magistrate shall be deemed to be a Magistrate of the first class*

(2) Such Magistrate shall thereupon proceed according to law, and as if upon complaint made and recorded under Section 200, and may, if he is authorised under Section 192 to transfer cases, transfer the inquiry or trial to some other competent Magistrate.

(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made under Section 200 * * *

(3) *Where it is brought to the notice of such*

or any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage adjourn the hearing of the case until such appeal is decided.

Change:—The whole section has been redrafted by section 128 of the Cr P C Amendment Act XVIII of 1923 but no important change has been introduced. Sub-section (3) is new. "The changes that we have made are not of great importance. We have provided that a Court can act on application made to it or *suo motu* and after such preliminary inquiry, if any, as it thinks necessary. For the words 'committed before it or brought under its notice in the course of a judicial proceeding' we have substituted the phraseology used in clause (b) of section 195. We have substituted 'may make a complaint' for 'shall make a complaint' and, in view of the criticism of the words 'nearest first-class Magistrate' we have provided that a complaint should be sent to a first-class Magistrate having jurisdiction. In order to give effect to our decision that proceedings under section 476 etc., should be subject to revision, we have introduced words which will make it necessary for the Court to record an order."—*Report of the Joint Committee (1922)*. The proviso to subsection (1) has been added recently by the Cr P Code Amendment Act II of 1926. For reasons, see Note 1240. From the third para of subsection (1) the word 'chief' has been omitted by the same Amendment Act, for reason of this omission see Note 1250.

1236 Object and scope of Section.—It is easy to imagine the inconvenience which might be caused if a Munsiff or a Subordinate Judge or a Judge were to appear before a Magistrate and make a complaint on oath in order to lay the foundation for a prosecution, and this section has been enacted to obviate the difficulty. The Legislature thought it desirable that the procedure to be followed in cases of complaint by a Court should be different from that which has to be observed by an ordinary complainant.—7 All 871. Under Section 195 it is open to the Court, before which the offence was committed, to prefer a complaint for the prosecution of the offender, and sec 476 prescribes the procedure as to how that complaint may be preferred.—32 Bom 184 31 Mad 140 32 Mad 49, 7 All 8-1. The language of this section indicates that when a Court is acting under sec 195 a complaint in the strict sense of the Code is not required, and the procedure herein laid down constitutes the complaint mentioned in sec 195 *ante*—7 All 871. The order of a Court under sec 476 is in the nature of a complaint under sec 195.—9 C P I R 26. Proceedings taken by a Court under this section operate of themselves to set a prosecution in motion without the necessity of any other complaint, the Court itself being the complainant.—2 Weir 589.

The words in sub-section (2) of this section "and as if upon complaint made and recorded under sec 200" have been introduced into the Code in 1895 in order to give legislative effect to the Full Bench ruling in 7 All

871 in which it was held that the order of the Court under this section was a complaint within the meaning of sec 195—26 All 249 That one of the functions of sec 476 is to provide the machinery by which a Court is enabled without inconvenience to make a complaint is made very clear by these words introduced in the present section—31 Mad 140 (per Miller J) Under sub-section (1) as now amended the Court will have to frame a complaint in writing

1237 Section 476 is supplementary to sec 195—The words 'offences referred to in sec 195' mean not merely the offences covered by the sections of the I P C mentioned in section 195, but they mean the offences covered by those sections *and committed under the qualifying circumstances* mentioned in section 195 That is, section 476 must be read along with section 195, and the qualifications mentioned in sec 195 are to be treated as incorporated in the provisions of section 476—19 Cr L J 638 (Cal), 42 Mad 540 Thus, an offence under sec 467 I P C does not come within the purview of section 195 unless it is committed by a 'party to the proceeding', and therefore a Court is not competent to pass an order under sec 476 directing the prosecution of a person who is not a party to the proceeding for an offence under sec 467 I P C—*Ramalingam v Subramayya* 40 Mad 100 18 M L T 488, 1917 P R 10 [Nor is a complaint under this section necessary in order to proceed against such person—21 C W N 950] So also, where certain documents were put in Court in a pending suit, but *not given in evidence* the Court was not competent to order the prosecution of the party, who had put in the documents, for forgery—*Abdul Khadar v Meera Saheb*, 15 Mad 224 1895 A W N 145, 1910 P. U R. 3.

But a different view has been taken in the following cases Thus in 31 Mad 49, *Sankaran Nair J* held that section 476 must be construed as entirely self-contained, and the power given to the Court under this Chapter to take action regarding the offences specified in sec 195 is not restricted by the qualifying circumstances mentioned in sec 195 And therefore it is competent to a Court to order prosecution for forgery of a person who was *not a party* to the proceeding in Court—*In re Devani*, 18 Bom 581, *In re Aeshav* 14 Bom I R 968 20 Cr L J 630 (Pat) 24 O C 367 It is competent to a Court to proceed under sec 476 against a party who has filed a forged document whether such document has been actually *given in evidence or not*—1897 P R 12, *Akhil Chandra v Q E*, 22 Cal 1004 The words referred to in sec 195 are merely words descriptive of the class of offences with which a particular Court can deal They do not mean that sec 195 governs sec 476 to any extent other than this—40 All 116 *Ganga Ram v Es P* 40 All 24, 20 Cr L J 426 (Nag) Sec 476 is a self-contained section, and the reference made to sec 195 is only for the purpose of avoiding the enumeration of the sections of the Penal Code mentioned in section 195—*Raj Kumar Singh v King Emperor*, 1 P L J 298

But the intention of the Legislature in making the present amendments is to make this section not independent of, but supplementary

section 195 In submitting the Report of the Joint Committee before the Council of State in September 1922, the Hon'ble Mr Moncrieff Smith said "One of the most weighty changes introduced by this measure (i.e., the Amendment Bill) is in respect of prosecutions for offences committed before or in relation to proceedings of the Courts . A glance at any commentary on the Code will give some indication of the difficulties that have arisen in putting sections 195 and 476 into operation After a long and careful thought, Government have decided on a line of action which I may say has met with general approval The two sections as they stand (under the old Code) provide an alternative procedure for the Courts in dealing with them Sanction is given to proceedings under sec 195 or action is directed by the Courts under sec 476 The sanction proceedings are now omitted, and the two sections will in future supplement each other Section 195 will contain the prohibition of prosecution except upon complaint by the Court section 476 will lay down the procedure to be followed It has been suggested that it will be better to bring the two sections together That is a matter to be considered when the consolidation of the Code will be undertaken'—*Debates in the Council of State* September 13 1922 See also *Dwarka v Makund*, 24 A L J 122 26 Cr L J 1506

The recent amendments in sections 195 and 476 have resulted in connecting the two sections more closely together Section 476 gives the Court power with respect to any offence referred to in section 195 The offence referred to in section 195 (c) is not merely an offence under certain sections but such an offence *when committed by a party to the proceeding*—*per Brown J in C T Guruswamy v D A S Ebrahim & Rang* 374 (381, 382) 26 Cr L J 295 By the recent amendment of the Cr P Code, the words 'offence referred to in section 195 (c) in sec 476 must be read in conjunction with the wording of section 195 (c) The only offence which sec 195 (c) bars from the cognizance of the Magistrate without a complaint by the Courts is when such offence is "alleged to have been committed by a party to any proceeding before that Court" and it is not right to divorce these words or take only a part of the section in endeavouring to discover what the offence referred to in section 195 is—*per Robinson C J in Ibid* (p 380) Therefore, the Court has jurisdiction to file a complaint only against parties to the suit—*Shree Poo v Ma Ma Hmoke*, 3 Rang 48 3 Bur L J 344 26 Cr L J 500 So also where there is no evidence to suggest that a forged document was produced or given in evidence in a Court, a complaint under sec 476 Cr P Code by the Court is not justified—*Bahiruddy v Emp*, 28 C W N 880

1238 Civil Criminal or Revenue Court—As to what are Courts, and what are not, see Note 622 under sec 195

An Income Tax Collector is a Revenue Court within the meaning of this section—36 Mad 72, 1905 P R 411 35 Bom 642 *Contra*—8 Bom 1, R 477 Where a sub-Registrar impounded a document presented for registration as insufficiently stamped and sent it to the Collector, and the Deputy Collector acting on the orders of the Collector reported that the

document was not genuine, whereupon the Collector directed the prosecution of the person who presented the document for registration, it was held that neither the Collector nor the Deputy Collector acted as a "Court", because the inquiry held by them solely for the purpose of determining who should be called upon to pay the stamp duty was not a judicial inquiry, and therefore the order directing the prosecution of the petitioner was without jurisdiction—7 C W N 795 A certificate officer acting under the powers conferred upon him by secs 58 and 66 of the Behar and Orissa Public Demands Recovery Act 1914 is, while acting in that capacity, a "Court", and where such officer inquires into the question of an alleged payment where a certificate has been issued the proceeding before him is a judicial proceeding—4 P L J 475 A Commissioner sitting as an election tribunal is a Civil Court—*Ram Nath v Emp* 46 All 611 (613), but see *Bilas Singh v K E* 23 A L J 845 47 All 934

A Judge receiving and dealing with a petition under sec 83 of the Transfer of Property Act (for deposit of mortgage money) is a Court, and he can therefore start a prosecution under this section against the person depositing the money, if the mortgage-deed is found to be forged—*Chamars v Public Prosecutor* 4 Pat 24 61 L L 225 26 Cr L J 170

An officer acting in an *executive*, and not in a *judicial* capacity cannot exercise the powers conferred under this section—15 A L J 654 See Note 1244 below under heading "Proceeding in Court"

A District Registrar (before whom a forged document was produced for registration) is not a Civil, Criminal or Revenue Court within the meaning of this section, but in his capacity as District Magistrate he can take cognizance of the offence (sec 471, I P C) under sec 190 (1) (c) of this Code—*Chetu Mahila v Emp* 11 459 26 Cr L J 148

Power after transfer—A Magistrate, who after trying a case has been transferred from the charge of the particular Court in which the case was tried to some other duty in the same district is not competent to make an order under this section in respect of a case which he tried as the presiding officer of that Court—*Chunni Lal v Harbans* 1 A L J 315, *Emp v Baldeo* 46 All 851 (854) In such an event, the only officer who can order the prosecution is his successor-in-office in that Court—46 All 851 (855) A Joint Magistrate after dismissing the complaint in a case became the District Magistrate, and then ordered the prosecution of the complainant for perjury under sec 193 I P C It was held that the order of the Joint Magistrate as a District Magistrate was bad and should be set aside—*Mallu Khan v K E*, 1 A L J. 388

But the fact that the case has been transferred from one Court to another Court, after it has been partly heard by the first Court, does not deprive the first Court of its jurisdiction to take proceedings against a witness in respect of a perjury committed before it, nor is that jurisdiction taken away by the circumstance that the second Court may have formed a different view as to the veracity of the witness—44 All 642

1239 Power of successor in office to act under this

The power to direct prosecution is conferred on the "Court" and

the particular officer who fills the judicial office at a particular time, and therefore the successor-in-office is competent to make an order under this section in respect of an offence committed before his predecessor-in-office—15 C. W. N. 691; 37 Cal 642 (F. B.); *In re Nawal Singh* 34 All 393, 19 A. L. J. 819, 32 Bom 184, 29 Mad 331, 14 N. L. R. 16, 1919 M. W. N. 112, 4 Lah 58, 4 Bur. L. T. 246; *Shwe Fwe v Ma Ma Hmoke*, 3 Rang 48 3 Bur. L. J. 344 But in 34 Cal 551 (F. B.), 35 Cal 114, 1909 P. R. 6, 2 Weir 597, and 17 Cr. L. J. 40 it has been held that a succeeding Magistrate has no jurisdiction to institute proceedings under this section, where an offence was neither committed before him nor was brought to his notice in the course of a judicial proceeding (see the words of the old section) These words have now been replaced by the more general words 'committed in a proceeding in that Court' and in this view of the law, the above five cases (34 Cal 551, etc.) are no longer correct Moreover, the new section 459 (as amended in 1923) expressly lays down that all the powers of a Judge or Magistrate may be exercised by his successor in office.

Where proceedings under this section have been commenced by a particular officer, it is competent for his successor in office to continue the proceedings—7 A. L. J. 991 *Contra*—1911 P. W. R. 4, where it is held that where the preliminary inquiry has been commenced by the proper officer who issued the notice, his successor is not competent to complete the inquiry and pass an order under this section But this ruling is no longer correct for the reasons stated above.

Power of Superior (Appellate) Court to take action—See sec 476.

1240 Power of High Court:—This section under the old law did not apply to proceedings in High Courts or Courts in Presidency towns, consequently, it was not competent to the High Court, acting under this section to direct the prosecution of a person for the offence of forgery or abetment of forgery brought to its notice in the course of hearing an appeal in a robbery case—19 Cr. L. J. 638 (Cal) see also 9 Bom. L. R. 110. This ruling is no longer correct in view of the second para (newly added) of subsection (1).

A High Court sitting to exercise the revisional powers under this Code can lay a complaint under sec 476—*Emp v Syed Khan* 3 Rang 303 27 Cr. L. J. 4.

The proviso newly added in 1926 lays down that a complaint by a High Court need not be signed by the Judge himself but may be signed by an officer of the Court "The Lahore High Court has represented that it is a needless waste of time of the Judges of a High Court that they should be required to sign all complaints under sec 476. The proposed change enables any officer of such a Court whom the Court may appoint to sign the complaint"—*Statement of Objects and Reasons* (Gazette of India, 1925 Part V, p. 215).

The procedure of the new section 476 in its application to the High Court is open to serious objections. It is hardly consistent with the dignity of a Judge of the High Court that he should have to make and sign a complaint which is to be inquired into by one of his subordinates, and that

he should be treated and recorded as a complainant throughout the proceedings, the only exception being that his examination in support of the allegations in the complaint has been dispensed with by proviso (1) of sec 200. Nor is it fair to the accused that he should be arraigned in a case which has been instituted on a complaint made by a Judge of the highest tribunal and is to be tried by a judicial officer who is subordinate to the complainant. There can be little doubt that by reason of the circumstance that the complaint has been preferred by a Judge of the High Court, the accused person is likely to entertain an apprehension, not altogether without justification that his conviction is a foregone conclusion—*Emp v Qadir Baksh* 6 Lah 34 26 F L R 158 27 (r L J) 98 A I R 1925 Lah 312. The proviso has been added probably in deference to these remarks. But it is curious to note that the *Statement of Objects and Reasons* (cited above) assigns a different reason for the addition of the proviso and makes no mention of the 'dignity' of the Judge of a High Court.

A Judge of the High Court can grant a direction to prosecute, under sec 476, although the matter out of which the action arose was heard by another Judge of the Court, because any Judge of the High Court has power to exercise the powers of the High Court. But as a matter of convenience the prosecution must be directed by the same Judge, unless it becomes impracticable by reason of that Judge ceasing to hold office—*Bat Kasturba v Lunmahdas* 49 Bom 710 27 Bom L R 616 26 Cr L J 1189.

1241 Duty of Court.—The power given by this section should be exercised with care and due consideration. It is not in every instance in which a party fails to prove his case that the Judge who has decided against him is justified in exercising the powers conferred by this section. Judges should bear in mind that criminal prosecutions are frequently suggested by successful litigations merely to prevent an appeal in the civil suit, and they should be careful not to lend themselves to such suggestions too readily. The Judges should also recollect that when they proceed under this section, the responsibility for the prosecution rests upon them entirely—1 Cal 450. Where a Civil Court institutes a criminal prosecution of its own motion under this section it should see that there is a ground for inquiry—2 Weir 587. The order should disclose a reasonably well founded and deliberate judicial opinion that there was ground for inquiry, and the power given by this section should be used with care and consideration—1901 A W N 177. There must be a reasonable probability of conviction, because without that there could be no ground for another Magistrate to waste his time in holding the inquiry—31 M L J 440, 9 N L R 184, 24 Cr L J 823. There must be a reasonable foundation for the charge in respect of which prosecution is directed, before the criminal law is set in motion—*Jadu Nandan v Emp.* 37 Cal 250 14 C. W N. 330, and it would be an abuse of the powers vested in a Court of Justice if a complaint were made by it on the principle that though the conviction of the party complained against is a mere possibility, still it is desirable that the matter should be thrashed out, so that it may be decided /

whether or not an offence has been committed—*Ibid* The Madras High Court holds that it is not the duty of the Court to see that there is a reasonable probability of the prosecution ending in a conviction, though the Court acting under this section should not act capriciously or without proper grounds—*Seshamma v. Venkamma*, 22 L. W. 863: 27 Cr. L. J. 280.

Before a Court is justified in making an order under this section directing the prosecution of any person, there must be some direct evidence fixing the offence upon the persons whom it is sought to charge, either in the preliminary inquiry or in the earlier proceedings out of which the inquiry arises. It is not sufficient that the evidence in the case may induce some sort of suspicion that these persons have been guilty of an offence, but there must be distinct evidence of the commission of an offence by such persons—10 C. I. 730, 21 Cr. L. J. 601 (L. J.). On the other hand, it is not necessary for the purpose of a prosecution under this section that the Court should go minutely into the evidence recorded in the suit. It is sufficient if that evidence discloses a reasonable foundation for a criminal charge—2 W. R. 557. This section does not say that before a Court orders a prosecution, it must try the whole case and be absolutely satisfied that the accused cannot by any possibility escape a conviction—9 N. L. R. 124. Under sections 195 and 476, all that a Court has to see is that a *prima facie* case has been made out upon the evidence before it for inquiring further into the question whether any of the offences punishable as set out in sec. 195 has or has not been made out—12 A. L. J. 1111 (dissenting on this point from 37 C. I. 13 and 37 C. I. 250), and the authority which is called upon to take action under sec. 476 need not and should not decide the question of the guilt or innocence of the party against whom proceedings are to be instituted—37 Cal. 250. Moreover, the Court taking action under this section must be *prima facie* satisfied that the offence has been committed by some definite individual or individuals against whom proceedings in the Criminal Court are to be taken—23 Cal. 532. It must come to a finding as to which of the individuals sent for trial has committed the offence—2 Lah. L. J. 63. Where a District Judge being of opinion that the forgery of a document produced before him was committed either by the plaintiff or by the defendant, sent both of them to a first class Magistrate so that the guilty party might be proceeded against, it was held that the order was illegal and must be set aside in revision—1905 P. L. R. 163.

* *Is of opinion*.*.—The opinion must be the opinion of the Court taking action under this section, the Court must form its own opinion and should not take opinion from others. Where the High Court directed the Sessions Judge to take action under this section, held that it was the duty of the Sessions Judge to apply his mind to the matter on the merits and then only decide whether a prosecution was necessary or not—*Ghansam v. Emp.* 21 A. L. J. 930. Where a Munsiff in making an order under this section purported to act not of his own accord but at the direction of the District Judge, it was held that the order of the Munsiff was bad, in as much as it was only nominally his, while the opinion was the opinion of the District Judge—6 A. L. J. 924. *Contra*—In 20 Cr. L. J. 274 (Pat.)

It was held that the proceedings were not vitiated by the mere fact that the District Judge had directed the Munsiff to institute the proceedings.

1242 Power to take action in a pending case or appeal:— Proceedings under this section should not be taken until *after* the close of the case in which the false evidence was given or forged document was used as genuine etc. Thus it is not competent for a Magistrate to order the prosecution of a witness for perjury while the proceedings in which the witness has given his deposition are pending before him—4 Bom I R 7-8 21 Cr I J 29 (Pat.) *Kalu v. Tikaraji* 26 Cr I J 1350 (Nag.) Such a hasty proceeding at placing a witness on his trial as an accused immediately after he has given his evidence, is bad because the necessary result of such a step would be to intimidate subsequent witnesses and defeat the object of the trial—9 S L R 176 *Ratanlal* 477 8 B H C R 126 21 Cr I J 29. But of course it is not illegal to take action under this section during the pendency of the suit or proceeding—in which the offence has been committed. The Court is not bound to wait until the substantive proceedings are over, before it can initiate an action under this section, and its failure to do so does not constitute any material irregularity in the exercise of its jurisdiction—A E v *Leukanna* 31 M L J 440 (T B). If there is a delay in the disposal of the suit in which the offence has been committed there is no reason why the Court should delay proceedings under this section until the suit is disposed of which disposal may not occur until months or years later—*In re Perumalla* 44 M L J 74.

Since in pp 1 is a continuation of the trial proceedings under this section should not be taken during the pendency of the appeal in the case in which the petitioner is alleged to have given false evidence or produced a fabricated document—3 C I J 302 16 Bom 729 6 Cal 308 1916 P R 29 *Harnam Singh v. Itri* 14th L J 73 26 Cr L J 1166. The new subsection (3) now provides that if a proceeding has already been taken it may be adjourned till the decision of the appeal.

1243 Offences covered by this Section—Under the old law the offences which fell under this section were those which were committed before the Court or were brought to its notice in the course of a judicial proceeding. The wording of the present section is now changed.

Where an affidavit containing a false statement was filed by a person before a Munsarim of Court, it was held under the old section that the Judge could not direct the prosecution of that person because the offence of perjury was not committed before the Judge himself—15 A L J 517. But this is no longer correct and the above case would be covered by the present section which contemplates an offence committed 'in relation to a proceeding in the Court'. The old section was wide enough to enable a Court to take action in respect of an offence committed in another forum (even in another province) and on some previous occasion, provided it was brought to the notice of the Court in the course of a judicial proceeding—6 A L J 392, 40 All 116, 1 P L J 298. See also 43 Cal. The present section is confined to offences committed 'in relation proceeding in that court'.

Where a person gave false evidence before the committing Magistrate, and that evidence, on account of his inability to attend the Sessions Court owing to illness was read out as evidence at the Sessions trial the Sessions Judge would be competent to direct the prosecution of that person for giving false evidence—1916 P R 29 Where the offence is not committed in or in relation to a proceeding in Court this section does not apply Thus if a false complaint is made to the Police, a Court cannot direct prosecution—*Andhlore v Emp* 5 P I T 300

As the offences contemplated by this section are offences mentioned in section 195 a Magistrate cannot direct a prosecution for an offence under section 471 I P C because this latter section is not mentioned in sec 195—18 A L J 50

1244 Proceeding in Court—A departmental inquiry is not a proceeding in Court—18 Cr L J 331 (Bur), 23 O C 136 Where a person preferred a complaint to a District Registrar containing an allegation against the Sub-Registrar, and the District Registrar after holding a departmental inquiry was satisfied as to the falsity of the complaint and directed the prosecution of the complainant for an offence under sec 182 I P C the order was held to be wholly without jurisdiction & the inquiry held by the District Registrar was a departmental inquiry and not a judicial proceeding—10 C W, N 222 Where a District Magistrate called for the record of a case tried before a Sub-Magistrate in his executive capacity for the purpose of enabling him to ascertain whether an application for an inquiry into the conduct of the Police Officer should be granted or not and then directed the prosecution of the officer under sec 193 I P C, it was held that the order should be set aside, in as much as there was no judicial proceeding before a Court for the purposes of this section—25 Mad 659 Where a District Magistrate directed the prosecution of a person under sec 211 of the I P C for having given a false report of theft to the Police it was held that the order was not one passed under this section but one passed by the District Magistrate as the *ex officio* head of the Police to whom a false complaint was made—1890 A W N 167 A village headman made an application to the District Magistrate stating that he wished to resign his post On being questioned as to his reasons he stated that the Police in the course of the investigation into a dacoity case was forcing a large number of people to pay money to them Thereupon the Magistrate examined the headman on oath and sent the papers to the D S P who after an inquiry reported that the charge against the Police was false Thereafter the District Magistrate passed an order directing the prosecution of the headman for perjury It was held that the order was illegal as the proceedings before the District Magistrate were not judicial proceedings—38 All 32 After the dismissal of a complaint as false by a Deputy Magistrate the papers were sent to the District Magistrate on the motion of the Police for the case being struck off the Register The District Magistrate in striking off the case ordered the prosecution of the complainant for an offence under sec 211 I P C It was held that the proceeding before the District Magistrate was not

judicial but purely an executive one, relating solely to the question as to the removal of the case from the register and the order therefore did not come under this section—1884 A W. N 290 A proceeding before a Deputy Commissioner or Chairman of the District Board is not a proceeding in any Court within the meaning of this section—23 O C 136 Where the accused went to the Magistrate's house and made a false statement there, the offence could not be said to have been committed in any proceeding before a Court—3 Lah L J 535 Where a person escaped from the lawful custody of a servant of a Civil Court the offence (escape from custody) was not committed in relation to any proceeding in Court consequently this section does not apply, and the proper procedure is that the servant of the Court should file a complaint in the ordinary way—*Emp v Madho Singh* 23 A L J 189 47 All 409 26 Cr L J 865

Proceedings which are irregular or illegal or without jurisdiction are not proceedings under this section and therefore no order for prosecution can be passed in such proceedings Thus where the order of a Magistrate, before whom a complaint was preferred in making over the complaint to a Subordinate Magistrate for inquiry and disposal of the case was bad in law, the order of the Subordinate Magistrate under sec 476 for the prosecution of the complainant passed after such inquiry would be illegal—18 C W N 95 See also 16 C W N 885 43 Cal 173 But see *contra*—1 P L J 553 A charge of unprofessional conduct made against a second grade pleader can be inquired into only by the presiding officer of the Court in which the pleader practises The District Judge has no jurisdiction to inquire into the matter where the District Judge assumes jurisdiction in such a case makes an inquiry and acquits the pleader, and takes proceedings under this section against a person for giving false evidence the order cannot be upheld as it is one without jurisdiction—32 M L J 402

Where the complainant did not desire to take further proceedings and applied to withdraw the complaint the Magistrate was not competent to order under this section the prosecution of the complainant under sec 211 I P C for making a false complaint on taking evidence as there was no proceeding before him it being withdrawn by the complainant—4 C W N 351

Execution proceedings are proceedings in Court—37 Cal 642, 10 C W N 55 25 M L J 593 17 O C 309 10 N L R 177, 19 Cr L J 153 (Pat) An appeal in a mutation case before the Commissioner is a proceeding contemplated by this section—6 P L J 178 Proceedings before a Collector under sec 69 of the Bengal Tenancy Act fall under this section—48 Cal 1086

Proceedings need not be judicial—Under the not necessary that the proceeding in respect be of a judicial character Where a was dropped on the ground that the offence was committed was not of a section) but after the amended Code proceedings in respect of which the

section is taken this of which the which

not be of a judicial character, the Public Prosecutor again moved the Court for taking the same action against the same person, held that the petitioner could be proceeded against. The dropping of the previous proceeding was no bar to the institution of the present proceeding—*Chamani v Public Prosecutor*, 4 Pat 24 6 P L R 225 26 Cr L J 170

1245 Preliminary Inquiry:—Where not necessary—For the purposes of this section neither notice to show cause why the party should not be sent before a Magistrate for trial nor a preliminary inquiry is indispensable—7 Bom L R 84 This section does not make it imperative on a Court to hold a preliminary inquiry before taking action under this section. To justify the Court in initiating a prosecution, it is necessary only to hold that it is expedient in the interests of justice that an inquiry should be made into an offence referred to in sec 195—*Emp, v Qadir Buksh* 6 Lah 34 26 P L R 158 27 Cr L J 98, 20 Cal 474, 34 Cal 551, 15 All 392, 34 All 267. It is for the Court acting in the matter to determine in the exercise of its discretion whether or not to make a preliminary inquiry—20 Cal 349, 20 Cal 474. Where a Munsiff sent a case under this section to the nearest first class Magistrate without making any inquiry, and where there was nothing to show that any inquiry the Munsiff could have made would have put the Magistrate in a better position, the omission to hold a preliminary inquiry was not bad—5 All 62. If in the course of a proceeding either civil or criminal, the Judge or Magistrate finds clear grounds for believing that either the parties or their witnesses have committed perjury he is justified in directing criminal proceedings against such persons without any further inquiry than that which he had already held in his Court—6 Cal 308. In a prosecution for making a false charge under Sec 211 I P C it is not always necessary that there should be a preliminary inquiry under this section—6 C W N 295. A preliminary inquiry is not necessary in all cases if there are materials on record on which a definite charge can be grounded—*Ratanlal* 895. Where an order was made under this section directing the prosecution of a witness under Sec 193 I P C, on the very day or the day after the witness's cross examination had been finished, and upon a clear statement by the witness and after an opportunity having been given him to explain the inconsistency in his statements and in the cross-examination it was held that it was not incumbent on the Magistrate to institute a fresh inquiry or to give any notice to the accused—4 P L W 44 19 Cr L J 169

Where necessary—Where a Magistrate dismissed a complaint without calling evidence, he should make an inquiry before charging the complainant with the offence of making a false charge—16 W R 44. Where a Subordinate Judge acting upon the report of a bailiff ordered the prosecution of persons who obstructed him in executing a warrant of attachment without making an inquiry of his own it was held that the Subordinate Judge would have done well if he had complied with the requirements of this section—*Ratanlal* 701. Where in a civil suit, settled without any evidence being gone into, by confession of judgment, the Court had grounds for supposing that an offence of false personation under Sec 205 I P C had been committed before it, the Court before directing a prosecution

would be competent to hold a preliminary inquiry to satisfy itself whether a *prima facie* case has been made out for directing the prosecution—19 Cal 345 The Court directed the prosecution of a person under sec 174 I P C for the disobedience of summons to attend the Court and give evidence, and that person appeared and denied the service of summons on him held that before prosecution a preliminary inquiry should be held as to the service of summons, and the said person should be given an opportunity to cross-examine the persons who had deposed to the service of summons on him—19 A I J 56

1246 Procedure in preliminary inquiry—Oath can be administered to the suspected person, in the preliminary inquiry—8 Bom I R 589

The inquiry must be on evidence one mode of making inquiry is certainly to take evidence—37 Cal 52 17 Cal 8,2 But it is not necessary to go minutely into the evidence or to see whether there is sufficient evidence to support a conviction It is sufficient if the evidence discloses a reasonable foundation for a criminal charge—2 Weir 587 The law does not require a minute or detailed inquiry but only such preliminary inquiry as may be necessary to make out a *prima facie* case The extent of the preliminary inquiry is left to the discretion of the Court—*Chamari v Public Prosecutor* 4 Pat 484 A I R 1925 Pat 677, 5 All 62 The Code does not contain any provision as to the manner in which the evidence in the inquiry should be recorded, but for future reference the Court should make a summary of the statement of the witnesses examined—42 Cal 240

It is not necessary that the preliminary inquiry should be conducted in the presence of the accused All that the Court making the inquiry has to do is to satisfy itself that there are *prima facie* grounds for sending the case for investigation to a Magistrate—9 W R 3 The accused has no right to cross-examine any witness in the preliminary inquiry—18 Bom I R 284 34 All 267 but see 6 P I J 146 and 19 A I J 56, *contra*

The proceedings in inquiries under this section are judicial proceedings and the person against whom they are directed is in the position of an accused person To examine such a person as a witness in the course of such proceedings is *ultra vires* In such proceedings the person can only be examined in accordance with the provisions of section 342 He cannot properly be asked questions merely to elicit a statement as a foundation for ordering his prosecution—10 Bur I T 32

Who can hold the inquiry—The preliminary inquiry must be conducted by the officer who directs prosecution under this section, and cannot be delegated to any other officer—20 Cr L J 243 (Pat)

This section contemplates that it is for the *complaining Court* to make any inquiry that is necessary, and then to make a complaint This section does not contemplate that the Court should send the case to a Magistrate for inquiry, and the Magistrate should make the inquiry and prosecute if he is satisfied that the offence has been committed It is the complaining Court that must be satisfied that there is a *prima facie* case against the person sent to the Magistrate Therefore an order forwarding to the District Magistrate proceedings taken against the accused persons and requesting him to hold an inquiry with a view to the prosecution of

those persons is laid in law—*Chamari v Public Prosecutor*, 4 Pat 24 6 P L T 225 26 Cr L J 170

It is not necessary that the whole of the preliminary inquiry ought to be conducted by the Court directing the prosecution. He can apply to the District Magistrate as the Head of the Police, for the assistance of the C I D, and the fact that he takes the assistance of the District Magistrate does not make him *functus officio* and deprive him of his jurisdiction to pass an order under this section—43 Bom 300

'May take sufficient security custody to such Magistrate'—'The object of this is not to make it compulsory on the Magistrate to send the accused in custody even in non bailable cases. I want to leave a discretion to the Magistrate to come to a conclusion that it is necessary for him to do so. Otherwise he may take security for his appearance'—*per Mr Rangachariar (Legislative Assembly Debates, 8th February, 1923 page 2087)*

1247 Notice to accused;—This section nowhere says that notice shall be given to the person intended to be proceeded against, and the want of notice is at best a mere irregularity in procedure—10 A L J 247, 2 Bur L J 153 U B R (1915) 3rd Qr 83. For a proceeding under this section, neither notice to show cause why the party should not be sent before a Magistrate, nor a preliminary inquiry is indispensable—7 Bom L R 84 15 C W N 691. But although as a matter of strict law, no notice would be necessary to the accused before taking proceedings under this section, still it is but right that he should have notice—*Bat Kasturbat v Janmalidas* 49 Bom 710 27 Bom L R 616. If a preliminary inquiry is started it must be a real inquiry and not merely a formal one, and the accused must be given ample opportunity to show cause why he should not be prosecuted—1 P L T 342 21 Cr L J 29 (Pat), 21 Cr L J 158 (Pat), 1 P L J 135, 10 A L J 247, U B R (1915) 3rd Qr 83, 4 P L J 475 25 Cr L J 488 (All), 2 Weir 587, 44 M L J 74. Where the prosecution has been ordered by a Court on evidence given by witnesses whom the accused had no opportunity to cross-examine, and whose evidence had thus not been tested, the Court acts with material irregularity in directing a criminal prosecution in the matter without giving the petitioner any chance to know and meet the case against him—*In re Perumalla* 44 M L J 74. When a Magistrate dismisses a complaint and takes action under this section against the complainant for preferring a false charge, he should give the complainant an opportunity of showing the truth or *bona fide* character of his complaint—7 Mad 189, 21 M L J 795, 5 C W N 106, 6 Cal 496, 7 Cal 87. So also, where a Civil Court directed the prosecution of the defendant in a civil suit for fabricating false evidence, without calling upon the defendant to shew cause, it was held that the Court acted wrongly in ordering the prosecution without giving the person concerned an opportunity to shew cause against such order—17 O C 25. But the proceedings would not be irregular merely because the accused was not given an opportunity of substantiating his case—7 Cal 208, 7 Mad 292 4 All 182.

1248 Order under this section:—An order under this section must specify the person alleged to have committed the offence. Where a District Judge, being of opinion that the forgery of a document produced before him was committed either by the plaintiff or by the defendant, and sent both of them to the nearest first class Magistrate so that the guilty party might be proceeded against, it was held that the order was illegal and must be set aside in revision—1905 P L R 163

The order must specify the offence committed—8 S L R 179. A District Magistrate passed an order directing prosecution for perjury or in the alternative for an offence under Sec 182 I P C. It was held that the option of that kind was not an order at all and therefore not valid—25 All 234. If the offence is perjury, the Court directing the prosecution should specify the false statement in regard to which the prosecution is directed, and should not leave it to the Magistrate to fish about and find it, if the offence is in respect of a forged document, the Court should mention the forged portion of the document. Omission to specify these particulars amounts to a material irregularity calling for interference by the High Court in revision—38 All 695, *Kalyani v Ram Deen* 48 Mad 395 48 M L J 290 4 P L W 44 19 Cr L J 169. *Kalisadhan v Ram Lal* 52 Cal 478 26 Cr L J 1307. It is preferable that a Court making a complaint for perjury should quote the passages in the witness' evidence which form the basis of the complaint—*Daarka v Mahand* 24 A. I. J 122 26 Cr L J 1506.

An order under this section should disclose the materials upon which it is based. Such an order is a judicial order if it does not show the basis upon which it is passed it is liable to be set aside in revision by the High Court—1 P L T 717. The complaining Court must hold such inquiry that its order when sent to the Magistrate will amount to a complaint under sec 200. For that purpose the complaining Court must decide upon and name the witnesses to be examined by the Magistrate otherwise the complaint is liable to be dismissed on the ground that there are no witnesses. The Court must not leave it to the Magistrate to inquire and find out for himself who the witnesses may be—*Kalyani v Ram Deen*, 48 Mad 395 48 M L J 290 26 Cr L J 801.

A Magistrate is competent under sec 250 to order the complainant to pay compensation to the accused and also to direct the prosecution of the complainant under this section for bringing a false charge—21 Mad 237 27 Mad 59 30 Cal 123 10 S L R 162 (*Contra*—26 Cal 181, 22 Cal 586). But the two orders must be simultaneous where the Magistrate ordered the complainant to pay compensation to the accused under Sec 250, and three weeks later he passed an order under this section directing the issue of notice to the complainant to show cause why he should not be prosecuted for an offence under Sec 211 I P C, it was held that this later order was not proper under the circumstances—20 Cr L J 226 (Pat).

An order under this section which merely directs the prosecution of the accused, but omits to direct the accused to be taken before the First Class Magistrate was held to be at most an irregularity cured by sec.

537 (b) of this Code—37 Mad 317 But it would not be so now, because Clause (b) of section 537 which cured irregularities under section 476 has been omitted by the Amendment Act of 1923

A Magistrate passed the following order “whereas D instituted a false case before the S I of Police I therefore sanction the prosecution of the abovenamed D under sec 211 I P C and send the proceeding to the Sub Divisional Magistrate for favour of disposal The prosecution is sanctioned under sec 476 Cr P Code Held that the order could not be treated as a complaint in proper form under this section The proceeding against D based on such a complaint must be quashed—*Durjodhan v Emp* 52 Cal 666 26 Cr I J 1459 A I R 1925 Cal 1226

1249 Effect of reversal of the order directing prosecution — If an order under section 476 (1) directing an inquiry by a Magistrate of the First Class is set aside it is just and proper that proceedings under sub section (2) before that Magistrate must also cease, the Magistrate can not proceed with the inquiry any further—6 I B R 49 Thus where in a suit on a registered bond alleged to have been executed by the defendant the Munsiff held that the bond was genuine, and directed the prosecution of the defendant, who had denied the execution of the bond for an offence under section 193 I P C and sent the defendant to the nearest First Class Magistrate to be tried for the offence but on appeal the judgment of the Munsiff was reversed by the Sub Judge who held that the bond was not genuine and that the defendant had not executed it it was held that the result of the judgment of the Appellate Court must be taken to be that the order for the prosecution of the defendant was not maintainable and that the inquiry into the case of the defendant by the First Class Magistrate must be stopped and should proceed no further and that if the defendant had been convicted by the Magistrate the conviction would be set aside by the High Court, although the defendant did not move the High Court to quash the proceeding taken against him—12 C W N 1 But where Magistrate dismissed a complaint and directed prosecution of the complainant under this section, and the Sessions Judge directed further inquiry setting aside the order of dismissal but passed no order in respect of the order of prosecution it was held that the order of prosecution remained good until it was quashed and the Magistrate to whom the case was sent was competent to continue the inquiry—21 M I J 793 If an order directing prosecution is set aside by the High Court as not being in proper form it does not debar the Court from instituting fresh proceedings by making a complaint in proper form—*Durjodhan v Emp* 52 Cal 666 26 Cr I J 1459

1250 First Class Magistrate:—Under the old section, the Court before which an offence was committed had to send the case for inquiry or trial to the nearest First Class Magistrate and it was not necessary that such Magistrate should be a Magistrate having jurisdiction over the offence The order making the transfer was of itself sufficient to confer jurisdiction on such Magistrate—16 Mad 461, 20 Cr I J 202 (Pat) The power to send the case to the nearest Magistrate of the First Class

was quite irrespective of the local jurisdiction of the Magistrate to whom the offender was forwarded, section 177 in no way curtailed the power under this section—*Ratanlal ES* See also 43 Cal 542 where the High Court sent the case to the nearest first class Magistrate who had no local jurisdiction over the case. But in a Sind case however, it was held that the word 'nearest' was merely directory, it did not confer jurisdiction, and the Magistrate to whom an accused had to be sent under this section must be a Magistrate having local jurisdiction over the offence—1 S L R 84. To remove this conflict of opinion, it has now been expressly laid down that the Magistrate to whom the accused is to be sent must be a Magistrate having jurisdiction, thus adopting the view of the Sind case.

If a High Court or Chief Presidency Magistrate takes action under this section, he shall send the case to a Presidency Magistrate, see part 2 of subsection (1). In this para as originally framed by the Amendment Act of 1923 the words were "Chief Presidency Magistrate" but the word 'Chief' has been omitted by the Cr P C Amendment Act II of 1926. "This amendment proposes to make all Presidency Magistrates Magistrates of the first class for the purpose of sec 476 (1). At present, if a Chief Presidency Magistrate wishes to take action, it is necessary for him to send the case to the first class Magistrate outside the Presidency town, because the other Presidency Magistrates are not first class Magistrates for the purpose of this section"—*Statement of Objects and Reasons* (Gazette of India, 1925 Part V, p 215). Such a difficulty arose in the case of *Enp v Mackay* 30 C W N 276 (F B) 27 Cr I J 385. In this case the accused gave false evidence before the Chief Presidency Magistrate, whereupon he drew up a complaint for an offence under sec 193 I P Code. This complaint he preferred in his own Court (i.e. to himself) because the other Presidency Magistrates were not first class Magistrates then he transferred the complaint under sec 192 Cr P Code to the Third Presidency Magistrate. The Full Bench decided that the procedure adopted by the Chief Presidency Magistrate in making the complaint to himself was irregular, though not absolutely illegal. The present amendment however has removed this difficulty.

This section authorises the Court to send the accused to the First Class Magistrate. It does not permit the Court to commit him to the Sessions—3 Bom L R 185.

The Court should specify the Magistrate to whom the case is sent; an order that the case be sent to the Magisterial authorities for investigation is not sufficient—4 N W P H C R 86.

1251 Power of the Magistrate:—The Magistrate to whom the case is sent under this section must proceed according to law, and dispose of the case—7 B H C R 29, 26 Bom 785, 31 Cal 664. He cannot refuse to take cognizance of the offence—13 Bom 109, and cannot return the case to the Court which sent it—12 W R 41.

The Magistrate receiving a case under section 476 cannot act under section 202. The latter section enables a Magistrate who is not satisfied as to the truth of the complaint to postpone the issue of process and to direct a local investigation. Now, section 476 presupposes that the

(Civil, Criminal or Revenue) making the reference to the Magistrate must be of opinion that *there is ground for inquiry* into the offence in respect of which the case is sent to the Magistrate. This shows that section 46 precludes the application of section 202, and that there can be no room for the investigation which is contemplated by that section—21 Cr L J 310 (Nag).

The expression 'proceed according to law' in sub section (2) requires the Magistrate receiving the reference to proceed under Chapters XVIII to XXI of the Code according to the nature of the offence supposed to have been committed. Chapter XVII has of course no application, in as much as the accused must necessarily appear before the Magistrate as a consequence of the reference itself—21 Cr L J 310.

The Magistrate to whom a case has been sent is competent to discharge the accused person, if in his opinion the evidence against the accused is not sufficient to warrant a committal to the Court of Session—5 B H C R 41.

If the order under this section is made without jurisdiction, the Magistrate is competent to dismiss the complaint—(1911) 2 M W N 431. The Magistrate while dismissing the case and acquitting the accused, cannot direct compensation to be paid to the accused. Thus, where the decree holder complained to the Civil Court of obstruction by the judgment-debtor under this section, and after the trial and acquittal of the accused the Magistrate directed the decree holder to pay compensation, it was held that the order was not valid, since the decree holder was not the complainant. The real complainant was the Civil Court which directed the prosecution of the accused—14 Bom L R 1166.

The Magistrate is competent to proceed against persons not named in the order of the Court directing the prosecution under this section. The Code provides for taking cognizance of offences and not of offenders, and a Magistrate who has legally taken cognizance of an offence on an order under section 476 has jurisdiction to proceed against any one who may be proved by the evidence to be concerned in the offence, whether he was mentioned in the order or not—21 C W N 950, 1917 P R 34. 43 Bom 300.

1252 Limit of time for taking action:—This section does not limit the time within which action should be taken and there is no legal necessity to proceed under this section immediately after the original trial or proceedings—19 A L J 819, 43 Bom 300, 7 S L R 187, 1916 P R 29, 19 Cr L J 981, 5 O L J 622, 20 Cr L J 724 (Pac), *Veshamma v Venkamma* 22 L W 863. 27 Cr L J 280. But still it is desirable that an order under this section should be made either at the close of the proceeding or so shortly thereafter that it may be reasonably said that the order is a part of the proceeding—*In re Rahmatulla* 31 Mad 140. 20 Cr L J 184, 20 Cr L J 286, 1916 P W R 53, 18 Cr L J 331 (Bur), 32 Mad 49, 42 Mad 422. If the Court thinks that action ought to be taken under this section, it ought to pass such order as early as possible (and not delayed by several months) after the termination of the original case—40 Cal 444, 38 All 695. No hard and fast rule can

be laid down that delay is a ground for setting aside an order for prosecution. It may, under certain circumstances, be almost a sufficient ground in itself, but in other cases it may be no ground at all. It is possible to imagine a case in which the commission of an alleged offence may not have actually come to light for many months or even years after it had been committed. But a prosecution for false complaint under sec 211 I P C should be ordered as soon as the complaint is dismissed as false, and not many months afterwards because the facts justifying the prosecution are known to the Court at the time when the complaint is dismissed—*Emp. v Baldeo Prasad* 46 All 851 (852). A delay of two months was considered too long—18 Cr L J 331. In 20 Cr L J 226 (Pat) a delay of three weeks was held to be too much under the circumstances of the case. But in view of the amendment made in this section and the enactment of the two new sections 476A and 476B it is no longer necessary that the proceeding under sec 476 should be taken immediately after the termination of the original proceeding—*Seshamma v Venkamma* 22 L W 863 27 Cr L J 280.

Where an appeal is preferred against the original case, the Court is justified in waiting till the disposal of the appeal before directing a prosecution under this section—1916 P R 29 3 C L J 302 16 Bom 729, 6 Cal 308 4 Lah 58. See subsection (3).

Where proceedings for directing a prosecution are commenced in the course of a judicial proceeding or so soon thereafter as to make the former substantially a continuation of the latter the final order directing the prosecution will not be vitiated by the fact that it was passed more than a year afterwards—1919 M W N 112. But the Court will sit aside an order directing a prosecution if it is passed so long after the offence that the delay is oppressive or scandalous—Ibid.

1253 Revision—Power of Sessions Judge—A Sessions Judge has no power to interfere with an order under section 476, nor with a complaint under section 195 made by a Deputy Magistrate—23 Mad 205 34 Cal 42. If the Sessions Judge is of opinion that the order should be set aside he should refer the matter to the High Court—15 Cr L J 16 (Cal). It is the High Court which has the power to interfere with an order under sec 476. A Sessions Judge has no such power—34 Cal 42. See also 14 C W N 132.

Power of High Court—There is a conflict of opinion as to whether the High Court is competent in the exercise of its revisional powers to interfere with an order of prosecution under this section. In 26 Mad 98, 13 Bom 109 13 Muz 144 16 All 80 and Ratanlal 595 it has been held the effect of the introduction of the words "as if upon complaint made and recorded" under section 200 in the Code of 1898 is that the order under this section is merely a complaint and not an order and is therefore not subject to revision by the High Court. Whereas in various other cases it has been laid down that the addition of these words in the section do not mean that the proceedings of the Court directing prosecution are to be taken merely as a complaint and not as an order the order of prosecution is therefore subject to revision—33 Mad 48 21 Mad 124, 26

(Civil, Criminal or Revenue) making the reference to the Magistrate must be of opinion that *there is ground for inquiry* into the offence in respect of which the case is sent to the Magistrate. This shows that section 476 precludes the application of section 202, and that there can be no room for the investigation which is contemplated by that section—21 Cr L J 310 (Nag.)

The expression 'proceed according to law' in sub section (2) requires the Magistrate receiving the reference to proceed under Chapters XVIII to XXI of the Code according to the nature of the offence supposed to have been committed. Chapter XVII has of course no application, in as much as the accused must necessarily appear before the Magistrate as a consequence of the reference itself—21 Cr L J 310

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If the order under this section is made without jurisdiction, the Magistrate is competent to dismiss the complaint—(1911) 2 M W N 431. The Magistrate while dismissing the case and acquitting the accused, cannot direct compensation to be paid to the accused. Thus, where the decree holder complained to the Civil Court of obstruction by the judgment-debtor under this section, and after the trial and acquittal of the accused the Magistrate directed the decree holder to pay compensation, it was held that the order was not valid, since the decree holder was not the complainant. The real complainant was the Civil Court which directed the prosecution of the accused—14 Bom L R 1166.

The Magistrate is competent to proceed against persons not named in the order of the Court directing the prosecution under this section. The Code provides for taking cognizance of offences and not of offenders and a Magistrate who has legally taken cognizance of an offence on an order under section 476 has jurisdiction to proceed against any one who may be proved by the evidence to be concerned in the offence whether he was mentioned in the order or not—21 C W N 950, 1917 P R 34, 43 Bom 300

1252 Limit of time for taking action:—This section does not limit the time within which action should be taken and there is no legal necessity to proceed under this section immediately after the original trial or proceedings—19 A L J 819, 43 Bom 300, 7 S L R 187, 1916 P R 29, 19 Cr L J 981, 5 O L J 622, 20 Cr L J 724 (P.N.), *Seshanna v. Venkanna* 22 I W 863, 27 Cr L J 280. But still it is desirable that an order under this section should be made either at the close of the proceeding or so shortly thereafter that it may be reasonably said that the order is a part of the proceeding—*In re Rahmatulla* 31 Mad 140, 20 Cr L J 184, 20 Cr L J 286, 1916 P W R 53, 18 Cr L J 331 (Bur.), 32 Mad 49, 42 Mad 422. If the Court thinks that action ought to be taken under this section, it ought to pass such order as early as possible (and not delayed by several months) after the termination of the original case—40 Cal 444, 38 All 695. No hard and fast rule can

be laid down that delay is a ground for setting aside an order for prosecution. It may, under certain circumstances, be almost a sufficient ground in itself, but in other cases it may be no ground at all. It is possible to imagine a case in which the commission of an alleged offence may not have actually come to light for many months or even years after it had been committed. But a prosecution for false complaint under sec 211 I P C should be ordered as soon as the complaint is dismissed as false, and not many months afterwards because the facts justifying the prosecution are known to the Court at the time when the complaint is dismissed—*Emp. v Haldea Prasad* 46 All 851 (852). A delay of two months was considered too long—18 Cr L J 331. In 20 Cr L J 226 (Pat) a delay of three weeks was held to be too much under the circumstances of the case. But in view of the amendment made in this section and the enactment of the two new sections 476A and 476B it is no longer necessary that the proceeding under sec 476 should be taken immediately after the termination of the original proceeding—*Seshamma v Venkamma* 22 L W 863, 27 Cr L J 280.

Where an appeal is preferred against the original case, the Court is justified in waiting till the disposal of the appeal before directing a prosecution under this section—1916 P R 29, 3 C L J 302, 16 Bom 729, 6 Cal 308, 4 Lah 58. See subsection (3).

Where proceedings for directing a prosecution are commenced in the course of a judicial proceeding or so soon thereafter as to make the former substantially a continuation of the latter the final order directing the prosecution will not be vitiated by the fact that it was passed more than a year afterwards—1919 M W N 112. But the Court will set aside an order directing a prosecution if it is passed so long after the offence that the delay is oppressive or scandalous—Ibid.

1253 Revision—Power of Sessions Judge.—A Sessions Judge has no power to interfere with an order under section 476, nor with a complaint under section 195 made by a Deputy Magistrate—23 Mad 205, 34 Cal 42. If the Sessions Judge is of opinion that the order should be set aside he should refer the matter to the High Court—15 Cr L J 16 (Cal). It is the High Court that alone has the power to interfere with an order under sec 476. A Sessions Judge has no such power—34 Cal 42. See also 14 C W N 132.

Power of High Court.—There is a conflict of opinion as to whether the High Court is competent in the exercise of its revisional powers to interfere with an order of prosecution under this section. In 26 Mad 98, 13 Bom 10, 13 Mad 144, 16 All 80 and Ratnaji 895 it has been held the effect of the introduction of the words "as if upon complaint made and recorded" under section 200 in the Code of 1898 is that the order under this section is merely a complaint and not an order and is therefore not subject to revision by the High Court. Whereas in various other cases it has been laid down that the addition of these words in the section do not mean that the proceedings of the Court directing prosecution are to be taken merely as a complaint and not as an order the order of prosecution is therefore subject to revision—33 Mad 48, 21 Mad 124, 26

Bom 785, 4 Bom L R 618, 34 Cal 42, 20 Cal 349 Further, it is the intention of the Legislature that an order under this section is subject to revision, see the *Report of the Joint Committee* cited under heading "Change" above

1254 When High Court will interfere and when not:—Orders purporting to be made under this section are open to revision by the High Court when they have been made during proceedings held entirely without jurisdiction—29 Mad 100 When the Lower Court has proceeded upon merely fanciful grounds or grounds so obviously wrong that it could not be said to have formed a serious judicial opinion at all, then the High Court will interfere and set aside the order of the Court below—23 All 249, *In re Parshotamdas*, 25 Bom L R 282, 10 N L R 177, but where the Lower Court has arrived at a judicial opinion on substantial grounds and the order shows that the Court has acted with circumspection and mature deliberation, the order should not be interfered with merely because the High Court disagrees with that opinion—*In re Alamdar* 23 All 249, 4 A L J 803, 18 Cr L J 1015 (Nag) The question whether a complaint should be made under sec 476 is almost invariably a matter of discretion and the High Court is always loath to interfere except in extraordinary cases—*Ranjit Narain v Rani Bahadur*, 7 P L T 114 If the trial Court or the Court to which it is subordinate thinks that no complaint should be made, then it is not desirable that the High Court should interfere—*Somabhai v Ididbhai* 48 Bom 401 26 Bom L R 269 Revision should be granted if there be some error of law, some irregularity, some abuse or failure to exercise jurisdiction, and not simply because the Revisional Court has formed a different opinion from that of the Court below about the case—1902 P R 18 Where an order was made on insufficient grounds and no further action was taken by the Court for more than a year, it was held that this was a case in which the revisional powers of the High Court might properly be exercised and the order set aside—1901 A W N 177

Proceedings of a Civil Court under this section cannot be interfered with by a Criminal Bench of the High Court in Revision The power of revision under section 435 is confined to the records of inferior criminal Courts Therefore, when an order under this section was passed by a Civil Court, the High Court can interfere only under section 115 of the Civil Procedure Code—*Emp v Har Prasad*, 40 Cal 477 17 C W N 647, 14 Cr L J 197, *In re Bhup Kanwar*, 26 All 249, *Bahurani Lal v Jhunka*, 24 A L J 217 27 Cr L J 278, 8 C W N 73, 16 N L R 23, (1915) U B R 3rd Qr 83, 38 All 695 10 Bur l l 11 24 O 1 367 An order of the Small Cause Court under sec 476 of this Code directing a prosecution for perjury can be interfered with only under sec 25 of the Pro Small Cause Courts Act—*Lalab Das v Maung Ha Than* 1 Rang 372

Similarly, the High Court has no power in revision to interfere with an order passed by a Revenue Court under this section, the application for revision should be filed before the Board of Revenue—4 A L J 701.

1902 A W N 202, 39 All 91, 15 Cr L J 2 (Oudh), 36 Mad 72 (per Suralara Ayyar J)

1255 Nature of proceedings under this section:—Proceedings in inquiries under this section are judicial proceedings, and the person against whom they are directed is in the position of an accused person. To examine such a person as a witness in the course of such proceedings is *ultra vires*—10 All L T 32 In 4 P L W 65, however, it has been held that in proceedings under this section, the person proceeded against is not in the position of an accused person.

476-A The power conferred on Civil, Revenue and Criminal Courts by Section 476, sub-Section (1) may be exercised, in respect of any offence referred to therein and alleged to have been committed in or in relation to any proceeding in any such Court, by the Court to which such former Court is subordinate within the meaning of Section 195 sub-section (3), in any case in which such former Court has neither made a complaint under Section 476 in respect of such offences nor rejected on application for the meaning of such complaint, and where the superior Court makes such complaint, the provisions of Section 476 shall apply accordingly

1256 This section has been newly added by section 128 of the Cr P C Amendment Act XVIII of 1923. Under the old law, there was a conflict of opinion as to whether a superior Court could take action in respect of an offence committed before a subordinate Court. In 27 Cal 921, 37 Cal 13 16 All 80 1913 P W R 13 9 C W N 1030 10 C W N 1901 and 1 P L J 206 it was held that the superior Court could not take action in respect of an offence which was not committed before itself but before a subordinate Court whereas in 21 C W N 755 and 20 Cr L J (30 (Pat)) it was held that the superior Court had that power. The present section adopts the latter view.

Where an application under sec 476 is pending before an inferior Court and has not been rejected by that Court there is no objection to the superior Court taking such action as could be taken by the Court under sec 476—*In re Premdas* 26 Bom L R 713. Where a person instituted a false case before a Bench of (2nd or 3rd class) Honorary Magistrates, the District Magistrate could order the prosecution of that person for an offence under sec 193 I P Code—*Mon Ram v A E* 26 Cr L J 566 (All). If a false charge is made by a person before a Magistrate of the 1st class, the complaint against that person under sec 211 I P Code should be made by the Sessions Judge and not by the District Magistrate. If the District Magistrate makes the complaint, it is *ultra vires* but that does not prevent the Sessions Judge from making a complaint on his own initiative—*Gulab v Emp*, 26 Cr L J. 923 (All).

476-B Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under Section 476 or

Appeal

Section 476 I, or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of Section 195 sub-section (3), and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the subordinate Court might have made under Section 476, and if it makes such complaint, the provisions of that section shall apply accordingly

This section has been newly added by section 128 of the Cr P Code Amendment Act XVIII of 1923. Under the old law, when an application was made to a Munsiff asking him to file an action himself against a certain party, and to send him to a criminal Court to be tried there for various offences, and the Munsiff declined to file any action, it was held that no appeal lay to the District Judge against the order of the Munsiff—12 A L J 684. This ruling is now rendered obsolete by the present section.

1257 Scope.—This section gives a right of appeal only when a Court has made or refused to make a complaint under sec 476 or sec 476A, and not when a complaint has been made by a Court on appeal from an order of a subordinate Judge refusing to make a complaint—*Mad. Idris v. Crown* 6 Lah 56 26 P L R 199 26 Cr L J 1168. But the Privy Council holds that an appeal lies under this section from an appellate order of the Appellate Court making a complaint which the first Court refused to make—*Ranjit Narain v. Ram Bahadur* 7 P L T 114 (dissenting from 6 Lah 56), *Toujdar v. K. E.* 7 P L T 199 26 Cr L J 1565.

An appeal against an order of the Presidency Small Cause Court directing that a complaint under secs 193 and 196 I P C be made against the appellants, lies to the High Court on its Appellate Side. For this purpose, the original side of the High Court is not different from the Appellate side. The words "principal Court of original civil jurisdiction" occurring in sec 195 (3) of this Code, when applied to the High Court, do not mean only the original side of the High Court but apply to the Appellate side also—*Kalyani v. Rani Deen*, 48 M L J 395 48 M L J 290 26 Cr L J 801.

The right of appeal under this section does not survive on the death of the appellant before hearing, the appeal abates—*Nihal v. Rampi* 47 M L J 359 26 Cr L J 1008 A I R 1925 All 620.

Duty of Superior Court.—The Appellate Court, in the case of appeals under this section, should reconsider the entire matter on the merits, and while allowing reasonable weight to the opinion of the Court below, should nevertheless reconsider the question of the propriety of the order appealed

against, upon a complete review of the entire facts. If the Appellate Court is not satisfied that a *prima facie* case has been made out, the order appealed against must be set aside—*Ram Charan v. Emp.* 23 A L J 515 26 Cr. L J 1126

Where the Court below has refused to make a complaint under sec. 476, the superior Court in reversing the order of the Court below must give sufficient reasons for such reversal—*Kalishadhan v. Nan Lal*, 52 Cal. 478 26 Cr L J 1307 A I R 1925 Cal 721

Effect from or revision of order under this section—No appeal lies against an order passed under this section by the appellate Court directing the withdrawal of the complaint. So also, the High Court will not ordinarily interfere in revision with an order of withdrawal of complaint passed under this section, except in extraordinary cases. The question whether a complaint should be made under sec. 476 is almost invariably a matter of discretion, and if the trial Court or the Court to which it is subordinate thinks that no complaint should be made or that the complaint should be withdrawn then it would not be desirable that the High Court should interfere—*Somabhai v. Ididbhai* 48 Bom 401 (403, 404) 26 Bom L R 289 25 Cr L J 1523 A I R 1923 Bom 347

477 (Repealed).

Section 477 which has now been repealed by sec. 123 of the Cr. P. C. Amendment Act VIII of 1923 ran as follows—

"477 (1) Subject to the provisions of section 444, a Court of Session may charge a person for any offence referred to in section 195 and committed before it or brought under its notice in the course of a judicial proceeding and may commit, or admit to bail and try, such person upon its own charge

(2) Such Court may direct the Magistrate to cause the attendance of any witnesses for the purposes of the trial

The reason of omitting this section has thus been stated by the *Joint Committee* (1922). Section 477 is inconsistent with section 476 as proposed by the Bill because the latter section made it obligatory on the Court to make a complaint and send it to a first-class Magistrate. This defect has been removed by one of the amendments we have made in section 476, but we are doubtful whether section 477 should stand. We considered a proposal to enable a Court of Session to try a case committed to it after a complaint had been made by itself, but we do not think it desirable that a Court which has instituted the proceedings should dispose of the case and we have therefore repealed section 477.

478 (1) When any such offence is committed before any

Power of Civil and Revenue Courts to complete inquiry and commit to High Court or Court of Session.

Civil or Revenue Court, or brought under the notice of any Civil or Revenue Court in the course of a judicial proceeding, and the case is triable exclusively by the High Court or Court of Session, or such Civil or

Revenue Court thinks that it ought to be tried by the High Court or Court of Session, such Civil or Revenue Court may, instead of sending the case under Section 476 to a Magistrate for inquiry, itself complete the inquiry, and commit or hold to bail the accused person to take his trial before the High Court or Court of Session, as the case may be.

(2) For the purposes of an inquiry under this section the Civil or Revenue Court may * * exercise all the powers of a Magistrate, and its proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Chapter XVIII and of Chapter XXXIII in cases where that Chapter applies and shall be deemed to have been held by a Magistrate.

Change:—In subsection (2), the words "subject to the provisions of section 443" have been omitted after the word 'may,' and the italicized words have been added, by section 28 of the Criminal Law Amendment Act XII of 1923. As a result of this Amendment, this section has been made applicable to European British subjects.

1268 Sections 476 and 478:—This section should be read as alternative to section 476, and not supplementary to it. The procedure prescribed by this section, viz., of completing the investigation and committing the accused, is only alternative to section 476 (see the words *instead of sending the case under section 476*), and therefore if the accused who had been sent by the Civil Court to the First Class Magistrate under section 476, has been discharged by the Magistrate the Civil Court has no power to revise the case against the accused and adopt the procedure prescribed by this section.—*Rumal 939*

This section deals with a more extended class of cases than section 476 and covers cases in which any Court whether Civil or Revenue whether possessing power of committal or not, may take action and commit for trial.—4 Bom 287. Section 476 merely lays down the procedure that may be followed in certain cases, and does not confer any new jurisdiction on a Court. That section does not by itself give to the Civil Court the powers of committal in the cases referred to in that section, and that is why section 478 has been enacted.—*Ibid*

1259 Scope:—The power of a Civil Court to commit a case to the Sessions is limited to cases triable exclusively by the Court of Session and to such cases only when the offence charged has been committed before the Civil Court or brought under its notice.—4 Bom 287.

This section, like section 476, must be taken as supplementary to section 195 in this sense that the Court can direct a committal under section 478 for an offence referred to under section 195 only when such offence has been committed under the circumstances mentioned in sec

tion 195 And therefore a Civil Court cannot direct a committal for offences under sections 463 and 471 I P C unless the documents have been given in evidence, as mentioned in clause (c) of section 195 If the documents have been merely put in Court but not given in evidence, section 195 cannot apply and section 478 I o will not apply—15 Mad 224 But in 22 Cal 1004 and 40 All 116 it has been held that the words 'any such offence' in this section simply mean an offence referred to in section 195 and not an offence qualified by the circumstances mentioned in section 195 But this view is no longer correct See this subject fully discussed in Note 1237 under section 476, under heading Section 476 is supplementary to section 195

A Civil Court has no power to order the commitment of persons for offences referred to in section 195, without holding the preliminary inquiry required by this section—22 W R 52

The procedure referred to in subsection (2) namely the procedure of Chapter XVIII must be followed as nearly as possible Where notices were issued to the persons concerned and after recording very brief statements of the accused, charge sheets were drawn up and commitment order passed without examining any of the witnesses and without the charge being explained to the accused it was held that the Court not having followed the procedure as laid down in Ch XVIII, the order was illegal—40 All 32

1260 Revision—Though certain Magisterial powers have been given to the Civil Court under this section for the purpose of investigating cases of contempt of Court, it still remains, while exercising those powers, a Civil Court and is not an 'inferior Criminal Court' within the meaning of section 435 It is not therefore amenable to the jurisdiction of the Sessions Judge The Sessions Judge has no power to revise the proceedings of the Civil Court—5 M L J 226

479 When any such commitment is made by a Civil or Revenue Court, the Court shall send the charge with the order of commitment and the record of the case to the Presidency Magistrate, District Magistrate or other Magistrate authorized to commit for trial, and such Magistrate shall bring the case before the High Court or Court of Session, as the case may be, together with the witnesses for the prosecution and defence

480 (1) When any such offence as is described in Section 175, Section 178, Section 179, Section 180 or Section 228 of the Indian Penal Code is committed in the view or presence of any Civil, Criminal and Revenue Court, the Court may cause the offender

* * * to be detained in custody and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the offence and sentence the offender to fine not exceeding two hundred rupees, and in default of payment, to simple imprisonment for a term which may extend to one month unless such fine be sooner paid.

(2) Nothing in Section 29A or in Chapter XXXIII shall be deemed to apply to proceedings under this section.

Change—The words "whether he is a European British Subject or not" have been omitted in subsection (1), and the words "section 29A or in Chapter XXXIII" in subsection (2) have been substituted for the words "section 443 or 444" by section 29 of the Criminal Law Amendment Act XII of 1923.

1261 Scope and application of Section—This section and the next deal with what is known in English law as direct contempt, that is contempt committed in the view of presence of the Court. The High Court has got greater powers (not by virtue of this Code or the Penal Code but by virtue of the common law of England) to punish for contempts committed out of Court, e.g. comments in newspapers on proceedings pending in the High Court—10 Cal 109 P C (*Surendra Nath Banerjee's case*) See also *In re Clardice* 14 Bom L R 231, 11 Est 1 v *Editor Bengalee* 15 C W N 71 *In re Banks* 26 C I J 401 19 Cr I J 449 *In re Satyabodha* 24 Bom L R 928 *In re Taylor* 26 C L J 245

As to the power of the High Court to punish for contempts of subordinate Courts see the Contempt of Courts Act XII of 1926 recently enacted. See also 46 Bom 592 24 Bom L R 16 21 M I J 832 (F B), and *In re M K Gandhi* 22 Bom L R 368 21 Cr I J 835. The rulings in 41 Cal 173 (*I B Patrika case*) and in 17 C W N 1285 (where it was held that the High Court had no power to punish for contempts of mofussil Courts) are no longer good law in view of the above new Act.

This section empowers a Magistrate to deal with the accused only when he is shown to have committed one of the offences enumerated in this section—3 M L T 286.

The offence of contempt must be committed during a judicial proceeding in order to come under this section. An inquiry by a Magistrate into a case of breach of the peace in order to ascertain whether he should make a report to his official superior and to satisfy himself whether he should act under section 108, is not a judicial proceeding and a person behaving insolently to the Magistrate in such proceeding cannot be proceeded against under this section—2 Weir 603.

A Tahsildar or a Sub-Tahsildar has to perform various miscellaneous duties most of which are of a non-judicial character, and the mere fact that on a particular day he has to try a case does not necessarily lead

to the conclusion that he is doing judicial business during the whole of that day. If it appears that at the time when the incident took place, he was engaged in conversation with two persons who were sitting in his room, it is doubtful whether it can be said that he was sitting in any stage of a judicial proceeding, and it is therefore doubtful whether he can be summarily acted under this section—*Dalip Singh v Crown* 2 Loh 308 (112) 23 Cr L J 9

The offence must be committed in the view and presence of the Court, to attract the provisions of this section. The plaintiff in a suit was directed to appear with certain account books on a specified date and give his deposition before a Small Cause Court, filing which the suit was to be decided against him. The plaintiff did not appear as directed and the Munsiff called upon him to show cause why he should not be fined for disobedience. Cause was shown by a petition but there was no appearance and he was fined for contempt of Court. It was held that the case did not come under this section, as there was no offence committed in the view or presence of the Court and the order was therefore without jurisdiction—*Chakmal v A F* 3 C W N 389 20 Cr L J 373

The provisions of this section must be applied then and there, or at any rate before the rising of the Court in whose view or presence a contempt has been committed if it considers that it can be properly and adequately dealt with under this section. Therefore where a Magistrate in whose presence a contempt was committed after taking cognizance of the matter, postponed passing final orders in order to afford the accused an opportunity of showing cause why such order should not be passed, and eventually fined him several days after it was held that the procedure adopted by the Magistrate was irregular and that the proper procedure would have been to detain the accused and to deal with the matter at once or before rising—11 All 361. But rising for a short time in the middle of the day (for luncheon) does not amount to rising of the Court for the day—*Emp v Lenkat Rao* 46 Bom 973 (979) 24 Bom L R 386

Where the Court deals with the offence of contempt of Court under this section it cannot pass the sentence prescribed by sec 228 I P C but should under this section limit the punishment to Rs 200 with imprisonment in default for 30 days—2 Weir 603. If it considers the fine of Rs 200 too light a sentence for the offence it ought to refer the case under section 482 to some competent Magistrate—10 W R 47 6 M H C R App 16

A substantive sentence of imprisonment cannot be passed under this section in a case under section 228 I P C—10 W R 47. The imprisonment will be only in default of fine

1262 Contempt—An application for transfer of a case from a particular Court on the ground of probable miscarriage of justice is not a contempt of that Court—1869 P R 34. *Emp v Lenkat Rao*, 24 Bom L R 386 46 Bom 973 (976). Even if in such an application the accused uses certain unhappy remarks concerning the Magistrate from whose Court the case is sought to be transferred it cannot be presumed that the accused intended to insult the Court—38 All 284, 1898 A W N 145. A refusal

by a witness to affix his thumb mark to the record of his deposition is not an offence under sec 180 I P C—*Crown v Fateh Ali*, 1912 P R 8. But a refusal by an accused to sign a statement under sec 364 of this Code is punishable under sec 180 I P C—39 All 399, (contra—4 Bom 15, 3 L B R 199). Walking with creaking shoes near the Court room does not *ipso facto* lead to the conclusion that the accused intended to insult or interrupt the Court in its work—5 M I T 286. Courts should not be unduly sensitive about their dignity, and a mere audible remark by the accused which interrupted the proceedings of a Court is not enough to sustain a conviction unless the accused intended to interrupt the Court—29 M I J 274, *Dalip Singh v Crown* 2 Lah 308 (312). In the absence of any intention to insult the Court and of any interruption to the Court a person accused of a scuffle in the verandah of a Court is not guilty of an offence under sec 278 I P C—20 Cr L J 777 (All). Prevarication by a witness may, though it does not necessarily, amount to contempt of Court—10 B H C R 69. See also 15 W R 5, 4 B H C R 6, 4 B H C R 6. Where a witness refused to answer the questions put to him in his examination-in-chief and cross examination unless an application made by him for stay of proceedings was granted, held that this conduct amounted to contempt—1918 P R 14. An accused person who during the hearing of a case makes an impertinent threat to a witness in the box commits an offence under sec 228 I P C—45 All 272. An irrelevant question put by a pleader to a witness cannot amount to contempt, though a persistence in vexatious or irrelevant questions after warning might amount to contempt—1867 P R 44. But every little insistence on the part of a pleader in the conduct of his case should not be turned into an occasion for a criminal trial unless the pleader's conduct is so clearly vexatious as to lead to an inference that his intention is to interrupt or insult the Court—6 Bom I R 541, 15 W R 62, 10 C W N 1062. Any trivial incident such as laugh or hesitation in speaking is not a contempt—4 M H C R 146. A witness who having a document in his possession will not produce it is guilty of contempt, and can be dealt with under this section—12 Bom 63. An accused who in the course of his statement under section 341 calls the Judge a 'prejudiced Judge' and being called upon by the Judge to withdraw the remark refuses to do so, is guilty of contempt, and can be proceeded against under this section—*Frip v Lenkat Rao* 46 Bom 93, 24 Bom I R 386, 23 Cr I J 325.

A comment on a pending case, if it has or may have the effect of prejudicing the fair trial of an accused person, amounts to a contempt of Court—*In re Clandage* 14 Bom I R 231, 13 Cr I J 461. An article in a newspaper reflecting on a party to a suit more especially when he is under cross examination, is a contempt of Court—*Weston v Editor Bengalee* 15 C W N 771. But such contempts can be punished only by the High Court. See Note 1261 above.

1263 Appeal.—A summary order under this section by a Sessions Judge for an offence under section 228 I P C in imposing a fine on a person for intentional insult to the Judge when sitting on a stage of judicial proceeding amounts to a trial, though

by a summary mode, and is therefore appealable—4 M II C R 146 A Sessions Judge cannot refuse to hear an appeal against an order under this section, because in his opinion the matter is a mere trifle. He is bound to hear the appeal and come to a finding whether the conviction is legal or not—Ratanlal 978

481 (1) In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence.

(2) If the offence is under Section 228 of the Indian Penal Code, the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

1264 Record:—The procedure prescribed by sec 480 for punishing a contempt committed *in facie curiae* is of a summary character, and the Court taking action under that section is therefore required to record certain particulars mentioned in sec 481. When the guilt or innocence of a person depends upon the exact words used by him it is the duty of the Magistrate to record them with a reasonable degree of precision and his omission to record the nature of the insult constitutes a great defect in the procedure—*Dalip Singh v Crown* 2 Lah 308 (311). A Criminal Court inflicting a fine for contempt of Court should specifically record its reasons and the facts constituting the contempt with any statements the offender may make as well as the finding and sentence—4 M II C R 229. The directions contained in this section are mandatory and the omission to record the particulars as directed by the section is fatal to the proceedings—to C W N 1062. No person can be punished for contempt unless the specific offence charged against him be distinctly stated and an opportunity given him of answering the charge. The omission to record the statement of a legal practitioner charged for contempt is a fatal defect to the prosecution—*Krishna Chandra v Emp* 37 C L J 535 24 Cr L J 798.

Where a person is charged with an offence under section 228 I P C, the record convicting him must show the stage of the judicial proceeding interrupted, and the evidence must establish that such interruption was intentional omission to do so is a vital irregularity in procedure not curable by sec 537 of this Code—*In re Kulah* 15 Cr L J 621 (1886) 1886 P R 36.

482 (1) If the Court in any case considers that a person accused of any of the offences referred to in Section 480 and committed in its view or presence should be punished otherwise than in default of payment

of fine, or that a fine exceeding two hundred rupees should be imposed upon him, or such Court is for any other reason

opinion that the case should not be disposed of under Section 480, such Court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such accused person before such Magistrate, or if sufficient security is not given, shall forward such person in custody to such Magistrate.

(2) The Magistrate, to whom any case is forwarded under this section shall proceed to hear the complaint against the accused person in manner hereinbefore provided.

1265 Scope—Under section 480 the Magistrate can award a fine up to Rs 200 or a sentence of imprisonment in default of payment of fine. If however, the Magistrate considers that a substantive sentence of imprisonment or a heavier fine is demanded by the circumstances of the case he ought to forward the case to another Magistrate under this section—6 M H C R App 16 10 W R 47

Section 482 need not be read along with section 480 and section 482 does not require a Magistrate to draw up proceedings on the same day that the offence is committed—35 Cal 161

Procedure—If a Court considers a substantive sentence of imprisonment necessary, it should record a statement of the facts constituting the contempt and the statement of the accused, and forward the case to another Magistrate—11 W R 49

A Barrister in the course of the trial of a case in which he was the complainant, used insulting language to the Sub Magistrate. The Magistrate then recorded proceedings required by this section but failed to take any statement from the accused explanatory of his conduct, as the accused left the Court at once. It was held that the omission to take such statement was not fatal to the proceedings, and the case ought not to be dismissed on that ground—2 Weir 604

483 When the Local Government so direct, any Registrar

When Registrar or Sub Registrar or any Sub Registrar appointed Registrar to be deemed a Court under the Indian Registration Act, 1908, shall be deemed to be a Civil Court within the meaning of Section 480 and 482

1266 A Registrar or Sub-Registrar may be deemed to be a Court only for the purposes of secs 480 and 482 and it cannot be implied that he is to be deemed a Court for ordinary purposes. A provision that a particular officer may for a particular purpose be deemed a Court does not warrant the extension of that provision so as by inference to produce a group of rules in conflict with the general system. A provision such as that contained in this section is an excrescence on the general system such

an exceptional provision should not be drawn out into all its logical consequences—12 Bom 36

484 When any Court has under Section 480 or Section 482 adjudged an offender to punish-

Discharge of offender on submission or apology

ment or forwarded him to a Magistrate for trial for refusing or omitting to do anything which he was lawfully required to do, or for any intentional insult or interruption, the Court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or requisition of such Court, or on apology being made to its satisfaction

1267 Discharge on submission or apology:—Too much notice should not be taken of a hasty language used by rustic litigants during a moment of excitement without any serious intention of insulting the Court. If the offender offers an apology or adopts a submissive attitude, an admonition by the Court, or at the most a petty fine would be sufficient—*Jit Singh v Crown* 1912 P W R 23

Power of High Court to interfere—A pleader was tried and punished for contempt by a Munsiff for having used certain words which the latter thought to be derogatory to his position. The pleader gave an assurance that the words in question had no reference to the Court but the Munsiff declined to accept the assurance. The District Judge refused to interfere on appeal by the pleader. The High Court on revision directed the Munsiff to consider whether it was not a case in which he himself should take action under section 484 of the Code. Upon the Munsiff declining to do so because the pleader had not withdrawn the words in question the High Court held that the assurance given by the pleader should be taken to be sufficient, and remitted the punishment—*Ravi Pal v A F 11 A 1 J* 933 14 Cr L J 687

485 If any witness or person called to produce a document or thing before a Criminal Court

Imprisonment or commitment of person refusing to answer or produce document.

refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the Court for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document or

thing. In the event of his persisting in his refusal, he may be dealt with according to the provisions of section 480 or section 482, and in the case of a Court established by Royal Charter, shall be deemed guilty of a contempt.

1268 *Witness*.—A complainant is not a witness and therefore not punishable under this section—13 Bom 600

A witness cannot be punished for not answering a question which is irrelevant to the real issue or which he is not legally bound to answer—13 Bom 600 Where the question is asked with a view to criminal proceedings being taken against the witness, he is not legally bound to answer it and he cannot be punished for refusing to answer—10 Bom 185

'Any term not exceeding 7 days'—It is advisable, but not necessary, to limit the period of detention in custody to a fixed time—1 Ind Jur N S 23.

An application for the release of the accused should be made to the committing Judge—*Ibid.* —

486 (1) Any person sentenced by any Court under section 480 or section 485 may, notwithstanding anything hereinbefore contained, appeal to the Court to which decrees or orders made in such Court are ordinarily appealable.

(2) The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under this section, and the Appellate Court may alter or reverse the finding, or reduce or reverse the sentence appealed against.

(3) An appeal from such conviction by a Court of Small Causes in a presidency-town shall lie to the High Court, and an appeal from such conviction by any other Court of Small Causes shall lie to the Court of Session for the sessions division within which such Court is situate.

(4) An appeal from such conviction by any officer as Registrar or Sub-Registrar appointed as aforesaid may, when such officer is also Judge of a Civil Court, be made to the Court to which it would, under the preceding portion of this section, be made if such conviction were a decree by such officer in his capacity as such Judge, and in other cases may be made to the District Judge or, in the presidency towns, to the High Court.

See 4 M H C R 146 and Ratanlal & Co. cited in Note 1263 under section 480, under heading "Appeal"

487 (1) Except as provided in Sections * * 480 and 485, no Judge of a Criminal Court or

Certain Judges and Magistrates not to try offences referred to in S 195 when committed before themselves

Magistrate, other than a Judge of a High Court, shall try any person for any offence referred to in Section 195,

when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding

(2) Nothing in Section 476 or Section 482 shall prevent a Magistrate empowered to commit to the Court of Session or High Court from himself committing any case to such Court

Change:—The word "477" has been omitted in Sub-section (1) by section 130 of the Cr P C Amendment Act, XVIII of 1923 This is consequential to the repeal of sec 477

1269 General rule:—A Magistrate cannot convict a person for contempt of Court committed in respect of his own authority A commitment to another Magistrate is necessary in all such cases—*Ratanlal* 641 All 625, 13 Mad 24 The Court before which an offence was committed, and by which the preliminary inquiry was held under sec 476, should not be the Court to try the case—15 W R 88 The fundamental rule in the administration of justice is that no man can be a Judge in a case wherein he is interested—12 W R 18

Thus, where a Sessions Judge has directed the trial of a person for the offence of giving false evidence committed before him in the course of a judicial proceeding of a criminal nature, he cannot try the case himself—14 All 324 If the facts alleged to constitute the offence came to the knowledge of the Magistrate in the course of judicial proceedings, he has no jurisdiction himself to try the case—*Emp v Kunwar Bahadur* 23 O C 138 21 Cr L J 696 A Magistrate whose summons was disobeyed has no jurisdiction to try the offence of disobedience of summons—2 Weir 612, 16 A L J 432 A Magistrate who issued an order under section 144 of this Code cannot himself try the disobedience of that order—10 B H C R 424, 24 Mad 262, *Ratanlal* 904 A Magistrate, who makes an order under sec 133 for the removal of a nuisance, cannot himself try and convict the person to whom such order was directed and who has disobeyed it—*Emp v Hira Lal*, 1883 A W N 222 The Rangoon High Court holds that although it is not desirable that a Magistrate whose lawful orders are disobeyed should, save in very exceptional circumstances, try and dispose of the charge of disobedience himself, still, unless there has been a clear failure of justice, the High Court will not ordinarily interfere with the Magistrate's action—*J R Das v Emp* 1 Rang 549

1270 Scope of section:—Sec 487, which says that no Court shall

try any person for the offence committed in contempt of its own authority is not limited to offences falling under Chapter X of the Penal Code. It extends to all contempts of Courts—1 Bom 339. Moreover, the prohibition in this section extends to the *abetment* of the offences referred to in the section. Therefore, a Magistrate is not competent to convict a person of abetting the giving of false evidence in a judicial proceeding before himself—7 M H C R App 28.

Where a District Magistrate (as the head of the Police) gave sanction to prosecute a person for giving false information to the police, the District Magistrate was not incompetent to try or hear an appeal from the conviction of such person, section 487 would not apply, because the offence was committed before the Police and not before the District Magistrate or in contempt of his authority or brought to his notice as Magistrate in the course of a judicial proceeding—*Ramaswamy Lal v Q E*, 27 Cal 452, 3 All 322, 1905 P R 12.

Magistrate—This section is wide enough to include a Presidency Magistrate. A Presidency Magistrate has no jurisdiction to try a case under sec 188 I P C when the order alleged to have been disobeyed was an order which he had himself passed—12 C W N 246.

Prohibition to try the case—According to the Madras High Court, this section prohibits the Judge or Magistrate only to *try* the case, but a Sessions Judge before whom an offence was committed is not precluded by this section to hear an *appeal* in the case—2 Weir 607. But the Calcutta High Court holds that the words "shall try a person" in this section include the trial of an appeal. Therefore, where a Judge sanctions the prosecution of a decreeholder under sec 210 I P C for an offence committed before a Munsiff he is not competent to hear an appeal from the conviction of the decreeholder for that offence—*Madhub Chunder v Notodeep* 16 Cal 121. So also, the Burma Chief Court holds that a Judge who has directed a prosecution should not hear the appeal of the accused when convicted, even though the appeal is not against the conviction but only against the severity of the sentence—2 L B R 302. Where a District Magistrate procured the initiation of a number of prosecutions against the same person, and one of them which resulted in conviction came before him in appeal, the High Court considering that it was not altogether proper that he should hear the appeal, ordered its transfer to the Sessions Judge—24 W R 58. The Nagpur Court also holds that the word 'try' as used in this section includes the hearing of an appeal—*Arishnappa v Emp* 25 Cr L J. 713.

1271 **"As such Judge or Magistrate"**:—These ambiguous words have given rise to two sets of conflicting rulings which it is difficult to reconcile and there can be no doubt that the policy of the law has been to some extent frustrated by the ambiguous language of the section. Does this expression mean that the Judge or Magistrate is precluded from trying the case only when the offence was committed before him or brought to his notice while acting in his capacity as Judge or Magistrate? In other words, does this section empower the Magistrate or Judge to try an offence

which was committed before him or brought under his notice in another capacity.' In 16 Cal 766, it has been held that a Sessions Judge may as Sessions Judge try an offence committed before him in another capacity as District Judge that is, the prohibition is restricted to a 'Judge' of a criminal Court, and that being so a strict construction must be placed upon the words 'as such Judge' and it must be held that they do not include a Judge of a Civil Court or a District Judge. The same view has been taken in 6 Bom 479, 7 C W N 768 L B R (1897 1901) 127, 16 Bom 380. Thus it is held that a Magistrate is not debarred from trying an accused person for disobedience of summons issued by him in his capacity as Mamlatdar—18 Bom 380. Where sanction is given by a Deputy Collector and Magistrate in his capacity as Revenue Officer, he is not debarred from trying the case himself as a Deputy Magistrate—2 Weir 613.

But if this view be adopted, does not this section run counter to the fundamental principle of law that no man ought to be a Judge in a case in which he is interested? The prohibition in this section is a personal one, the mischief to be prevented being that the same person should not decide a matter which he may have already prejudged. It does not refer to the office of the Magistrate or Judge before whom an offence of the class described in the section is committed but refers to the person of the Judge or Magistrate—1 Mad 305. An officer before whom while acting in a particular capacity an offence has been committed, punishable under sec 218 I L C cannot in another capacity take up and try the offence—an offence committed against himself. If he could do so, it would be in violation of that fundamental rule in the administration of justice that no man can be a Judge in a case wherein he is interested—12 W R 18. When a Judge on the Civil side has already formed an opinion that a document has been forged or a perjury has been committed he should not try the case as a Sessions Judge and it is proper for the High Court to transfer the case to another Judge as in no of relieving the former Judge from a position which he himself would desire to avoid—5 M 11 C R 212.

CHAPTER XXXVI

OF THE MAINTENANCE OF WIVES AND CHILDREN

Sir James Fitz James Stephen describes this chapter as 'a mode of preventing vagrancy or at least of preventing its consequences'. The object of maintenance proceedings is not to punish a parent for his past neglect, but to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a moral duty to support—*Sardar Md v Nur Md* 1917 F R 22. The scope of this chapter is limited and the Magistrate may not, except as here provided, usurp the jurisdiction in matrimonial disputes possessed by the Court—16 Bom 269.

488 (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate,

Order for maintenance of wives and children

a Presidency Magistrate, a Sub divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate not exceeding *one hundred rupees in the whole*, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance

(3) If any person so ordered *fails without sufficient cause* to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner herein before provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer if he is satisfied that there is just ground for so doing

Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that with

out sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under the Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases.

Provided that, if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte*. Any order so made may be set aside for good cause shown on application made within three months from the date thereof.

(7) (*Omitted.*)

(8) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(9) Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.

This section has been amended by section 131 of the Cr P C amendment Act XVIII of 1923, and the changes introduced are the following:—*First* in sub-section (1) the words *one hundred* have been substituted for *fifty*, in order to suit modern conditions in life. *Secondly*, in sub-section (2) the words *fails without sufficient cause* have been substituted for the words *wilfully neglects* owing to the difficulties which have been felt in the interpretation of the word *wilfully* (*Statement of Objects and Reasons*, 1914). *Thirdly* a proviso has been added to sub-section (3) to provide a period of limitation for the recovery of outstanding arrears. *Fourthly*, sub-section (7) has been omitted, it ran thus: The accused may tender himself as a witness and in such case shall be examined as such. This is now expressly provided by sub-section (2) of sec 340. *Fifthly*, in sub-section (9) the words *any person* have been substituted for the words *the accused* in order to make it clear that the person proceeded against under this section is not in the position of an *accused* person.

1272 Section not affected by personal law.—The right to maintenance conferred by this section is a Statutory right, which the Legislature has created irrespective of the nationality or creed of the parties, the only condition precedent to the possession of that right, in the case of a wife being the existence of the conjugal relation.—3 All 226

Thus, a *mutta* wife is not, under the Muhammedan Law of the Shia sect, entitled to maintenance, but this disability arising from her personal law is different from her statutory right to maintenance under this Code. In other words, she is entitled to maintenance under this section, irrespective of the fact that she is not entitled to maintenance under her personal law—*Luddon Sahiba v Mirza Kamar*, 8 Cal 736. The right of illegitimate children to be maintained by their actual father is a statutory right, and the duty is created by express enactment independent of the personal law of the parties—19 Mad 46r. There is no text of Hindu law under which an illegitimate son of a Hindu by a woman who is not a Hindu can claim maintenance but under this section such illegitimate child is entitled to claim maintenance from his putative father—27 Mad 13. Apart from the Hindu Law, maintenance is awardable in such cases on general principles, the defendant having begotten the child is bound to provide for its maintenance—32 Cal 49. The father of an illegitimate child cannot get rid of his statutory obligation under this Code to maintain that child by pleading that he is a Buddhist monk. The Criminal Procedure Code must override his personal law if it conflicts with it—(1922) U B R 2nd Qr 138.

On the other hand, the provision in the Cr P Code does not take away any right conferred by the Hindu Law. Thus under this Code, the illegitimate daughters are entitled to claim maintenance only from their father, but under the Hindu law, they can claim maintenance not only from their father but also from his coparceners who took his property by survivorship—*Natarajan v Muthia* 22 L W 650 A I R 1926 Mad 261.

1273 Who can be ordered:—An undivided son living with his father can be ordered to maintain his wife under this section—13 Mad 17. The mere fact that the defendant is 16 years of age only and studying at school will not by itself be a sufficient cause for his being relieved of the liability imposed by this section of providing for his illegitimate child—4 N W P H C R 123.

The order may be passed only against the father or husband as the case may be. This section does not authorise a Magistrate to order the father-in-law to pay maintenance to his daughter-in-law—1903 P R 26 1914 P L R 115.

Of sufficient means—Before an order is passed under this section it must be proved that the person ordered has sufficient means to support his wife and children—1882 A W N 179. If he has sufficient means he is not relieved of the obligation to maintain his wife on the ground that the wife has means of earning money by her own labour—1887 A W N 107, or that the wife has relations able and willing to maintain her—2 Weir 615, 16 Cr L J 80 (Mad), or that the wife has sufficient earning of her own (including her husband's earnings)—10 Bur L R 166.

A Magistrate is not justified in absolutely refusing to order maintenance to be paid to the wife on the ground that the husband is a man of slender means—2 Weir 617. In such a case, only a small amount will be ordered. So too the fact that the father is a professional beggar does not relieve him from his obligation to maintain his illegitimate child. If

a man is capable of labour, and the Magistrate is satisfied that the child is his child, he should order the payment of a reasonable sum—2 Weir 616. The word 'means' in this section does not signify only visible means, such as real property or definite employment. If a man is healthy and able-bodied he must be held to have the means to support his wife, and he cannot be relieved of this obligation on the ground that he is only 19 years old and unemployed—*In re Handasamy*, 50 M L J 44 27 Cr L J 350. So also, the mere fact that the husband is a young boy of 16 is not a ground for granting merely nominal maintenance. He must make serious endeavour to find work, and must pay sufficient maintenance to his wife—*Ma v Ma Ma* 4 Bur L J 258. In a Burma case it has been held that in the case of a Pongyi or Buddhist priest, the presumption is that he possesses no property except such as is necessary for his religious life and which is held under conditions which do not make it available for other purposes and a woman who allows herself to be seduced by a member of the priesthood cannot obtain any maintenance for her child, she ought to have known beforehand that a priest has no money—1 Bur L J 97. But in another Burma case it has been held that a Buddhist monk cannot get rid of his statutory obligation under this Code to maintain his illegitimate child. If he is an able-bodied man, the presumption is that he has sufficient means to maintain himself and his child and it is for him to prove the contrary. If he cannot pay the maintenance ordered if he remains a monk, it is his duty to throw off the yellow robe and work—(1921) U B R 2nd Qr 138.

The onus is on the husband or father to show that he has no sufficient means to support his wife and children. An able-bodied man who is suffering from no physical infirmity will be presumed to have sufficient means to support himself and his family—1911 U B R 1st Qr 90.

1274 Neglect or refusal to maintain.—The first essential for proceedings under this section is that the person proceeded against should have neglected or refused to maintain his wife or children. If there is no evidence as to the neglect or refusal, an order for maintenance passed by the Magistrate is bad in *Law v Sa Ma* 27 O C 271 1 O W N 150 26 Cr L J 128 16 W R 6 16 Bom 269. Where the evidence was that since the separation had taken place, the husband was regularly paying Rs 92 for the maintenance of his wife and children, it was held that the Magistrate was wrong in having entertained the petition at all—*Graham v Graham*, 4 Bur L J 11, 26 Cr L J 831.

The neglect or refusal to maintain wife and children may be expressed or implied. The Court may infer the neglect or refusal from the conduct of the husband—9 Bom L R 359. To give jurisdiction to a Magistrate, it is not necessary to prove express refusal to maintain, if the husband or father does not in fact maintain his wife or children, he is said to neglect or refuse to maintain them—8 Bur L R 96. Where the father has denied his paternity, that is a fact from which the Court can infer neglect to maintain—6 S L R 208. But where the husband is willing to maintain his wife and the wife is willing to live with her husband, i.e. where both parties are willing to live together, the fact

the wife deposes that though she is willing to live with her husband, the latter refuses to maintain her, will not lead the Court to infer that the husband is unwilling to maintain his wife—1914 P W R 46 When there is no proof of refusal or neglect to maintain the wife, the husband ought not to be ordered to pay maintenance on the ground that he has been guilty of cruelty to her—Ibid

A mere offer by the husband to maintain his children made at the trial is not sufficient to oust the Magistrate of his jurisdiction, if as a matter of fact the husband has paid nothing for the maintenance of his children for several years—*Kent v Kent* 49 M L J 335 26 Cr L J 1597, *Kambu Ammal v Ranganathan*, 1924 M W N 465 25 Cr L J 94 If in fact the father has neglected or refused to maintain his children the Magistrate can make an order for the payment of monthly allowance for the maintenance of the children An offer to maintain the children in the future is not sufficient of itself to debar the Magistrate from making the order Otherwise in those cases where the children are very young a man, knowing full well that no mother would part with such children, has simply to make an ostensible offer to keep the children with him, and he can thus defeat an application for maintenance The Magistrate will be entitled to consider the circumstances in which the offer was made, and whether it is right and proper that the children, if not in the custody of the father, should be handed over to him—*David Sasson v Emp*, 49 Bom 562 27 Bom I R 359 A I R 1925 Bom 259 26 Cr L J 975 1905 U B R (Cr P C) 39 But the Punjab Chief Court has held that if the father offers to maintain his children on condition that they should live with him the Magistrate should refrain from passing an order against him—*Sardar Muhammad v Nur Muhd* 1917 P R 221 18 Cr L J 811, *Rulla v Iltis* 1914 P I R 115 15 Cr L J 329 *Vin Singh v Dharma* 1894 P R 18

This section is based on the principle that there is a continuing obligation upon a father, who has sufficient means, to support his child If a man who is bound to maintain his child continuously does not do so, he is deemed to have neglected to maintain and proof of actual refusal to maintain is not necessary The fact that the child is not in a starving condition is no answer to an application for maintenance—L B R (1900-1902) 189, *Baran v Ma Chan*, 2 Rang 682 26 Cr L J 535, 8 Bur L R 96

The fact that a lump sum has been paid to the wife in final settlement of all her claims is no answer to an application for maintenance, if in fact the money has been spent or lost or does not yield a sufficient income—1905 L B R (Cr P C) 45 I B R (1900-1902) 189 But where the father has given certain property to the mother for the maintenance of the child, which yields sufficient monthly income and furnishes means of support, he cannot be said to have neglected to maintain his child and an order cannot be made under this section—U B R (1897-1901) 108; 2 Weir 643

A father's neglect to sue for the custody of a girl who has chosen to live with her mother who is living in adultery, cannot be deemed to be a

neglect on his part to maintain the daughter—2 Weir 630 Where the father is entitled to the custody of children, and the mother who takes them away does not allow them to return to him, there is no such neglect or refusal to maintain them as is contemplated by this section—2 Weir 632 Where the children who were being properly maintained while in the custody of their father, were dissuaded by their mother from his custody and went away to live with their mother, the refusal of the father to maintain them unless they returned to his custody was not a refusal to maintain within the meaning of this section—*Ma Shwe v Mg Po Chat*, 8 L B R 103 16 Cr L J 217

Before passing an order under this section, the Magistrate ought to ascertain whether the husband has been called upon to maintain his wife Where the husband has not been called upon to do so, and the wife was living with her father who refused to allow her to live with her husband without a money payment from him, the Magistrate cannot make an order for maintenance—22 W R 30

The neglect or refusal must be *present* neglect or refusal Where a wife, subsequent to her application for maintenance, came to live with her husband and compromised her claim, but prayed for an order of the Magistrate to the effect that if her husband failed to maintain her in *future* he should pay her a certain allowance, it was held that the Magistrate could not pass such order but must dismiss the application, as no *present* refusal or neglect was established—2 Weir 630

1275 Right of wife to maintenance—To justify an order under this section, it must be shown that the complainant is the wife of the defendant—16 Bom 269 The condition precedent to a right of maintenance, in the case of a wife is the existence of a conjugal relation—5 All 226 It is only on proof of the relationship of husband and wife that an order for maintenance should be made but where such relationship has ceased to exist an order already made may be stayed—5 Cal 558 No order for maintenance can be passed under this section as against the husband, in favour of the wife where there is no proof that the latter is the lawfully married wife of the former, according to his personal law—7 Bur L T 71 7 L B R 270 Among Jats, Karoo marriage is a valid marriage, and the woman is entitled to maintenance—4 N W P H C R 128 A *muta* wife is entitled to maintenance under this section, though she is not entitled under the Mahomedan law—8 Cal 736

Effect of divorce—A Muhammadan wife is entitled to maintenance up to the date of divorce—19 All 50 Even after divorce, she is entitled to maintenance during the *iddat*—1905 P R 5 2 Weir 617 20 M L J 12 But an order for maintenance subsequent to the expiration of the *iddat* is illegal, unless pregnancy is alleged—2 Weir 617 1888 A W N 116, 13 Bur L T 43

When a husband pleads non liability to maintain his wife on the ground of his having divorced her, the Magistrate is bound to entertain and enquire into such plea If he finds the plea established, he cannot order maintenance—1894 P R 21, 2 Weir 620 1915 U B R 1st Cr 53 Where a Magistrate makes an order under this section, the order becomes

functus officio on a subsequent divorce of the wife by the husband—17 O C 260

1276 Right of children to maintenance—The child must be born no order can be passed under this section for the maintenance of a foetus, when it is believed that a woman is pregnant. Until it is born it can hardly be regarded as a child—3 N W P H C R 70, 2 Weir 618

The word 'child' in this section simply means son or daughter. Reference to age is purposely omitted the object being that any son or daughter is entitled to maintenance so long as he or she is unable to maintain himself or herself—1910 P W R 28. In 37 Mad 565 and 5 N L J 247 it has been held that the word 'child' means one who has not attained majority.

Legitimate children—A child born during the continuance of the form of marriage known as *Sai bandhan* and prevalent among the Syrian community in Malabar is entitled to maintenance under this section—22 Mad 246. 23 Mad 247 (foot note). Children of a Nikah wife are legitimate and entitled to maintenance—18 W R 28.

Illegitimate children—An order under this section may be passed for the maintenance of legitimate as well as illegitimate children. The basis of an application for the maintenance of a child under this section is the paternity of the child irrespective of its legitimacy or illegitimacy—16 Cal 781. But before an order for the maintenance of illegitimate children is passed it must be proved that the man against whom the woman proceeds was the father of the children—18 All 107. Where maintenance is claimed for an illegitimate child from an alleged father it is not enough that the defendant may have been the father, but the Magistrate must be able to find that in all reasonableness no one else can have been the father—2 Weir (2). The Magistrate is not justified in holding that the child is the child of the defendant on the ground of the similarity of the features and the name of the child with those of the defendant—16 Cal 781.

Children in custody of mother—Where a mother has the custody of a child and has to maintain it, she is entitled to claim maintenance on his account—2 Weir 630. And the father cannot refuse to maintain his children on the ground that they are living with their mother. If he wants to have them in his custody, he must enforce his right, if any, in the Civil Court—*Munagesa v. Sodiamma* 8 Bur 1 T 134. 16 Cr 1 J 65. A divorced wife is under the Mohammedan law entitled to the custody of her children, and the father is not thereby relieved of his liability to maintain them—6 Bom L R 536, 19 Mad 461. But where a child has left its father and has chosen to live with its mother who is leading a life of adultery since she left her husband, the father cannot be directed to pay an allowance to the child under this section—2 Weir (30). See also 2 Weir (32) and 8 L B R 105 cited in Note 1274 ante.

Effect of agreement—Obligation to maintain a child is a statutory obligation and the parties cannot contract themselves out of it—L B R (1900-1902) 126. The father cannot divest himself of his liability to maintain his child, by an agreement with his wife—2 Weir 648. The language

of this section is inconsistent with the capacity of a wife to make a contract absolving her husband from his statutory liability—U B R (1905) 45. But it has been held in 2 Weir 611, that where the mother of the illegitimate children renounced on their behalf all future claims of maintenance by a document on payment of a certain sum by the father, the Magistrate was not competent to pass any further order for maintenance unless there was proof of fraud in the execution of the document, or unless it was proved that there was a valid subsequent oral agreement in supersession of the document. A compromise by the lawful guardian of a minor acting *bona fide* for his benefit cannot be set aside even at his instance, except upon proof of fraud—2 Weir 639.

But there can be no doubt that when a compromise made by the guardian of a minor does not appear to be for his benefit and it is very likely that he would be materially injured by a manifestly inadequate adjustment of his maintenance-claim under this section the compromise will not bind the minor nor any one acting as guardian after the mother's death—1885 P R 13.

1277 'Unable to maintain itself':—The words 'unable to maintain itself' refer to the child and not to the wife—to Bur L R 166.

The father is bound to maintain the child if it is unable to maintain itself, even though its mother may be able to maintain it. The question as to the means of the mother is not to be taken into account, the true criterion is the inability of the child to support itself—7 Bur I T 34. The fact that the child belongs to a well-to-do *farwad* does not relieve the father from his liability to maintain it. The inability referred to in this section relates to the absence of sufficient maturity of physical and mental development in the child rendering it in consequence unable to earn its living by its own efforts and does not refer to inability through poverty or absence of all means—*In re Parathi Lalappell* 25 M L J 355 14 Cr I J 59. But in 39 Mad 957 and 19 Mad 461 it has been held that this section has no application to cases where the children are being maintained by a *farwad* which is bound by law to maintain them. The words 'unable to maintain itself' cannot be confined to the tender age of the child but have also reference to its financial position. Therefore where there are enough funds to support the child in the *farwad* to which it belongs it cannot be said to be unable to maintain itself—37 M L J 361. The offspring of a *sambandham* marriage are entitled to maintenance from their *tavazhi*, and if the *tavazhi* or *farwad* has sufficient means to maintain them, they are not entitled to an order of maintenance under this section—*In re Bharata Aiyar*, 46 M L J 324.

A child who is deaf and dumb and unable to maintain itself is entitled to maintenance even though it may have attained majority—*In re Todd* 5 N W P H C R 237. A minor girl earning her living by prostitution will still be considered to be 'unable to maintain herself' because prostitution is not to be treated as a profession by which a girl can maintain herself for the purpose of this section—37 Mad 565. But a minor married girl, whose husband is willing to maintain her, cannot be regarded as a person unable to maintain herself, and her father cannot be ordered to

maintain her—2 Weir 650 But if in spite of her marriage the girl still remains unable to maintain herself either because her husband is too poor to maintain her or for any other good reason, the father's liability to maintain the child would still exist—*Ameenakshi v Karupanna* 48 Mad 503 48 M L J 183 26 Cr L J 732 The child is entitled to get maintenance until it is able to maintain itself, the Magistrate is not justified in ordering maintenance 'till the child attains the age of 14' 2 Magistrate has no power to fix an arbitrary age limit up to which the child will get maintenance—2 P I T 109 Where a boy is aged 17 or 18 and is able to work and earn his living he cannot be said to be 'unable to maintain himself,' and he cannot compel his father to educate him in a college and thus better his prospects—1 Bur L J 123 But a boy of 11 years must be deemed to be a child 'unable to maintain itself,' and is entitled to maintenance it would be contrary to public policy to encourage child labour by holding that a boy of 11 years should contribute towards his own support by work, when he should be in school—*Baran Shanta v Ma Chan* 2 Rang 682 26 Cr L J 535

1278 Order for maintenance:—The only order that can be passed under this section is either an order allowing maintenance or an order dismissing the application for maintenance. He cannot pass any other order. Where a claim for maintenance is compromised by the consent of parties the Magistrate is not competent to pass an order in accordance with the terms of the compromise. He can only dismiss the petition and strike it off the file. To pass a decree in terms of the compromise would be to assume the functions of the Civil Court—2 Weir 629 2 Weir 630

The order under this section must not be conditional and must not have reference to any future circumstances. When the wife, after compromising the claim for maintenance, prayed for an order by the Magistrate that if her husband failed to support her in future, he should pay her a monthly allowance, it was held that the Magistrate could not pass an order of this nature, he must dismiss the application—2 Weir 630 An order for maintenance passed on condition that the woman must reside in her husband's house is illegal—1917 P R 14

Who can order—Only the Magistrates enumerated in this section can inquire into the case and pass an order for maintenance. An inquiry under this section cannot be delegated by a First Class Magistrate to a Magistrate of a lower rank—2 Weir 617 A First Class Magistrate cannot refer an application under this section to a Subordinate Magistrate of lower grade and act upon his report—1905 P R 20, 11 Mad 109

Monthly allowance—The law empowers a Magistrate only to direct payment of a monthly maintenance. An agreement between a husband and wife whereby the husband agreed that he would furnish his wife with certain ornaments build a house for her, deliver to her annually a certain amount of grain and pay her a certain sum in cash, is not an agreement which can be made the basis of an order under this section, and therefore can not be enforced under its provisions—6 Mad 283, 21 Cr L J 612 (Lab) The payment ordered must be a monthly payment. An order

for the payment of a certain sum annually for the value of clothes is not legal—2 Weir 627 But where a *razinamah* entered into between the parties contains an agreement for the payment of a certain sum annually for value of clothes, the wife is entitled to ask the Court to give effect to the general intention of the parties as disclosed by the *razinamah*, by allotting in the monthly allowance the value of the clothes agreed to be paid annually—2 Weir 634

The payment of maintenance must be in money an order for payment of maintenance in grain is not in accordance with this Code—2 Weir 626, 2 Weir 627, 1911 P R 19 1887 P R 3 *Itru v Mabon* 25 Cr L J 1271 (Lah) So also, an order directing a mixed payment in kind and cash is contrary to the terms of this section—*Mukta v Dattu Mahader* 26 Bom L R 186

An order under this section fixing the duration of the period for which the maintenance is to be paid, is illegal—2 Weir 634

1279 Amount of maintenance:—In determining the amount of maintenance, no luxury should be allowed, but only the necessities of life should be considered according to the station in life of the applicant and the means of the respondent—4 Bur L T 269 The maximum amount which can be awarded for the maintenance of each person is now Rs 100, under the old law it was Rs 50 The words 'in the whole' mean that a sum of money not exceeding Rs 100 should be ordered to be paid, and no other payment either in the shape of school fees or medical expenses etc should be ordered to be paid The words do not mean that when a woman makes an application for herself and for her children, she can only be awarded Rs 100 for the maintenance of herself and of her children whatever be the number The Magistrate can order a sum not exceeding Rs 100 to be paid for the wife and for each of the children unable to maintain itself—*Kent v Kent* 49 M L J 335 26 Cr L J 1597 A I R 1926 Mad 59 Where a wife applied for maintenance of herself and her four children and the Magistrate ordered the husband to pay Rs 50 (under the old section) for maintenance of the wife and Rs 10 for each child, every month, it was held that the order was legal The husband was liable to maintain his wife and each of his children and the Magistrate might order him to pay as much as Rs 50 for each of them if each child was living with a different person And the fact that all the children were at the time in the custody of the mother could not affect the question of what should be paid to each child—4 Bur L T 139

A prospective order, providing for increase being made in the amount awarded for a child's maintenance hereafter as the child grows older, is not justified by law—2 N W P H C R 454 A Magistrate cannot, under this section, make an order for maintenance at a progressively increasing rate He may, however, under sec 489, from time to time alter the rate of monthly allowance granted under this section, as the child grows older—12 Cal 535, 14 Mad 398

The Magistrate shall order the amount to be paid to the wife or

child as the case may be. An order for the payment of the amount of maintenance at the Taluk Kutchery is not authorised by law—2 Weir 627

Order should specify amount payable to each person—An order under this section awarded Rs 42 for the maintenance of the wife and son, but nothing was said as to what portion was to be for the wife and what portion for the son. At the time the wife applied for enforcement of the order, the son was over 19 years of age and earning sufficient for him to live on. The Magistrate altered (under sec 489) the monthly allowance into Rs 25 payable to the wife only. It was held that as regards the son the foundation of the order was taken away when he was able to maintain himself, and it became spent so far as he was concerned and was not enforceable, and that the Magistrate in the original order not having allotted any particular portion to the wife, the order could not be partially enforced in favour of the wife, but that she should make a fresh application for maintenance for herself alone—9 L B R 49

Subsection (2)—The maintenance allowance is payable only from the date of the order (or at most from the date of the application). A direction to pay maintenance from a date prior to such date is opposed to this section—2 Weir 635. But where an order for such retrospective payment was made with the consent of the parties, the High Court did not interfere—2 Weir 635

1280 Subsection (3)—Enforcement of order:—In this subsection, the words 'fails without sufficient cause' have been substituted for the words 'wilfully neglects', because of difficulties which have arisen in the interpretation of the word 'wilfully'. Under the old law it was held that before an order for imprisonment could be made on default of payment of maintenance strict proof was necessary that the nonpayment was due to wilful neglect on the part of the defendant, and mere omission to pay the arrears was not sufficient—22 Cal 291, 5 O C 316, 25 Cal 291. Under the present law, no such proof is necessary, but simple non-payment without sufficient cause is sufficient to attract the provisions of this subsection.

When execution of a maintenance order is applied for and the counter-petitioner files a counter petition setting out certain grounds on which he contends that the order should not be executed, the Court is bound to consider the sufficiency of the cause alleged by the counter-petitioner and to refuse the execution if the Court is satisfied that the cause is sufficient and to grant execution if the Court is not satisfied with the cause alleged. The Legislature has used the expression 'sufficient cause' obviously intending that the Magistrate before whom the matter comes up should be in a position to use his judicial discretion having regard to all the circumstances, and that such judicial discretion should not be fettered or limited by any definite rules. The expression 'sufficient cause' is wide enough to include all possible considerations that may be submitted to the Magistrate in the circumstances of the case—*Tertharappa v Meenakshi* 48 M L J 424 26 Cr L J 953 A I R 1925 Mad 715

Under this section, the Magistrate can imprison the person proceeded

against after default is made but he cannot take security from that person in anticipation of default—24 W R 72

Warrant—A warrant in respect of the breach of the order is a condition precedent to the inflicting of imprisonment—9 All 240 A Police officer when executing a warrant for the levy of the amount of maintenance recoverable under this section can break open an inner door of the house of the person against whom it is executed—Rutinal 431

The law contemplates only a single warrant of commitment regarding the arrears due at the time of issue. Where six months' arrears are due, a separate warrant of commitment for each month's arrear is bad in law—25 Cal 291. The levy of accumulated arrears of maintenance by a single warrant and in one proceeding is not illegal—7 M H C R App 38 6 M H C R App 22

The second proviso (nowly added) to this sub-section provides a period of limitation (one year from the date of default) within which the application is to be made for the issue of the warrant for realisation of the outstanding arrears.

1281 Imprisonment:—The imprisonment may be awarded only after default is made. Where it was provided in the order of maintenance itself that in case of the defendant failing to pay the monthly allowance, he should be imprisoned for a term of 15 days for every breach of the order, it was held that the order was in anticipation of the procedure to take place on a wilful default if such should occur, and was therefore illegal—5 M H C R App 34. Imprisonment is a means of enforcing payment, and an order for imprisonment can be passed only after there has been negligence to pay the amount of maintenance—22 Cal 291.

Release on payment—The imprisonment awarded under this section is not a punishment for contempt of the Court's order, nor is it an absolute sentence. It is passed only for the unpaid portion of the maintenance, or in other words, it is owing to default of payment of the unrealised portion of the maintenance. Therefore, the imprisonment ought to cease upon payment of the amount of maintenance—22 Cal 291. The words "until payment is sooner made" did not occur in the 1882 Code, and therefore it was held in 8 Mad 70, and U B R (1892-96) 70, that a person committed to jail for non-payment of maintenance was not entitled to be released even when the arrears were paid because the imprisonment ordered in default of payment was held to be a punishment for breach of the order of the Court. These rulings are no longer good law.

Nature of imprisonment—The imprisonment under this section may be either simple or rigorous, looking to the terms of sec 2 (18) of the General Clauses Act—9 All 240. In Form VI not only simple but rigorous imprisonment is provided for, but it would be safer to order the imprisonment to be simple—U B R (1892-1896) 70.

Term of Imprisonment—It has been held in 9 All 240, 6 C R App 22 and 7 Bur L T. 225 that the maximum term of imprisonment is one month, and that only one month's imprisonment can be awarded on the whole in default of payment of the aggregate

due In the *Burma* case, the words 'for the whole or any part of each month's allowance remaining unpaid' have been interpreted to mean 'for the whole or any part of every month's or all months' allowance remaining unpaid' Such an interpretation seems to be too laboured The more reasonable view has been taken in 20 Mad 3, 25 Cal 291 and 1877 P R 12 Thus, a person who has wilfully neglected to pay the arrears of maintenance for several months may be imprisoned for more than one month—1877 P R 12, 1919 P R 12 The imprisonment in default of payment of maintenance is not to be limited to one month The procedure contemplated by the Code appears to be to ascertain how many months arrears are due The maximum imprisonment that can be imposed will then be *one month for each month's arrears*, and if there is a balance representing the arrears for a portion of a month, a further term of a month's imprisonment may be imposed for such arrears—20 Mad 3, 25 Cal 291

1282 When order cannot be enforced:—Where a woman to whom maintenance has been ordered under this section subsequently voluntarily resides with her husband, the original order becomes ineffectual and if the husband again refuses to maintain her, fresh proceeding must be instituted under this section—1888 A W N 217

When the husband on summons appears and pays the arrears of maintenance into Court, the Magistrate cannot order imprisonment—1891 A W N 19

Where the husband has been adjudged an insolvent, the order of maintenance cannot be enforced so long as the order of adjudication stands and he cannot therefore be imprisoned for default of payment—*Halphid v Halphid* 50 Cal 867

If the defaulter dies, the order cannot be enforced against his estate—41 Cal 88

But the defendant's *inability to pay* is not a ground for the Magistrate's refusal to enforce the order for maintenance If the allowance granted is too excessive, he may revise the rate of maintenance on further inquiry, and the order will take effect from the date of such inquiry—2 Weir 636

1283 Offer to maintain wife:—Where the husband offers to maintain his wife and the wife consents to live with him, the Magistrate cannot make an order under this section, unless the complainant (wife) satisfies him that notwithstanding such offer there is just ground for making such order—1 C L J 214

The offer to maintain must be a *bona fide* offer, and not made with the object of escaping obligation—13 Cr L J. 55 But the fact that in the past he has neglected to maintain should not be considered as sufficient by itself to lead to the presumption that the offer is not made in good faith—1917 P R 22 In 22 Cr L J 149 (Lah) it has been held that if it is found that the husband had formerly turned his wife out of his house, his subsequent offer to keep her in his house cannot be taken to be *bona fide*, and he cannot escape his liability to maintain her under

this section merely by such an offer, because he may break his promise as soon as she gets home.

The offer must be to maintain wife as wife. It has been however held in 16 Bom 269 that where the husband offered to keep the complainant in his house, not as wife but as a servant or dependent, the offer was a sufficient offer within the meaning of this section. But this decision does not seem to be just. The Madras High Court rightly lays down that an offer to maintain wife must be one to maintain her with the consideration due to her position as wife—17 Mad 260 2 Weir 641. And therefore where a Hindu husband having two wives offered to maintain his first wife in his own house adding that he would not live with her, but would supply grain for her to cook her own food and eat it separately in the house such an offer was not a sufficient offer within the meaning of this section—6 Mad 371 *Sakrulla v Fatma* 25 Cr L J 453 (Nag).

1284 Grounds of wife's refusal to live with husband:—An order for separate maintenance in favour of the wife may be made under this section if the wife has just grounds for refusing to live with her husband. Inability of husband and wife to agree to live together is not a ground for ordering separate maintenance for wife—6 W R 59. A Magistrate is not authorised to entertain an application for maintenance, where the husband has neither ill-treated his wife nor has refused or neglected to maintain her but she of her own accord left her husband's house and protection—6 N W P H C R 205. When the wife voluntarily leaves her husband's house without sufficient justification, she is not entitled to any order under this section unless the husband refuses to maintain her or turns her out or ill-treats her, so as to make it impossible for her to live with her husband—5 Bom L R 614.

The following are proper grounds for the wife's refusal to live with her husband—

(1) **Cruelty.** If the husband so ill-treats his wife (e.g. drives her out with blows) that she is compelled to leave his house she is justified in refusing to live with her husband and in claiming maintenance—*Rappati v Deoli* 46 All 87 (878). Under the Code of 1882 cruelty was the only ground on which a wife was justified in living separately from her husband and demanding maintenance. But the words "that he habitually treated his wife with cruelty" which occurred in the Code of 1882 have been substituted by the words "that there is just ground for so doing". This alteration gives the Magistrate larger discretion in giving maintenance. The present Code does not restrict the payment of maintenance, when the wife is living separately only to cases of cruelty—4 Bur L T 269. There are other grounds on which the wife may live separately and claim maintenance.

(2) If a Christian husband reverts to Hinduism and marries a second (Hindu) wife, the Christian wife may refuse to live with her husband, and apply for maintenance—4 M H C R App 3.

(3) **Adultery** on the part of the husband although not punished under the I P C, may nevertheless constitute sufficient cause for

wife living separately from her husband, and enable her to claim maintenance under this section—20 Mad 470, 13 All 348 Where the husband is living with a mistress in the house at the time of application, the wife is entitled to refuse to live with him and a subsequent offer made by the husband in Court to give up his mistress does not deprive the wife of her right of refusal to live with her husband—14 Bur L R 240 But in such cases, the Magistrate should take into consideration the social habits of the particular community to which the parties belong If that community does not completely disapprove of concubinage and tolerates it so far as to give kept women some status and rights, the fact that the husband keeps a concubine ought not by itself to entitle the wife to claim separate maintenance—*Gantapalli v Gantapalli* 20 Mad 470 The circumstance that a Hindu husband keeps a concubine in the house will not entitle a wife to an allowance for maintenance if her husband is willing to receive her and treat her with the consideration which is due to her position—2 Weir 641 17 Mad 260

(4) Where the breach between the husband and wife is irremediable and it is quite impossible for the latter to return to the former after many years separation without leading to fresh trouble and dispute she is entitled to maintenance by living separate from him—1914 P W R 26

(5) The marriage of a Mahomedan with the step mother of his wife is not valid under the Mahomedan law The wife is entitled in such a case to say that she would not live with her husband during the continuance of such marriage—2 Weir 647

(6) Where a Burmese Buddhist has taken a lesser wife without the consent of the chief wife the latter can refuse to live with her husband at the same time and can claim maintenance—4 L B R 340 Also according to Burmese Buddhist law the fact that the husband took a second wife might be a good reason for the first wife's refusal to live with him unless he provided her with a separate residence—11 Bur L T 105

The following are not sufficient grounds for the wife's refusal to live with her husband —

(1) The fact that the husband has married again does not entitle the first wife to separate maintenance, if the husband is willing to maintain her in his house—7 Mad 187 1880 P R 27 1882 P R 31 1878 P R 2, 1877 P R 66 *Ratanlal* 7 1914 P R 12, *Sukrulla v Fatma* 25 Cr 1 J 423 (Nag) The existence of a co wife with whom the complainant had quarrels or the husband's want of affection for the complainant or his greater affection for the co wife is not a valid ground of the complainant's refusal to live with her husband—1901 P R 14 The fact that the younger wife will suffer annoyance from the elder wife and that the husband may not protect her from such annoyance, is not a proper ground for the younger wife's refusing to live with her husband and claiming maintenance—1904 L B R 1st Qr (Cr P C) 10

(2) Minority of the wife is not a ground for her not living with her husband if the husband offers to maintain his wife in her house—1882 P R 1 though in such a case having regard to her tender age, it might be better that she should live with her parents

(3) Where the husband is willing to maintain his wife, the fact that the prompt dower has not been paid is not a ground for separate residence and maintenance—1848 P R 6, 1840 P R 15

1285 Sub-section (4):—“Living in adultery”—Living in adultery means following a course of adulterous conduct more or less continuous a single act of adultery cannot be considered as living in adultery—*Gantapalli v Gantapalli* 20 Mad 470, 5 N I R 19, *Patala Itchamma v Patala Mahalakshmi* 30 Mad 332 The words ‘living in adultery’ refer to a course of conduct or at least to something more than a single lapse from virtue. Where the wife, two years prior to the application for maintenance, had given birth to an illegitimate child but since that time she had been living with her parents leading a chaste and respectable life, she cannot be said to be living in adultery so as to disentitle her to maintenance—*Hallu v Kanniah* 26 All 326

In the following cases, past adultery of the wife was held sufficient to disentitle her to maintenance, although she was not living in adultery at the time of the application. Thus, where a woman committed adultery with a man of low caste and was expelled from her caste, thereby making it impossible for her husband to live with her she could not claim maintenance, although at the time of application she was not living in adultery—31 Mad 185. Where the wife deserted her husband many years ago and led a life of adultery and has not attempted to seek her husband’s pardon for past misconduct the wife was not entitled to maintenance, merely because she was not living in adultery at the time of making the application for maintenance—*Ratanlal* 506

There must be clear proof of adultery. The mere fact that the husband considers the wife’s conduct open to suspicion is not sufficient—2 Weir 647. A mere suspicion by the husband that the child of the wife was the result of her intimacy with another man is not a ground of refusing maintenance—1881 V W N 31. The mere fact that the president of the brotherhood condemned the wife’s conduct is not a ground for dismissing an application for maintenance and the Magistrate should have inquired whether the wife was living in adultery—1881 V W N 62.

‘Refuses to live with her husband’—See Note 1284 ante. Where a Hindu wife leaves her husband’s house without good cause, her right of maintenance is only suspended, and she has the right to return to her husband’s house and claim maintenance—12 S L R 90.

‘Living separately by mutual consent’—A wife is not entitled to maintenance from her husband when both have entered into an agreement which provides for their living separately by mutual consent, and they are actually living separately in terms of that agreement—*Ratanlal* 870. Where it appeared that by mutual consent, the husband and wife had been living separately for a number of years, and that the maintenance of the wife was by arrangement made at the time they began to live separately, provided for by the assignment to her of some land, the Magistrate had no jurisdiction to make an order under this section—2 Weir 648.

To bring the case within subsection (4) it must be shown that the husband and the wife are living apart by a definite contract mutually m

between them. A contract *voluntarily and freely* made and entered into between the parties is essential. Where therefore a husband and wife are living apart in obedience to the decree of a Panchayet of their castemen by which the wife is awarded maintenance, it cannot be said that they are living apart by mutual consent—4 P L J 109

1286 Sub section (5).—Cancellation of order.—Under this sub section an allowance granted to the *wife only* can be cancelled, an allowance granted to a *child* cannot be cancelled, though it may be altered under sec 489—1885 P R 17. An order for maintenance of the child of a divorced Mahomedan wife who has married again, cannot be cancelled under this section. Such an order can be cancelled only on the ground of change of circumstances mentioned in sec 489—27 All 11

Is living in adultery —An order granting maintenance to a wife can be cancelled under this sub section upon proof that the wife is living in adultery *subsequent* to the order—Ratanlal 353 8 B H C R 124 5 All 224. But adultery previous to the order of maintenance is not admissible in evidence to cancel the order. An order cancelling maintenance on the ground of facts antecedent to the order granting maintenance is illegal on the principle of *res judicata*—5 All 224. Past adultery is admissible under sub section (4) *before* passing an order of maintenance, but after an order is passed, such past adultery cannot be considered for the purpose of cancelling the order.

There must be sufficient evidence of adultery. The fact that the wife continually went to the bazar, or that men went to the house where she lived (especially when other people including the wife's mother lived in that house) is not sufficient evidence to lead to the conclusion that the wife was living in adultery—1893 A W N 56. The words 'living in adultery' mean a continuous course of misconduct and unless this continuity is established it cannot be inferred from a single act of adultery that the woman is living in adultery. Therefore where a woman to whom maintenance had been awarded under this section gave birth to an illegitimate child held that this single instance of misconduct did not show that she was living in adultery, so as to enable the Magistrate to cancel the allowance—*Jatindra v Gouribala* 29 C W N 647 26 Cr L J 1184. Where the husband alleges adultery, the Magistrate should make an inquiry and adjudicate upon such allegation—1902 P R 36 1882 A W N 168.

'Living separately by mutual consent' —Where after an order for maintenance has been passed both the husband and wife while temporarily living together presented a petition by which they agreed that the husband should pay his wife Rs 10 a month so long as she stayed at the house of her father, and the petition asked for a decree on the said terms, held that the intention of the parties was when they filed the petition that the wife should abandon all claims for arrears due till then—*Parul Bala v Satish* 37 C L J 180.

Where the wife denied the validity of an alleged deed of compromise by which the parties agreed to a reduction in the rate of the allowance ordered by the Magistrate it was held that the Magistrate was not competent to cancel the order for maintenance until the agreement had been

declared by a competent tribunal to be binding on the wife—2 Weir 649

Other cases—Sub-section (5) is not exhaustive of the grounds on which an order for maintenance may be cancelled. Thus, an order can be cancelled on the ground of *divorce*. Where the husband pleads in answer to an application for enforcement of the order of maintenance, that he has lawfully divorced his wife, and such plea is proved, the Court will decline to enforce the order for the period subsequent to the date when the marriage ceased to exist—19 All 56; Bom 180, 17 N. L. R. 92. The apostacy of a Mahomedan wife *ipso facto* dissolves the marriage and the wife therefore is not entitled to maintenance from her husband—9 L. B. R. 206. In case of Mahomedans the order becomes inoperative on the expiry of the period of *iddat after divorce*—13 Buc 1743. Similarly, where the father was ordered to pay maintenance to his daughter, the marriage of the daughter makes her maintenance a charge on her husband and not on her father, and the father may apply for cancellation of the order—2 Weir 650. But these grounds are neither mentioned in this sub-section nor are they covered by Sec. 489 which speaks only of *alteration* of allowance and not of *cancellation* of the maintenance order. Therefore it is suggested that either this sub-section should be made more comprehensive, or the language of Sec. 489 should be so altered as to cover the above cases. See Note 1295 under Sec. 489.

Application to whom to be made—An application for the cancellation of an order of maintenance must be made to the Magistrate who made the original order or to his successor in office—25 All 545.

1287 Sub-section (6):—Evidence;—An order under this section must be passed on proof in the proceedings and not upon knowledge acquired by the Magistrate in some other case—8 W. R. 67 and the various elements required to sustain an order under this section must be strictly proved by evidence recorded on oath—13 W. R. 19. An order for payment of maintenance without recording evidence and without examining any witnesses is illegal—2 Weir 628. Where a Magistrate instead of examining the applicant at length and her witnesses, put her only to verify on oath the truth and correctness of her application, and treating her application as legal evidence against the husband passed an order for maintenance, held that the order was bad—23 O. C. 237. Proceedings under this Chapter are judicial in their nature and should not be conducted as if they were ministerial matters. The notes of evidence therefore should not be vague or inadequate and the order recorded must be issued on distinct findings of fact—5 All 224. If however an order is made with the consent of parties, the necessity of evidence may be dispensed with—2 Weir 629.

The evidence must be recorded as provided by Sec. 355. Proceedings under this Chapter cannot be conducted as in a summary trial under Chapter XXII—20 Cal 351.

Presence of the defendant—As directed by this sub-section, the inquiry should be conducted in the presence of the person proceeded against. A proceeding under this section should not be conducted *ex parte*. Evidence should be taken in the presence of the defendant or his pleader, unless the Court

is satisfied that the defendant is willingly avoiding service of summons or neglecting to attend the Court, proceedings should not be taken *ex parte*—1 C L J 10. Proceedings can be conducted in the presence of the pleader only when the personal attendance of the defendant has been dispensed with. Where his attendance has not been dispensed with, the Court is justified in refusing to hear the Mukhtear by whom he is represented, and the Court ought to insist upon the presence of the defendant and should not proceed *ex parte*—2 Bom I R 700.

Under the proviso to this sub-section the Magistrate may proceed *ex parte* if he is satisfied that the defendant is willingly avoiding service and neglecting to attend the Court. But in every case of absence of the defendant the Court ought not to treat the absence as due to wilful neglect—2 Bom L R 700. A Court ought not to infer that the defendant was neglecting to attend the Court when the inability to attend was due to the absence of specification in the summons of the place where he was to appear—7 M H C R App 43.

Where, no notice having been served on the person against whom the proceedings were taken, the order was passed *ex parte*, and within three months he applied to the Magistrate's successor to have the order revised stating that he had no notice of the application such succeeding Magistrate had jurisdiction under sec 488 (6) to have the case re-opened and disposed of according to law—2 Bur L J 61.

Presence of complainant—This section does not require the personal attendance of the complainant. If the complainant be a *pardanashin* lady, her presence may be dispensed with—1903 P R 19. In 1 C L J 214 and L B R (1892-96) 64 however, the Magistrate dismissed an application for maintenance for default of appearance of the complainant.

1288 Subsection (9)—Forum—This sub-section did not occur in the 1872 and 1882 Codes and it was therefore held that the application must be heard by the Magistrate within whose jurisdiction the wife resided—13 All 348 5 N W P H C R 217. These decisions are no longer good law. Under the present Code, the proper Court to take cognizance of a petition by the wife under this section is the Court within whose jurisdiction the husband or the father, as the case may be, resides—See 24 Cal 638 9 Bom 40 1885 P R 13 1893 P R 3. This sub-section does not give the wife or child to select a *forum* other than that where the husband or father is then residing or last resided with the complainant—1904 U B R 1st Cr (Cr P C) 10.

Mere casual residence in a place for a temporary purpose with no intention of remaining is not residence so as to give jurisdiction to the Magistrate of that place—*Ramdeo v Jhunnulal* 3 O W N 231, *Flowers v Flowers* 32 All 203 (I B). Where the husband pays only occasional visits to his wife, who lives apart from him, he cannot be said to reside at the place where the wife resides so as to give jurisdiction to the Magistrate of that place—24 O C 249 5 S L R 220. Therefore where the husband who was a resident of Lahore for 11 years took his wife to Lucknow at her brother's house and left her there declaring that he would support her no longer and his stay at Lucknow did not exceed a week,

held that the application for maintenance should be made at Lahore and not at Lucknow—*Ramdeo v. Jhunn* (Supra). But a man may be said to reside with the mother of the illegitimate child if he visits her only occasionally at her settled abode, so long as he has the intention of continuing to visit her and where she has no permanent residence elsewhere, two months stay at a place where she is occasionally visited by the father of the children is sufficient to constitute that place as his residence for the purpose of this sub-section—5 S. I. R. 220. In 21 C. W. N. 872, however temporary residence was held sufficient to give jurisdiction to the Magistrate of that place. Thus where it appeared that the husband ordinarily resided outside Calcutta but was temporarily there on the date the application was filed and for some days previously, it was held that this temporary residence gave the Calcutta Court jurisdiction under this sub-section.

1289 Whether civil suit lies. Where the right to maintenance is conferred by this section as well as by the personal law of the parties the right can be enforced not only under this section but also by a civil suit for maintenance. But where the right is not conferred by the personal law of the parties (e.g. the right of the illegitimate children of a Hindu by a non-Hindu woman to get maintenance from their putative father) such right cannot be enforced by a civil suit and the only remedy is that provided by this section. The distinction between a remedy under the common law and a remedy under this section is that the right under the common law may be enforced not only against the father during his life time but also against his estate after his death but a right under this section does not survive the death of the father—27 Mad. 13.

Order does not bar civil suit.—An order under this section passed by a Magistrate does not take away the jurisdiction of the Civil Courts—30 Mad. 400. A Magistrate's order for maintenance does not bar the jurisdiction of the Civil Court to make a declaration that the husband is not liable to pay separate maintenance to his wife—2 Weir 615. In pursuance of an order for maintenance of illegitimate children passed by a Magistrate a civil suit is maintainable for a declaration that the children are not the children of the plaintiff—1 O. C. 331. 1 Bur. 1 J. 82. Similarly, an order of a Magistrate refusing maintenance does not bar a suit in a Civil Court for maintenance—32 C. I. 429. *Co. tra.*—18 All. 29 and 2 Weir 614 where it has been held that a Magistrate's order for maintenance of wife duly made under this section cannot be superseded by a decree of the Civil Court declaring that the wife is not entitled to any maintenance.

1290 Effect of Civil Court decree.—*Effect of previous decree.*—A Civil Court's decree cannot be disturbed by an order of the Magistrate. Where a decision for a monthly allowance for maintenance has been obtained in the Civil Court and is in force the Magistrate is not competent to order a further and separate maintenance—2 Weir 615. The jurisdiction vested in the Magistrate is auxiliary to that of the Civil Court, and it is not open to a Magistrate to ignore a final decree of a Civil Court on the ground that it rests on reasons which do not appear to him satisfactory—2 Weir 615. Where the husband has obtained a decree for restitution of

conjugal rights, and the decree is in force, no application for maintenance by the wife ought to be entertained by the Magistrate—U B R (1910) 1st Or 34 Where a Civil Court has declared that the child is not the child of the defendant, the Magistrate should treat the decree as conclusive on the question of relationship and should refuse to pass any order for the maintenance of the child—33 M L J 449 But the weight to be attached to a decree must depend upon the particular circumstances of the case and no hard and fast rule can be laid down that a decree of a Civil Court is for ever binding on the Magistrate If, after the husband had obtained a decree for restitution of conjugal rights, he ill-treated his wife so much that she had to leave his house, and she applied to the Magistrate for an order of maintenance and the Magistrate granted the application on the ground that she was justified in refusing to live with her husband, *held* that the Magistrate was justified in ignoring the decree and in exercising his discretion in favour of the wife by absolving her from the condition that she must live with her husband Otherwise the husband can at first get a decree for restitution of conjugal rights and then turn his wife out without any allowance at all—*Rajpati v Deoli* 46 All 877 (878)

The existence of an order of the Probate, Divorce and Admiralty Division of the High Court in England whereby the husband is directed to pay his wife so much alimony per month is no bar to an application by the wife under sec 488 Cr P C, if in fact the husband has neglected to maintain his wife The existence of the order is not sufficient to oust the jurisdiction of the Magistrate, for a mere order for maintenance is not equivalent to maintenance Sec 488 gives jurisdiction to the Magistrate to award maintenance if he is satisfied that a person has neglected to maintain his wife—*Kent v Kent* 49 M L J 335 26 Cr L 1597 A I R 1926 Mad 59

Effect of subsequent decree—Where an order is passed by a Magistrate under this section for maintenance against the husband, and in a subsequent suit by the husband in the Civil Court for restitution of conjugal rights a consent decree is passed allowing the wife maintenance and residence, *held* that the decree of the Civil Court will supersede the Magistrate's order—27 All 483 The decree of a Civil Court for restitution of conjugal rights supersedes any previous order of a Magistrate for maintenance, if the wife should persist in refusing to live with her husband The Magistrate ought to cancel his order or rather to treat it as determined if the wife failing to comply with the decree for restitution refuses to live with her husband—*In re Bulakidas* 23 Bom 484, *Maung Tha v Ma Mya* 9 Bur L T 162 17 Cr L J 412, *In re Chandulal* 43 Bom 88, 21 Bom L R 766 20 Cr L J 687 See the new subsection (2) of sec 489 But a decree of a Civil Court ordering restitution of conjugal rights does not *ipso facto* cancel a maintenance order passed under the Cr P Code In considering any application for cancellation of a maintenance order, the Magistrate is not necessarily bound to follow the order of the Civil Court, but must consider it along with any other circumstances which may be brought before him—*Maung Dun v Ma Sein* 3 Rang 150 26 Cr L J 1341 A I R 1925 Rang 268 Where a decree for restitution of conjugal rights imposing certain conditions on the husband is passed

against a wife, who had obtained an order for maintenance, non-compliance by the husband with the conditions of the decree would revive the right of the wife to claim maintenance and to have the order enforced—*Dev Datta v. Ganga Devi*, 1906 P. R. 4, 4 Cr. L. J. 73. See also 3 P. L. T. 51. A husband against whom an order for maintenance was passed obtained subsequently a decree for restitution of conjugal rights. Two execution petitions filed by him were dismissed as he failed to prosecute the same diligently, and it was clear from his conduct that he was not at all anxious to get back his wife to live with him on the ordinary terms of husband and wife. Held that as the object in getting the decree for restitution of conjugal rights was merely to get the maintenance order cancelled, and not a bona fide wish to live amicably with her, the Court should not exercise its discretion under clause (2) of sec. 489 and cancel the order for maintenance—*Paalkat v. Ithappa*, 49 M. I. J. 269, 27 Cr. L. J. 30. A. I. R. 1925 Mad. 1218.

When the Civil Court finds that the relationship of husband and wife has ceased to exist the husband is entitled to ask the Magistrate, who is enforcing the order of maintenance, to abstain from giving further effect to the order—*Lal H. v. Ladden Sahaba*, 14 Cal. 276. Where a Civil Court has decided any points which would disentitle the wife to maintenance, the Magistrate who had passed an order for maintenance, will be bound, in the interests of justice, to take the judgment into consideration before passing a fresh order to enforce the former order—2 Weir 614. Similarly, where the relationship on which the maintenance order is based has been declared by a full bench of a competent Civil Court not to exist, it is open to the person adversely affected by the order to ask the Magistrate to abstain from giving any further effect to the order of maintenance. Therefore a Civil Court decree declaring that A is not the child of B supersedes a Magistrate's previous order for A's maintenance, and the Magistrate cannot enforce the Criminal Court's order after the Civil Court decree is passed—*Senkayya v. Padamma*, 46 Mad. 721, 45 M. L. J. 104, 24 Cr. L. J. 720, 16 Cr. I. J. 609 (Oudh), 13 Bur. L. T. 104.

1291 Miscellaneous—Fresh application—It is not competent for a Magistrate to hold a second inquiry into the same allegations which have once been already inquired into and dismissed by a competent Court—1916 P. R. 24, 17 Cr. I. J. 106 (Cal.). But the Magistrate can entertain a subsequent application for fresh cause shown. There may be change of circumstances which would enable the applicant to come into Court again, not on the same ground, but on a new ground—U. B. R. (1892-96) 64, 2 Weir 633.

But if the previous application has been dismissed for default of appearance and there was no adjudication regarding the merits, a second application is entertainable—24 C. W. N. 32, 30 C. L. J. 128, *Contra*—1 C. I. J. 214, where it has been held that if an application under this section is dismissed for default, the law does not empower the Magistrate to rehear the application.

Insanity of defendant—If the defendant in a proceeding under this section is alleged to be insane, the Magistrate has no power to appoint a

guardian *ad litem* but he should hold a judicial inquiry into his sanity and put him under medical observation, if necessary. If, as a result of such inquiry he comes to the conclusion that the defendant is insane, he must follow the procedure laid down in Ch XXXIV and postpone the proceedings until the Magistrate is satisfied that the defendant is capable of understanding the proceedings.—*Ippich v Kuthu Jammal* 48 Mad 388, 48 M I J 187, 26 Cr I J 701.

Further inquiry—When an application under this section is dismissed by a Magistrate, the District Magistrate cannot order further inquiry under sec 436 because the defendant is not in the position of an accused.—17 C P I R 127, 25 All 545.

Appeal—When a Magistrate orders maintenance under this section, no appeal lies, as there is no conviction of an offence.—7 W R 10, 5 B H C R 81.

No limitation—A wife does not lose her right of maintenance because she has delayed in making the application.—2 Weir 616. The law has not fixed any time within which a claim of maintenance is to be made. The fact that the wife has not advanced her claim immediately on her husband's desertion of her does not disentitle her to maintenance.—2 Weir 615. The second proviso to sub-section (3) provides a period of limitation for an application for the issue of a warrant for enforcement of the order, but not for an application for maintenance.

1292 Nature of proceedings under this section—A proceeding under this section is of a criminal nature, and therefore it is a criminal case within the meaning of Sec 528, and the District Magistrate may withdraw a case instituted under this section from the file of a first class Magistrate to his own file.—1905 P R 5. No appeal lies under clause 15 of the Letters Patent against the order of a single Judge made on a revision petition against the order of a Magistrate under this section as the order is one passed in a criminal trial.—17 M I T 330. If the parties to the proceedings compromise the claim for maintenance, the Magistrate cannot pass an order in accordance with the terms of the compromise, because to do so would be to assume the functions of a Civil Court.—2 Weir 629.

But though the proceeding under this section is of a criminal nature, still the person proceeded against under this section cannot be called an *accused*; he can be examined as a witness and oath can be administered to him.—17 C P I R 127. The Calcutta High Court holds that proceedings under this section are civil proceedings and the defendant there to may give evidence on his own behalf.—16 Cal 781. This is now expressly provided by sub-section (2) of sec 340. A proceeding under this section being a proceeding of a civil nature the parties can be examined as witnesses.—18 Bom 468. The word 'accused' was formerly inadvertently used in sub-section (9). The Legislature has now corrected the error by substituting the words "any person" for the word 'accused'. This section is not intended to be punitive but a preventive one, and hence the neglect or refusal to pay maintenance is not an 'offence' within the meaning of section 4.—1893 P R 15, and an application for maintenance is not a complaint of an offence.—1885 P R 13, 17 C P L R 127. Compensation

cannot be awarded under section 250 to the person proceeded against if the complaint is dismissed as false and frivolous or vexatious—6 M L T 261

1293 Revision:—The High Court has jurisdiction to set aside or modify the Magistrate's order, if the rate of maintenance awarded appears to be excessive, or to order further inquiry with a view to decide what amount should be allowed—*Mad H C Lr 23*—7—1887 The High Court can set aside in revision a previous order of a Criminal Court passed under this section in view of a subsequent decree of a Civil Court—16 Cr L J 609 (Oudh)

But the High Court does not interfere in revision when other issues are raised which should be settled in the Civil Courts, and when nothing is to be gained by protracted litigation in the Criminal Court. In such cases the persons aggrieved by Magisterial orders should take their case to the Civil Court—*In re Kandasami* 50 M L J 44 27 Cr L J 350

489 (1) On proof of a change in the circumstances of any person receiving under Section 488 a monthly allowance or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit

Provided that if he increases the allowance the monthly rate of one hundred rupees in the whole be not exceeded

(2) Where it appears to the Magistrate that in consequence of any decision of a competent Civil Court any order made under section 488 should be cancelled or varied, he shall cancel the order or vary the same accordingly

Change—In sub-section (1) the words one hundred have been substituted for the word fifty and sub-section (2) has been newly added by section 132 of the Cr P Code Amendment Act XVIII of 1923

1294 Scope:—This section furnishes the ground on which the Court passing an order under sec 488 can modify that order. An order of a competent Court under sec 488 for the maintenance of a child can be modified under this section. *2nd All 11* When a maintenance order is made with reference to the means of the husband he should apply under this section if he is aggrieved for reduction of the allowance—9 W R 1 The revision of an order of maintenance and the grant of it on a lower scale than that of the original order is not legal without an application under this section from one of the parties and without proof of change of circumstances—2 Weir 628

An application under this section can be made so long as there is a subsisting order under section 488. Thus, an order awarding maintenance to the wife was passed in 1910 afterwards in 1912 the husband obtained

a decree for restitution of conjugal rights, but he never executed it and went on paying the maintenance to his wife as before. In 1918, the wife applied for increase of the amount of maintenance under sec. 489. Held that this application could not be granted because there was no subsisting order under section 488, the same having been put an end to by the decree of 1912. The fact that the husband continued to pay the maintenance in spite of the decree of 1912 did not keep the order of 1910 alive—43 Bom 885

1295 Change of circumstances:—The expression 'change in the circumstances' in this section means not merely a temporary or accidental change in one of such circumstances (such as salary) but a change in all the circumstances connected with the condition of the person—1991 A W N 32

The change of circumstances in this section is a change of pecuniary or other circumstances of the party paying or receiving the allowance, which would justify an increase or decrease of the amount of the monthly payment originally fixed, and not a change in the status of the parties, which would entail stoppage of the allowance—19 All 50. The words 'alteration in the allowance' clearly indicate that the section refers to such change of circumstances as would necessitate only an alteration in the amount of allowance, and not to circumstances (e.g., divorce) which entail the discontinuance of allowance altogether—5 All 226 (per Mahmood J). Circumstances which necessitate not merely an alteration in the allowance but a cancellation of the order of maintenance do not come under this section but should fall under subsection (5) of section 488, and that subsection should be made much more comprehensive in its terms so as to include those circumstances. See Note 1286 under section 488, under subheading 'other cases'. But the Madras High Court has held in a recent case that the word 'alteration' includes cancellation. The reduction of the maintenance allowance to nothing (which is the same thing as cancellation of the order granting maintenance) would come within the meaning of the word 'alteration'. Therefore a Magistrate can, under this section, cancel the allowance granted to the daughter, if she has since been married and has thus become able to maintain herself by reason of her marriage—*Meenakshi v. Karuppanna* 48 Mad 503 48 M L J 183 26 Cr L J 732

The growth of the child, or the birth of another child, or the death of a child is a change in the circumstances—12 Mad 398, 12 Cal 535. The fact that the children are grown up and are no longer unable to maintain themselves amounts to a change in the circumstances—10 Cr L J 160 (Bur.), 9 L B R 49. Where a divorced Mahomedan wife has married again, the fact that the second husband has merely undertaken to maintain her child by the first husband, does not empower the Magistrate to cancel the order of maintenance passed against the first husband to maintain his child. There is no such change of circumstances as is contemplated by this section—27 All 11. The second husband is not bound by law to maintain the child, perhaps he may refuse to maintain

it any day. So the change of circumstances in this case is not such as can be relied upon.

The change of circumstances must be actual and of such a nature that the law would recognise it. The mere fact that the wife might possibly be able to earn something by her own labour is not a ground on which the husband may apply for reduction of the rate of allowance—1897 A. W. N. 107, because the law does not compel a wife to work for her livelihood, while her husband is living and has sufficient means to maintain her. If the parties subsequent to an order under sec. 488 make an agreement modifying its terms, such agreement would amount to a change in the circumstances, and the party interested can apply under this section and get the order modified—25 All. 165.

1296 Alteration of allowance:—Is to whether 'alteration' means cancellation, see Note 1295 above.

An order of alteration of allowance under this section cannot take effect retrospectively. The Magistrate has no power to reduce the rate of maintenance which has already accrued due. His order will take effect in respect of the allowance that will fall due after the date of the order—2 Weir 650. The arrears which have fallen due will be enforced at the rate originally fixed.

When an application for modification of the allowance has been preferred under this section the Magistrate cannot inquire into the propriety or otherwise of the previous order of maintenance—2 Weir 650.

An application for alteration of allowance is no ground for staying the execution of an order of maintenance already granted, as that order carries with it all the proper consequences so long as it remains in force—22 Cal. 291.

The amount of maintenance payable to each person must be specified, otherwise it cannot be altered. See 9 I. B. R. 49 cited under Sec. 488 under heading 'Amount of maintenance'.

Sub-section (2)—See Note 1290 under section 488 under heading 'Effect of subsequent decree'.

490 A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid, and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non payment of the allowance.

1297 Who can enforce order:—An order under Sec. 488 can be enforced by a second class Magistrate, if the person against whom the order is passed resides within his jurisdiction—Ratanlal 288.

The words 'any Magistrate of any place where the person against whom it is made may be' do not deprive the Magistrate who has made the order of his power to enforce the order under Sec 488 (3). When the defendant is beyond his jurisdiction, he may issue a warrant for collection of the arrears of maintenance, or refer the applicant to the Magistrate having jurisdiction at the place where the defendant is to be found—4 Mad 230. The application for an order to enforce the recovery of maintenance may be made either to the Magistrate who passed the original order or to the Magistrate having jurisdiction over the place where the person resides. The provisions of this section cannot be held to derogate from the provisions of sec 488 (3)—7 L B R 116.

Powers and Duties of the Magistrate—It has been held in 25 All 165 that a Magistrate to whom an application has been made to enforce an order of maintenance, should not take into consideration anything further than the identity of the parties and the nonpayment of the allowance. He may also consider whether the person (in case of Mahomedans) to whom maintenance is ordered still holds the position of wife. But no further steps relaxing the clear words of Sec 490 should be allowed. The fact that the parties had made an agreement subsequent to the order modifying its terms is not a matter for the consideration of the Magistrate enforcing the order. If the person against whom an order for maintenance is made considers that such order should no longer be in force against him, it is for him to apply under Sec 489 and get the order altered. It is not suitable or expedient that it should be open to a second Magistrate to call in question an order duly given upon proof.

But a wider view has been taken in 10 Mad 13. In this case it has been held that where in answer to an application for enforcement of an order of maintenance, the husband pleads that the claim has been released, the wife having received a lump sum in satisfaction of her claims for maintenance, the Magistrate enforcing the order is competent to consider such plea, and if it is proved, to refuse to enforce the order.

But there can be no doubt that the Magistrate enforcing the order should take into consideration the question whether the person to whom the order has been given is, at the time she makes the application, still holding the position of wife (i.e., has not been divorced), on this point, there is no conflict of opinion between the High Courts. See 25 All. 165, 19 All 50, 1894 P R 21, 17 O C 260, 1915 U B R 1st Qr 53.

The Magistrate enforcing the order is also bound to consider a Civil Court decree passed subsequent to the order of maintenance. If the Civil Court has decided that the complainant is not and never had been the wife of the defendant, the Magistrate must refuse to enforce the order for maintenance—9 O C, 49. For further notes as to the effect of Civil Court decree, see Note 1290 under sec 488.

CHAPTER XXXVII

DIRECTIONS OF THE NATURE OF A HABEAS CORPUS

491 (1) The High Court may, whenever it thinks fit

Power to issue direct, direct,
tions of the nature of a
habeas corpus.

- (a) that any person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law,
- (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty,
- (c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court,
- (d) that a prisoner detained as aforesaid be brought before a Court martial or any Commissioners acting under the authority of any commission from the Governor General in Council for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively
- (e) that a prisoner within such limits be removed from one custody to another for the purpose of trial, and
- (f) that the body of a defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section

(3) Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation, 1818, Madras Regulation II of 1819 or Bombay Regulation XXV of 1827, or the State Prisoners Act, 1850, or the State Prisoners Act, 1858

1298 Scope—This section has been amended by sec 30 of the Criminal Law Amendment Act XII of 1923 Under the old law, power under this section was given only to the High Courts at Calcutta Madras and Bombay, under the present section power is given to all High Courts Under the old law, the jurisdiction of the High Court in respect of

proceedings under this section was confined to the limits of its original jurisdiction (44 Cal 76 and 46 Cal 52), under the present section the jurisdiction has been extended to mofussil places See 43 M L J 396 (F B) So also, the Criminal Appellate Bench of the High Court has power so dispose of applications under this section—*Subodh Chandra v Emp.*, 29 C W N 98 52 Cal 319 26 Cr L J 625

The investment of the extraordinary powers of *habeas corpus* in a High Court does not take away from the litigants their ordinary rights which they have under the Civil Law Therefore a refusal by the High Court to exercise the powers under this section to recover the custody of a child will not deprive the applicant of his right to seek his remedy either by means of an application under the Guardians and Wards Act or by means of a regular suit—*Sara Lay v Leo Boon*, 4 Bur L J 269

This section does not apply to a case where there has been a conviction and sentence Where there has been a conviction and sentence, the proper course, if there is a miscarriage of justice, is to take the matter to the Crown for remedy—44 Cal 723 (F B)

High Court's power not taken away by the Extradition Act—The High Court's power to issue a writ of *habeas corpus* has not been taken away by the procedure provided in the Indian Extradition Act, sec 3 sub-sections (6) and (7)—46 Cal 52 The High Court has power to issue an order and to examine whether a person detained in public custody under the Extradition Act is legally detained, and this power is not taken away merely because the Government have already issued a warrant for surrender under sec 3 sub-section (8) of that Act—*Rudolf Stollmann* 39 Cal 164

1299 Clause (b).—*Custody of children*—The High Court before passing an order in respect of a minor child, ought to take into consideration the interest and welfare of the child—*Zarabibi v Abdul* 12 Bom I R 891, *Sara Lay v Leo Boon* 4 Bur L J 269 The Court will not ordinarily force a child to remain in a custody to which the child objects, and before deciding as to its custody, the Court will take account of the wishes of the child, if it is old enough to form an intelligent preference—33 Mad 288 Where a mother had for eight years neglected her child who had been educated at a mission school, the High Court refused her application for custody of the girl aged 15 years, on the ground that, if granted, it would be detrimental to the welfare of the child—16 Bom 307 Where the father has delegated the guardianship of his children to another person, the question whether the father is entitled to resume the guardianship depends on the children's interests and welfare—*Annie Besant v Narayaniah* 38 Mad 807 (P C)

Appeal—When a petitioner obtains a rule calling upon the other side to show cause why a child should not be delivered to her, and the rule is discharged, the order discharging the rule is a judgment within the meaning of clause 15 of the Letters Patent, and is therefore appealable—14 Bom 555

491-A *In a High Court established by Letters Patent*

Powers of High Court outside the limits of appellate jurisdiction may exercise the powers conferred by Section 491 in the case of any European British subject within such territories, other than those within the limits of its appellate criminal jurisdiction as the Governor General in Council may direct

This section has been newly added by Sec 31 of the Cr Law Amendment Act 1923. By this section European British Subjects even when outside the limits of British India will get the privilege of obtaining writs in the nature of *Habeas Corpus* from the High Courts.

PART IX.

SUPPLEMENTARY PROVISIONS

CHAPTER XXXVIII

OF THE PUBLIC PROSECUTOR

492 (1) The Governor General in Council or the Local Government may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors

(2) * * The District Magistrate, or, subject to the control of the District Magistrate, the Sub divisional Magistrate, may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below *such rank as the Local Government may prescribe in this behalf*, to be Public Prosecutor for the purpose of any case

Change:—This section has been amended by section 133 of the Cr P C Amendment Act VIII of 1923. The following changes have been made—*Firstly* the words 'In any case committed for trial to the Court of Session' in the beginning of sub-section (2) have been omitted because the necessity of appointing a Public Prosecutor in the absence of that officer may arise not only in Sessions Courts but in all other instances. *Secondly* the italicised words have been substituted in place of the words 'the rank of Assistant District Superintendent,' because as there is a variety of nomenclature of the Police officers we think it better to leave it to the Local Governments to prescribe the rank of police-officers who may be appointed Public Prosecutors for the purposes of a particular case.—*Report of the Joint Committee (1922)*

In U P, all Joint Magistrates and Assistant Magistrates exercising first class powers have been empowered to prosecute in sessions trials—*Govt Notification, 31st December 1890*

But it is highly objectionable to appoint the Magistrate who in the first instance tried and convicted the accused to be Crown Prosecutor to conduct an inquiry subsequently directed in the same case. To convert a Judge into an Advocate seeking to uphold his decision before another tribunal is quite unprecedented and most objectionable as he has an interest in the case which a Public Prosecutor should not have.—8 B H C R 126

1300 Duty of Public Prosecutor:—The purpose of a Criminal

trial is not to support a theory but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the Police but the Crown and this duty should be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of any one else—*Ram Ranjan v Emp*, 42 Cal 422. There should be no unseemly eagerness on the part of the Prosecutor at securing a conviction. His object must be the furtherance of justice and not to act as counsel for any particular person or party—*Reg v Hashimath* 8 B H C R 126.

493 The Public Prosecutor may appear and plead with- out any written authority before any

Public Prosecutor may plead in all Courts in cases under his charge. Pleaders privately instructed to be under his direction. Court in which any case of which he has charge is under inquiry, trial or appeal, and if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein under his directions.

1301 *Pleader privately instructed*—The Counsel instructed and retained by a private individual can watch the case on behalf of his client, but he can not without being especially empowered by the District Magistrate, conduct the prosecution—O S C No 31. Where in a criminal appeal pending before the Chief Court of Panjab the brother of the murdered man appointed a pleader to support the conviction held that the pleader so appointed was not a Public Prosecutor—*Akbar v Emp* 1886 P R 29.

Where the Public Prosecutor has charge of the prosecution the pleader instructed by a private person shall act under the directions of the Public Prosecutor—*B A Ry Co Ltd v Shaikh Makhbul A I K* 1925 Pat 755. The Public Prosecutor may always avail himself of the services of the counsel retained by a private individual but in doing so he does not deprive himself of the management of the case—11 B H C R 102.

494 Any Public Prose-

Effect of withdrawal from prosecution. Governor General in Council or the Local Government may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before

494 Any Public Prose-

Effect of withdrawal from prosecution. Governor General in Council or the Local Government may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from

judgment is pronounced, with *either generally or in respect of*
draw from the prosecution of *any one or more of the offences*
any person, and upon such *for which he is tried, and upon*
withdrawal,— *such withdrawal,—*

(a) if it is made before a charge has been framed, the accused shall be discharged, *(a) if it is made before a*
charge has been framed, the
accused shall be discharged in
respect of such offence or
offences,

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted *(b) if it is made after a*
charge has been framed, or
when under this Code no charge
is required, he shall be acquitted
in respect of such offence or
offences

Change—This section has been amended by section 134 of the Cr P C Amendment Act XVIII of 1923. The reasons are stated below

1302 Scope of Section—Under the old law this section applied only to Public Prosecutors appointed by Government. A Prosecutor especially appointed by the Magistrate, under sec. 492 (2) to conduct a case had not the power to withdraw from the prosecution under this section—8 All 291 2 Weir 653. A Government Pleader who was not appointed a Public Prosecutor under the provisions of sec. 492 (1) could not withdraw from the prosecution under this section. He could withdraw only under section 240 *ie* only in cases where several charges had been preferred against the same person and he had been convicted on one of those charges—2 Weir 258. The present section as now amended will confer the power of withdrawal on all Public Prosecutors.

No person other than the Public Prosecutor can withdraw from the prosecution even a Vakil acting under the directions of the Public Prosecutor cannot do so. But if the prosecution is withdrawn by the Public Prosecutor and the Vakil, and the application for withdrawal of the case is signed by both the persons the withdrawal is not invalid—46 Cal 700.

This section (as well as section 495) does not apply to security proceedings. It applies only to proceedings which can end in a discharge or acquittal of the accused, but security proceedings do not contemplate the frame of a charge at all, and as a result of the proceedings neither an order of discharge nor one of acquittal is passed therein. Hence sections 494 and 495 cannot apply to security proceedings—36 Mad 315.

1303 Withdrawal from prosecution—The Public Prosecutor cannot withdraw a case on the ground that the complainant was keeping out of the way and could not be served with summons. He should take steps to enforce his attendance—2 Weir 655.

The complainant has no *locus standi* in the matter of withdrawal of a prosecution. When a case has been started upon a police report, and the Court Sub-Inspector (who is the Public Prosecutor) wants to withdraw the case, the Court cannot reject the application for withdrawal simply because the complainant wants to proceed with the case—1 P L T 400.

Withdrawal of some of the charges—Under the old section, a Public Prosecutor was not competent to withdraw only one of the charges. If he withdrew at all he had to withdraw all the charges. Where one of the charges was withdrawn, and the accused was tried on the other charges, the High Court ordered the trial on the charge withdrawn—2 C L J 18 (n). But the law has now been changed, and this section empowers the Public Prosecutor to withdraw one or some of the charges.

Record of reasons—When a Court, acting under this section gives its consent to a withdrawal from a prosecution, it should record its reasons in an order that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised—22 C W N 69, 48 Cal 1105, 26 C W N 880, *Sugan Chand v Chummal*, 6 N L J 177, *Abdul Gani v Abdul Hadir* 2 Bur L J 287. The Madras and Patna High Courts hold that it is not necessary that the reasons are to be recorded by the Judge—5 M L T 216, *Gulli Bhagat v Naram Singh*, 2 Pat 708.

1304 Acquittal:—If the Public Prosecutor withdraws from the case after a charge is framed, he must be acquitted under clause (b), and not discharged—12 Mad 35. Where therefore a prisoner, the charge against whom was withdrawn by the Public Prosecutor was discharged, instead of being acquitted, and was again committed to the Sessions on a second charge for the same offence, it was held that the conviction was bad in law—12 Mad 35. In a summons case, an order of discharge under this section amounts to an order of acquittal—*Vid Singh v Emp* 24 Cr L J 433 (Lah).

Where a person is acquitted, on the charge being withdrawn by the Public Prosecutor, the acquittal should be recorded without taking the opinions of the assessors. An acquittal is a matter of right to the accused, whatever might be the opinions of the assessors—*Ratanlal* 307.

Retrial—An order of acquittal under this section bars a retrial for the same offence by virtue of sec 403—9 N L R 26, 40 Mad 976, 18 Cr L J 329 (Mad), 23 Cr L J 305 (Sind).

Accused a competent witness against co-accused—When a prosecution against a person has been withdrawn under this section, he can be examined as a witness in the case against his other co-accused—25 Bom 422, 33 Cal 1353, 47 Cal 154.

But the prosecution must be withdrawn and the accused discharged under this section, before he can be examined as a witness against his co-accused, because so long as he is in the position of an accused, no oath can be administered to him under sec 342 (4), and he cannot therefore be examined as a witness. Where the Court sanctions the withdrawal of a prosecution but omits to record an order of discharge, and the accused

continues to be kept in custody, his position is in no way changed from that of the accused, and he cannot be examined as a witness—33 Cal 1353. But if the accused was in fact discharged from custody by virtue of withdrawal from prosecution, the omission to record a formal order of discharge would be cured by sec 537, and the accused would be a competent witness against the other accused—7 A L J 86, 15 C W N 1213.

1305 Revision:—The High Court is in a position to consider whether the discretion vested in the Magistrate to give consent to the withdrawal of a prosecution has been rightly exercised—*Kajani Lunda v Hiss* 48 Cal 1103, 25 C W N 615, 26 C W N 880, 2 P L T 400.

But where good reasons have been shown by the Court below for allowing the withdrawal of a prosecution, the High Court will be slow to interfere in revision against the order allowing the withdrawal—24 Cr L J 5 (Cal). Where the Sessions Judge has exercised his discretion in refusing permission to withdraw a case, and he has not improperly exercised that discretion, the High Court would be very reluctant to interfere with his discretion—*In re Kakhappa* 23 L W 101, 27 Cr L J 334. Where a discretion has been exercised by a Court of competent jurisdiction, which is not on the face of it arbitrary, the practice of the High Court is that as a revisional Court it will neither inquire into the reasons nor interfere. Specially where the Court has acquitted the accused upon withdrawal of the charges the High Court would not be right in interfering except upon a properly constituted appeal preferred by the Local Government under sec 417—*Gulab Bhagat v Varan Singh* 2 Pat 708 (710) 5 P L T 404, 25 Cr L J 446. A I R 1924 Pat 281 5 M L T 216. *Abdul Gani v Abdul Kadir* 2 Bur L J 28.

When a charge is withdrawn and the accused is acquitted, it is not competent to the revisional Court to consider the question of the legality of the charge. A number of persons were charged before the Magistrate with the offence of robbery. The Public Prosecutor withdrew the charge, and the Magistrate recorded an order of acquittal. On revision, it was contended that the charge of robbery was wrong in as much as more than five persons were implicated in the act, and the Magistrate ought to have framed a charge of dacoity, and therefore the acquittal on the charge of robbery was wrong. The High Court refused to enter into the question as to the legality of the charge, and held that the Magistrate's procedure was right. There being a charge before him, and that charge having been withdrawn, he acted rightly in recording an order of acquittal—2 A L J 30.

The High Court will not interfere with the order of acquittal passed by the trial Court under this section at the instance of a private prosecutor if the Court has allowed the Public Prosecutor to withdraw the case upon insufficient or improper grounds and has passed an order of acquittal. The private prosecutor cannot be heard to object to it in revision. The Local Government is the only authority who can take action for the correction of that error—*Gulab Bhagat v Varan Singh* 2 Pat 708 (711) 5 P L T 404, 25 Cr L J 446.

Further inquiry—Where the order of discharge under this Section is a proper one, no further inquiry should be directed under sec 436—*Sitaramayya v. Emp.*, (1911) 2 M. W. N. 74. But a fresh complaint can be made on fresh materials.

495 (1) Any Magistrate inquiring into or trying any case may permit the prosecution to be

conducted by any person other than an

officer of police below a rank to be prescribed by the Local Government in this behalf * * *

but no person, other than the Advocate General, Standing Counsel, Government Solicitor Public Prosecutor or other officer generally or specially empowered by the Local Government in this behalf shall be entitled to do so without such permission.

(2) Any such officer shall have the like power of withdrawing from the prosecution as is provided by Section 494, and the provisions of that section shall apply to any withdrawal by such officer.

(3) Any person conducting the prosecution may do so personally or by pleader.

(4) An officer of police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted.

The words 'with the previous sanction of the Governor General in Council' have been omitted by the Devolution Act (XXVIII) of 1920.

1306 Permission to conduct prosecution—The permission of the Magistrate is discretionary and the High Court will not interfere with such discretion. Where a Magistrate has, after due consideration, exercised the discretion and allowed counsel to appear on behalf of the prosecution, the High Court cannot as a Court of Revision overrule the order of the Magistrate and direct him to refuse to allow counsel to appear—2 Weir 655. Similarly where the District Magistrate considers that the too frequent appearance of pleaders for the prosecution in petty criminal cases is detrimental to the interests of justice, he can refuse to permit the prosecution to be conducted by a pleader and the Chief Court will decline to interfere with the order of the District Magistrate—1905 1 R. 6.

Who can be permitted—The Magistrate is not precluded from exercising in exceptional cases his discretion by allowing private Vakils of good character to conduct the prosecution—12 M. I. J. 354. The words 'any person' include persons other than certificated pleaders. It is however discretionary with the Criminal Courts in each case to permit such persons to conduct the prosecution—*Mid. H. C. Proc.* 1904-1882.

The fact that a certain person is also a Prosecuting Inspector does not deprive him of his right as a private citizen, and he may in his private

capacity ask for permission to prosecute in his case—10 Bur L T 213 So also, the fact that a particular person is a complainant is not a sufficient ground for not permitting him to prosecute the case—Ibid But it is doubtful whether the words 'any person' would include an absolute stranger who had no connection in the remotest degree with the prosecution and whose desire to help the prosecution was based on a personal grudge only—11 A L J 313

If the offence be of a nature affecting the public (e.g. rioting or unlawful assembly) which the Crown alone in the interests of public peace and security has a right to conduct, a private person should not be permitted to conduct the prosecution—18 Cr L J 329 (Mad)

Under a notification of the Madras Government all superior police officers above the rank of a first class Head constable in charge of a police station are generally empowered to conduct the prosecution without even the permission of the Magistrate under sub section (1) such officers would be entitled under sub section (2) to withdraw from the prosecution with the permission of the Court as mentioned in section 494—*Anantharama v Muthia Thera*, 1914 M W N 776

Sub section (2) — Iny such officers—These words refer only to the Advocate General Standing Counsel etc., mentioned in sub section (1) If any person other than these officers (e.g. an Advocate privately engaged by the complainant and permitted by the Magistrate) withdraws from the prosecution the effect provided in sec 494 does not follow, in other words the trial will proceed—1908 U B R 1st Qr (Cr P C) 15 see also 1911 M W N 106

Sub-section (3) —A person whether a private complainant or not when he is permitted to conduct the case as prosecutor, may instruct a counsel to appear—11 B H C R 102

It is not open to a Magistrate to decline to allow the complainant, who is conducting the prosecution, to have a particular pleader of his own choice This section does not authorise the Magistrate to take the prosecution out of the hands of the pleader of the complainant and to assign it to some other person who is not the Public Prosecutor—*Ghadilly v Emp*, 18 S L R 30 25 Cr L J 571

1307 Sub section (4) —Exclusion of Police officer—In all important cases and specially in cases of murder and dacoity, the police-officer making the investigation should be examined as a witness regarding the circumstances of the investigation For this reason he is debarred from conducting the prosecution—*Ranlal* 173 Where the police-officer who conducted the investigation by arresting the accused and seizing the property found, was allowed to conduct the prosecution, it was held that such a procedure was highly improper but since in this case the accused were not prejudiced thereby, the irregularity did not vitiate the trial but was cured by section 537—26 Bom 533

CHAPTER XXXIX

OF BAIL

496 When any person other than a person accused of a non-bailable offence is arrested or

In what cases bail to be taken.

detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail. Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

Provided, further, that nothing in this section shall be deemed to affect the provisions of Section 107 sub-section (1), or Section 117, sub-section (3)

Change:—The second proviso has been added by section 13, of the Cr P C Amendment Act XVIII of 1923. For notes relating to this proviso, see Note 240 under sec 107.

1308 Grant of bail—This section is imperative in its terms and the Court is bound to comply with its provisions. In every bailable offence bail is a right and not a favour. Detention in the lock up is the alternative, not the original, order—32 Cal 80, 6 C P L R 31. When a man who is arrested is not accused of a non-bailable offence, no needless impediments should be placed in the way of his being admitted to bail. The intention of the law is that in such cases the man is ordinarily to be at liberty, and it is only when he is unable to furnish such moderate security, if any is required of him, as is suitable for the purpose of securing his appearance before a Court pending inquiry, that he should remain in detention—*Emp v Mir Hashamali* 20 Bom L R 121. The Magistrate cannot refuse to pass an order of bail on the ground of expediency and of the inability of the accused's pleader to show a provision in the Code how he could claim a bail—6 C P L R 31.

When the Police arrests a person under sec 53, he should be given the option of bail—14 All 45.

Where a person arrested under Chap VIII claims a bail he is entitled to bail as a matter of right—6 C P L R 31, 32 Cal 80, 36 Mad 474, 20 Bom L R 121.

Refusal of bail—If the Magistrate refuses to grant bail, he must record his reasons for such refusal. In the absence of any record of reasons the High Court in revision granted bail—14 C W N 111.

If the Magistrate improperly refuses bail, no objection can be taken—14 C W N 111.

him for such improper refusal. The duty of a Magistrate in accepting or refusing bail is not merely a ministerial but a judicial duty. A mistake in the exercise of that duty, without malice, will not sustain an action—2 M H C R 396

Court to decide sufficiency of bail—When the bail is ordered by the Court, the duty of deciding as to the sufficiency or otherwise of the bail is with the Court itself and not with the police. If such duties are irregularly entrusted to police, two dangers are likely to arise: first a police officer may sometimes be unscrupulous enough to take advantage of the power entrusted to him for the purpose of extortion; and secondly the bringing of false charges against the police. But the Court when it admits a man to bail is at liberty to call for a report from the police as to the sufficiency of the bail—15 Cal 455

1309 Bond—Bail means security with sureties, whereas the bond referred to in the first proviso is a simple recognizance of the principal without any surety.

Bond of agent—Where the personal attendance of the accused is dispensed with, a recognizance bond if deemed necessary, should be taken from him (and not from his agent) binding him to appear, either in person or by agent. A Magistrate has no legal authority to secure the attendance of the agent by a bond taken from the agent—5 B H C R 64. The Magistrate wants the accused and not his agent, and therefore the bond is to be executed by the accused himself and not by his agent although he may appear by agent.

497 (1) When any person accused of any non-bailable offence is arrested or detained without

When bail may be taken in case of non-bailable offence

warrant by an officer in charge of a police station or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life.

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(1) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2) shall record in writing his or its reasons for so doing

(4) If at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused if he is in custody on the execution by him of a bond without sureties for his appearance to hear judgment delivered

(5) A High Court or Court of Session and in the case of a person released by itself any other Court may cause any person who has been released under this section to be arrested and may commit him to custody

Change.—This section has been amended by section 136 of the Criminal Pro Code Amendment Act XVIII of 1923. In sub-section (1) the words "an offence punishable with death or transportation for life" have been substituted for the words "the offence of which he is accused". The proviso and sub-sections (3) and (4) have been newly inserted and the italicised words in sub-section (5) have been added. It was pressed upon us that the provisions as to bail in non-bailable cases are much too stringent. One suggestion made to us was that in section 497 we should delete all words after "may be released on bail" in sub-section (1) and the whole of sub-section (2). The result would have been to give all Courts full discretion in the matter of allowing bail in non-bailable cases, and we felt generally that this was going too far. What we have done is to allow the Court or police officer to release on bail in a non-bailable case unless there appear to be reasonable grounds for believing that the accused has been guilty of an offence punishable with death or transportation and, as some safeguard against this we have provided in sub-section (5) for a review by the Sessions Court or the High Court of any order admitting to bail in a non-bailable case.—*Report of the Joint Committee (1922)*

1310 Principle.—Under the old section the general rule was that bail was not to be taken in respect of non-bailable offences—8 Bom 1 R 420, 36 Cal 166 10 S I R 208 2 Weir 657. Under the present section, the Legislature by defining the offences under which bail is not to be granted (*viz* offences punishable with death or transportation) has practically laid down that bail *should ordinarily* be granted and that only in respect of heinous offences it will be refused. This cannot but be regarded as the result of a liberating influence on the policy of the Legislature, and the discretion of the Courts will henceforth be less fettered than before.—*In re Nagendra Nath* 51 Cal 402 (417)

As the law stands now, it is no longer the case that bail ought to be refused merely because the offence is a non-bailable one. That rule is now restricted to offences punishable by death or transportation for life.

The mere fact that the offence is a serious one is not a ground for refusing bail. Where the accused is an old man of 70 and is a Government servant and it is found that if he is not released on bail there would be nobody to instruct his counsel in going through the documentary evidence and thus he would not be able to make a proper defence, *held* that bail should be granted—*Abhram Bal v Emp* 28 O C 220 12 O L J 394 26 Cr L J 1286

Reasonable grounds for believing etc—The section says nothing about taking into consideration the likelihood of the accused person absconding. All that the Court has to consider is whether there are reasonable grounds for believing that the accused is guilty—6 L B R 172. Other considerations may arise in deciding the question as to granting bail, and one of those considerations is whether there are any grounds for supposing that the accused would abscond. But the main question for consideration in determining matters of bail is whether there are reasonable grounds for believing the accused to be guilty—*Janum v A F* 36 Cal 174. Whether there are reasonable grounds or not for believing that the accused is guilty must be decided judicially, that is to say, there must be tangible evidence on which if un rebutted, the Court might come to the conclusion that the accused might be convicted—36 Cal 174.

The phrase 'an offence punishable with death or transportation for life' is ambiguous and is not a particularly elegant expression from a grammatical point of view. This phrase is intended to cover only offences which are punishable with death as well as in the alternative with transportation for life i.e. it covers those offences in which either punishment may be inflicted at the discretion of the sentencing Court. The phrase is not intended to be disjunctive; if it were so intended, the legislature would have used the expression 'offence punishable with death, or with transportation for life'. Therefore, the phrase does not cover offences which are punishable only with transportation for life—*Id Euzof v A F*, 3 Rang 538 27 Cr I J 401 A I R 1926 Rang 51.

The discretionary power of the Court to admit to bail is not arbitrary but is judicial and is governed by established principles. The object of the detention of the accused being to secure his appearance to abide the sentence of law, the principal enquiry is whether a recognizance would effect that end. In seeking an answer to this enquiry, Courts have considered the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence and in some instances the character, means and standing of the accused—*In re Nagendra Nath* 51 Cal 402 (416) 38 C L J 388.

Magistrates are bound to consider the nature of the offence charged, the character of the evidence against the prisoner, and the punishment which the event of conviction is likely to be inflicted on the prisoner. Again, while mere vague allegations that the prisoner if released will tutor witnesses should not be taken into account, the Magistrate may well refuse to enlarge on bail where the prisoner is of such a character that his presence at large will intimidate witnesses or where there are

reasonable grounds for believing that he will use his liberty to suborn evidence—*Mad Eusoof v K E*, (supra)

Proviso:—"This clause provides for the grant of bail in any case at the discretion of the Court, if the accused is a minor, female, sick or infirm person"—*Statement of Objects and Reasons* (1914)

1311 Sub section (2)—Bond for appearance:—When a Police officer takes a bond under this section, he has power to make it a condition of the bond that the accused person shall appear before the police the law does not require that the accused person shall always be directed to appear before a Court. When the law enables a Police officer to take bonds, that officer can certainly direct the accused to appear before the police. To hold otherwise would be to render secs 499 and 514 meaningless—1913 P R 22. But in 11 Cal 77 it has been held that a bond for appearance before a Police officer is void.

1312 Sub section (4).—This sub section did not occur in any of the Bills but has been added during the course of the Debate in the Legislative Assembly. The reason has been thus stated by Mr Rangachariar on whose motion the amendment was carried. The reason for this amendment is this. As Honourable Members are aware, at the conclusion of the trial in the original Court, oftentimes judgment is not ready for delivery at once, but the Court has come to the conclusion, after taking the verdict of the assessors or the jury in a Sessions trial or the Magistrate has made up his mind, that the accused is not guilty and therefore proposes to acquit him. As sections 366 and 367 stand, a doubt has been expressed whether really the accused could be set at liberty before judgment is actually pronounced. In fact an unfortunate client of mine was acquitted like this and judgment was delivered a week later. The complainant took the matter up to the High Court and a Full Bench had to sit to consider the question whether the whole trial was not vitiated by such a procedure. In order to avoid such things this provision is necessary.—*Legislative Assembly Debates* 12th February 1923 page 2206

The Full Bench case referred to by Mr Rangachariar is *Sankaralinga v Narayan* 45 Mad 913 (F B). In this case a trial was held with the aid of assessors, and they gave their opinions that the accused were not guilty. The Sessions Judge then wrote a short note setting forth the findings of the assessors, and adding his own finding agreeing with the assessors that the accused were not guilty, and they were acquitted. At a later date he wrote a full reasoned judgment. Held by the Full Bench that the procedure was a mere irregularity curable by section 537.

The present sub-section validates such procedure, making it conditional on the accused to execute a bond for appearance when judgment is to be delivered.

1313 Sub section (5):—Cancellation of bail.—The Magistrate cancel any bail allowed to an accused person and direct him to surrender if it appears on the production of further evidence that a case is made against him—10 C W N 1093, 36 Cal 173. The High Court of Session can cancel a bail granted by the Subordinate

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1313 Sub section (5):—Cancellation of bail—The Magistrate can cancel any bail allowed to an accused person and direct him to surrender, if it appears on the production of further evidence that a case is made out against him—10 C W N 1093 36 Cal 174. The High Court and the Court of Session can cancel a bail granted by the Subordinate Court.

But the District Magistrate has no power to cancel a bail and order the re-arrest of a person released on bail by a Subordinate Magistrate—4 Bur L T 70 Subsection (5) gives that power only to the High Court and the Court of Session

Under this clause, the powers of the High Court are confined to cases of persons released by the Trial Magistrate. Therefore, there is no jurisdiction in the High Court to entertain an application under this clause against an order granting bail passed by a Sessions Judge in a case pending before a sub-Magistrate. But under sec 561A the High Court has inherent power to interfere with an order granting bail passed by a Sessions Judge—*Local Govt v Gulam Jilani*, 25 Cr L J 1363 (Nag)

1314 Revision:—The proceedings in which it is, or has to be determined whether bail from an accused person should be taken or not, fall within the definition of "judicial proceedings" and the High Court has power to interfere with the orders made in such proceedings when they prove to be illegal—6 Mad 63. But the District Magistrate cannot revise any order as to bail passed by a subordinate Magistrate under this section. If the District Magistrate considers the subordinate Magistrate's order to be wrong, he should report it to the High Court—22 Bom 549

Even the High Court's power of interference is limited. The High Court has jurisdiction to interfere in revision, only if the Judge has passed an illegal order. Where a Sessions Judge after considering the evidence thinks that there are no reasonable grounds for believing the accused to be guilty of the offence of which he is accused, and releases him on bail, the High Court will not go behind this finding and cancel the order of the Judge releasing the accused on bail—10 M L J 411, 3 A L J 419. The High Court will be very cautious in interfering with the discretion of a Magistrate in case of bail under sec 497, especially where the prosecution has not tendered evidence to connect the accused with the offence—*Ratnmal* 892

498 The amount of every bond executed under this

Chapter shall be fixed with due regard

Power to direct admission to bail or reduction of bail.

to the circumstances of the case, and shall not be excessive; and the High

Court or Court of Session may, in any

case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Magistrate be reduced

Scope of section:—Under this section the High Court can only release the accused on bail or reduce the amount of bail, but cannot order the arrest or commitment to custody of any person who has been released on bail by the lower Courts—*Local Govt v Gulam Jilani* 25 Cr L J 1363 (Nag)

Amount of bond—The amount of bond should be fixed with reference to the social status of the party concerned—2 L B R 235

1315 Power of High Court to grant bail: This section gives the High Court and the Court of Session very wide powers to admit an accused person to bail in any case even when he is charged with a non-bailable offence—*K E v Badri Prasad*, 5 A L J 419, 1882 A W N. 234, 2 Weir 657, 7 Bur L R 86 The powers of the High Court or the Court of Session given by section 498 are not controlled by the statutory limitation laid down in Sec 497 of refusing bail if there appear reasonable grounds for believing the accused to be guilty of an offence punishable with death or transportation for life The powers in Sec 498 are not fettered by any rules defining the limits within which they would be exercised, as the powers under Sec 497 are—*Bishambhar Nath v Emp*, 11 O L J 527 1 O W N 281 25 Cr L J 1132 But the Calcutta High Court holds that although the power of the High Court under this section to grant bail 'in any case' is quite unfettered, still in exercising its discretion the High Court ought to take into consideration the limitations imposed by Sec 497—*Emp v Sourindra* 37 Cal 412 This case has been followed by the Nagpur Court in *Sh Karim v Emp* 27 Cr L J 319 (But now the limitations imposed by Sec 497 are very few) The rule laid down in sec 497 for the guidance of Courts other than High Courts is a rule founded upon justice and equity and one which should be followed by the High Court as well as by every other Court, unless anything appears to the contrary The extended powers given to the High Court under Sec 498 are not to be used to get rid of this very reasonable and proper provision of the law—42 Cal 25 In another case the Calcutta High Court has held that in exercising its discretion under sec 498 the High Court should not confine its attention to the question whether the prisoner is likely to abscond or not Other circumstances may also affect the question of granting bail to accused persons charged with crimes of a grave character—*Narendra Lal Khan v Emp*, 36 Cal 166 13 C W N 43 9 Cr L J 375 The Rangoon High Court holds that although the High Court has absolute discretion in the matter of granting bail, and is not bound by the provision of sec 497, still the Legislature having placed the initial stage of dealing with crimes with Magistrates and having in fact enacted that persons accused of non bailable offences shall not be released on bail except under the terms of sec 497, the High Court is bound to follow the general law as a rule, and not to depart from it except under very special circumstances—*Boudville v King Emp* 2 Rang 546 (547), *Henderson v A F*, 6 L. B R 172 It has been held in Sind that the High Court when passing order under Sec 498 is not limited by the restrictions imposed by Sec 497, but when bail has been refused by the Sessions Court it should not be granted by the High Court unless special grounds are disclosed Bail should not as a matter of principle be taken in non bailable cases except in special circumstances what those special circumstances are is not capable of precise definition, and the discretion given under Sec 498 is one that should be exercised according to the exigencies of each case—

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1. 凡在本行开立存款账户的客户，均可向本行申请开立支票。
 2. 支票的有效期为自签发之日起六个月内。
 3. 支票的金额不得超过账户余额。
 4. 支票的签发人必须为账户持有人。
 5. 支票的收款人必须为本行客户。
 6. 支票的签发必须使用本行提供的支票簿。
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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1. The High Court of Justice, in the case of *Re M. J. J.*, [1965] 1 W.L.R. 1218, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, 1414, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1423, 1424, 1425, 1426, 1427, 1428, 1429, 1430, 1431, 1432, 1433, 1434, 1435, 1436, 1437, 1438, 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447, 1448, 1449, 1450, 1451, 1452, 1453, 1454, 1455, 1456, 1457, 1458, 1459, 1460, 1461, 1462, 1463, 1464, 1465, 1466, 1467, 1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1477, 1478, 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514, 1515, 1516, 1517, 1518, 1519, 1520, 1521, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, 1636, 1637, 1638, 1639, 1640, 1641, 1642, 1643, 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, 1655, 1656, 1657, 1658, 1659, 1660, 1661, 1662, 1663, 1664, 1665, 1666, 1667, 1668, 1669, 1670, 1671, 1672, 1673, 1674, 1675, 1676, 1677, 1678, 1679, 1680, 1681, 1682, 1683, 1684, 1685, 1686, 1687, 1688, 1689, 1690, 1691, 1692, 1693, 1694, 1695, 1696, 1697, 1698, 1699, 1700, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714, 1715, 1716, 1717, 1718, 1719, 1720, 1721, 1722, 1723, 1724, 1725, 1726, 1727, 1728, 1729, 1730, 1731, 1732, 1733, 1734, 1735, 1736, 1737, 1738, 1739, 1740, 1741, 1742, 1743, 1744, 1745, 1746, 1747, 1748, 1749, 1750, 1751, 1752, 1753, 1754, 1755, 1756, 1757, 1758, 1759, 1760, 1761, 1762, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, 1783, 1784, 1785, 1786, 1787, 1788, 1789, 1790, 1791, 1792, 1793, 1794, 1795, 1796, 1797, 1798, 1799, 1800, 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1826, 1827, 1828, 1829, 1830, 1831, 1832, 1833, 1834, 1835, 1836, 1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1

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an appeal bail is allowable bail can similarly be allowed in the case of a person against whom an order has been made under sec 118 and which order is liable to be revised by the Sessions Judge under section 123, sub-section (2)—*Imed Ali Sardar v Emperor* 50 Cal 969

The admission to bail is a matter within the discretion of the Sessions Judge and where the Judge uses his discretion with proper care, the High Court will decline to interfere—*A E v Badri Prasad* 5 A L J 419 8 Cr L J 49 *Sh Karim v Emp*, 27 Cr L J 319 (Nag)

499 (1) Before any person is released on bail or released on his own bond, a bond for such sum

Bond of accused and
sureties of money as the police officer or Court,

as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court, as the case may be

(2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

1317 Time and place—A bail bond must contain the time and place of appearance—1885 A W N 44

There is nothing illegal in requiring the accused to bind himself to appear from the date of the execution of the bail bond on every day until the case is disposed of. No notice is necessary before proceeding to enforce the penalty if default is made—6 M H C R App 38

Verbal direction to appear—By the terms of a bail bond the defendant bound himself to appear on the first inquiry or at other times required. He appeared on the first day of the inquiry and was verbally directed to appear on a subsequent date but failed to do so. It was held that the amount secured by the bond could be legally forfeited by reason of such non attendance—2 Weir 658

Omission of date by surety—Where in the bail bond the accused bound himself to appear on a specified date and below his signature was the undertaking by the surety that he would cause the accused's appearance, but this declaration did not mention the date for the accused's appearance. The accused having made default the security was forfeited. It was held that the bail bond and the undertaking by the surety should be read as one document, and the undertaking should be read as referring to the date mentioned in the portion of the bond signed by the accused, that the omission of date by surety was immaterial, and that therefore the security was rightly forfeited—19 Cr L J 687 (Nag)

Appearance before Police—The words 'until otherwise directed by the Police officer' shew that a bond under sec 497 may require the

Harchand v Crown 10 S L R 208 When the High Court is concerned with persons who have been actually convicted, the principle which will necessarily guide the High Court in granting bail will be whether there are reasonable grounds for believing that the convicts committed the offences in question—*Sh Karim v Emp.* 27 Cr L J 319 (Nag)

When High Court can grant bail—The High Court and the Court of Session can exercise their power of granting bail, as soon as the Police have arrested the accused and even before the case is sent up to the Magistrate—7 Bur L R 86 They can admit a person to bail even where he has been convicted and has not appealed—5 A L J 419 Where the accused obtained special leave from the Privy Council to appeal to that tribunal, and applied for bail to the Judicial Committee, and the Judicial Committee expressed an opinion that the matter should be decided by the High Court, whereupon the petitioner applied to the High Court for bail, held that the High Court had jurisdiction to make an order in the case releasing the accused on bail, pending the decision of the Privy Council—*Queen Empress v Subrahmaniam Ayyar*, 24 Mad 161 But when in a case the petitioner has no right to appeal to the Privy Council, and the High Court has no power to give leave to appeal to that tribunal the High Court cannot, after it confirms the conviction of the Court below, admit the petitioner to bail, simply because he proposes to apply (but has not yet applied) to the Judicial Committee for leave to appeal to the Privy Council It cannot do so even under clause 41 of the Letters Patent As soon as the High Court confirms the conviction on appeal or revision, it becomes *functus officio* and has no jurisdiction afterwards to grant bail in order that a petition for leave to appeal may be made to His Majesty in Council or until the petition for leave to appeal to His Majesty in Council is disposed of—*Tulsi Tehni v Emperor* 50 Cal 585 *Diwan Chand v King Emperor*, 1908 P R 15, *Hannantrao v Emp.*, 21 A L R 161 27 Cr L J 185

When High Court will not grant bail—Where the accused relies merely on a technical ground against the probability of his conviction, he should not be admitted to bail—Rianaji 480 The High Court refused to grant bail where the application for bail contained defamatory statements and allegations consisting of attacks on the trying Magistrate and on the public and private conduct of other officers of high rank in the service of the Government—15 Bom 488

1316 Power of Sessions Judge—The Sessions Judge can grant bail to 'any person' who has been wrongly convicted by the Magistrate and whose case he can either deal with himself or can refer to the High Court But the words 'any person' do not include a person convicted by the Sessions Judge himself When a Sessions Judge, after convicting the accused, released them on bail pending their appeal to the High Court, it was held that he had no jurisdiction to do so This section does not give him power to alter or vary his own order—4 Bom L R 55

The Sessions Judge has power to admit the petitioners to bail in any case e.g., on a reference under section 123 (2) It stands to reason that if in the case of a person who is convicted and who has preferred

an appeal, bail is allowable, bail can similarly be allowed in the case of a person against whom an order has been made under sec. 118 and which order is liable to be revised by the Sessions Judge under section 123, sub-section (2)—*Ihmed Ali Sardar v Emperor*, 50 Cal 969

The admission to bail is a matter within the discretion of the Sessions Judge, and where the Judge uses his discretion with proper care, the High Court will decline to interfere—*K E v Badri Prasad* 5 A L J 419 8 Cr L J 49, *Sh Aarim v Emp*, 27 Cr L J 319 (Nag)

499 (1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court, as the case may be

(2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge

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Appearance before Police—The words 'until otherwise directed by the Police officer' shew that a bond under sec 497 may require the

accused to appear before the *Police* the direction as to appearance is not limited to appearance before a *Court*—1913 P R 22

500 (1) As soon as the bond has been executed, the person for whose appearance it has

Discharge from custody been executed shall be released, and, when he is in jail, the Court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the order shall release him

(2) Nothing in this section, Section 496 or Section 497 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed

501 If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they

Power to order sufficient bail when that first taken is insufficient. afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be

brought before it and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail

1318 Scope—This section applies only to a case where there were sureties. It does not apply where the accused was let out on his own bond without any surety—38 Mad 1088

Insufficient sureties—A Magistrate is justified in increasing the amount of bail if by further inquiry the case turns out more serious than he at first imagined—1912 P W R 4

502 (1) All or any sureties for the attendance and appearance of a person released on bail

Discharge of sureties may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him

(3) On the appearance of such person pursuant to the warrant or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so may commit him to custody

Where a surety has applied for cancellation of the bail bond and the Magistrate has received the application there is no other alternative left to the Magistrate than to cancel the bail-bond. There is no need to hear the application on the merits and the Magistrate cannot dismiss it because of the applicant's failure to attend and plead—9 Bom L R 1285

CHAPTER XL

OF COMMISSIONS FOR THE EXAMINATION OF WITNESSES

- 503 (1) Whenever, in the course of an inquiry, a trial or any other proceeding under this Code, it appears to a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay expense or inconvenience which, under the circumstances of the case, would be unreasonable such Magistrate or Court may dispense with such attendance and may issue a commission to any District Magistrate or Magistrate of the first class, within the local limits of whose jurisdiction such witness resides, to take the evidence of such witness
- (2) When the witness resides in the territories of any Prince or Chief in India in which there is an officer representing the British Indian Government, the commission may be issued to such officer
- (3) The Magistrate or officer to whom the commission is issued, or, if he is the District Magistrate, he or such Magistrate of the first class as he appoints in this behalf, shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers as in trials of warrant cases under this Code
- (4) Where the commission is issued to such officer as is mentioned in sub section (2), he may delegate his powers and duties under this commission to any officer subordinate to him

whose powers are not less than those of a Magistrate of the first class in British India

1319 Scope of section:—This section provides for the issue of a commission to examine a witness in British India or in the territories of any Prince or Chief in India in which there is an officer representing the British Government. This section does not provide for the examination of a witness residing outside India—5 Bom 338, *Emp v Ibidul* 49 Bom 878 27 Bom L R 1373, 10 Cr L J 571 (All)

This section relates to the issue of a commission and does not empower the trying Magistrate himself to go to the house of a witness to examine him—2 S L R 8

'In the course of inquiry'—A committing Magistrate is competent to examine a witness in the course of the inquiry before himself. But after making the order of committal he has no jurisdiction to issue a commission for taking evidence so that it might be available at the trial before the Court of Session or High Court. After a commitment is made applications for the examination of witnesses on commission must be made to the High Court or to the particular Judge exercising original criminal jurisdiction in the High Court or to the Court of Session as the case may be—19 Cal 113, 19 Bom 749

'Witness'—This section relates to commission for the examination of witnesses. In the preliminary stage of a proceeding a complainant is not a witness, and a commission cannot be issued for his examination. But if a complainant calls himself to testify to matters within his knowledge he will as regards such testimony be a witness for the prosecution and the issue of a commission for his examination is perfectly legal—1866 P R 10, 1913 P W R 11, 42 Cal 19

Witness residing within jurisdiction—There is nothing in the language of this section to support the contention that the Court has no authority to examine a witness on commission when he is within the Court's jurisdiction—6 Bom 285 24 Cal 551

Expert witnesses—Where an expert in handwriting appears to be the principal witness in the case, he ought not to be examined on commission but should appear before the Court—(1911) 2 M W N 97

1320 Pardanashin ladies—A *pardanashin* lady has a right, as a witness in a criminal case, to be exempt from personal appearance at Court and to be examined on commission—4 Cr 20. This section allows the examination on commission of a witness who is a *ghosha* woman, although she is practically the complainant—2 Weir 159. Although *pardanashin* women are not of right exempted from personal appearance at Court, the word 'inconvenience' in this section empowers the Court to allow their examination by commission where according to the customs and manners of the country they ought not to be compelled to appear in public—5 All 92. See also 1 S L R 5. An application by a *pardanashin* woman to be examined on commission on the ground that her appearance in Court would cause social degradation to her, was granted where she lived near the Court house and volunteered to pay the expenses of the

commission, and the opposite party did not insist on her examination in open Court—15 Cal 775, 24 Cal 551. Even a daughter of a prostitute is entitled to be examined on commission if she is *pardanashin* and living a married life, despite her lowly origin—1913 P W R 11.

In an Allahabad case, however, it has been held that it would be weakness to surrender as a general principle to be adopted that *pardanashin* ladies whose evidence is required in criminal trials are in all cases to be allowed to compel the Court to examine them on commission at some other place than the Court house itself. If it becomes imperatively necessary to take her evidence, the Magistrate should make arrangements, so as to take her evidence either in an empty Court room in the presence of himself, the accused, his pleader and the pleader for the prosecution, if there be any, or if no empty room is available, in his own private room or some other room in the Court building—12 All 69. In another Allahabad case it was held that where the *pardanashin* woman was not merely a witness but was also the complainant in a case of defamation (which gave both a civil and a criminal remedy), the fact that she avoided the civil remedy and chose to set the criminal law in motion materially altered her position as regards the question whether she should be exempted from personal appearance, and the accused had a right and a privilege to have her evidence taken in his presence in the Court—5 All 92.

1321 Delay, expense or inconvenience—The taking of evidence on commission in criminal cases ought to be most sparingly resorted to. Such a procedure may be adopted only in extreme cases of delay expense or inconvenience—5 All 92. If a witness is unable to attend the Court owing to illness (e. g. weak heart and a painful internal mildry) the proper course for the Magistrate would be to first ascertain whether it would be possible for the witness to come to Court within a reasonable time, and if not possible, then the Magistrate will have to reluctantly come to the conclusion that his evidence should be taken on commission—*Jamuna Singh v A E* 3 Pat 591 (514). Where the evidence of two witnesses was a most material one in the case in as much as they deposed to the identification of the stolen property, on which deposition the whole case depended, the witnesses ought not to have been examined on commission but their attendance before the Court ought to have been procured and the expense of Rs 500 in procuring their attendance was not considered to be unreasonable or excessive, having regard to the circumstances of the case—6 All 224.

May issue —Discretion of Court—The issue of a commission for examination is entirely in the discretion of the Court. In criminal cases the issue of a commission would be a most unsatisfactory course of proceeding and one dangerous to the interests of the community—8 Cal 866. The issue of commission is an unsatisfactory proceeding, because on the one hand the Court has no opportunity of noting the demeanour of witness, and on the other hand of controlling irrelevant and unnecessary or harassing cross-examination of the witness. The discretion to issue a commission should be sparingly exercised, and only in cases of real hardship and

inconvenience having due regard to the prejudice which is likely to be thereby caused to the opponent—*Ishnoo v Dipchand*, 27 Cr L J 89 (Sind)

1322 Sub section (4)—Delegation—This sub-section has been newly added to the Code in 1898 Under the Code of 1882, when a commission was issued to an officer representing the British Indian Government for the examination of a witness residing in a Native State, he could not delegate his powers and duties under the commission to his subordinate, but had to personally execute such commission—1896 A W N 106 The present sub section provides for such delegation

Commissioner cannot make complaint under sec 195—Although the commissioner appointed under this section may be a 'Court' for the purpose of issuing process against the witness and for recording evidence still he is not a 'Court' within the meaning of sec 195 Therefore where a witness gives false evidence before such commissioner, the proper authority to make a complaint for the prosecution of the witness for perjury is not the commissioner but the Court which issued the commission—11 C W N 909

504 (1) If the witness is within the local limits of the jurisdiction of any Presidency Magistrate, the Magistrate or Court issuing the commission may direct the same to such Presidency Magistrate, who thereupon may compel the attendance of, and examine, such witness as if he were a witness in a case pending before himself

(1A) When a commission is issued under this section to a Chief Presidency Magistrate he may delegate his powers and duties under the commission to any Presidency Magistrate subordinate to him

(2) Nothing in this section shall be deemed to affect the power of the High Court to issue commissions under the Slave Trade Act, 1876, Section 3

Change—In sub-section (1) the word 'such' has been substituted for 'the said,' and sub-section (1A) has been newly added, by section 137 of the Cr P C Amendment Act VIII of 1923 This clause enables a Chief Presidency Magistrate to delegate to a subordinate Presidency Magistrate his powers and duties under any commission issued in his name—*Statement of Objects and Reasons (1914)*

505 (1) The parties to any proceeding under this Code in which a commission is issued, may respectively forward any interrogatories in writing which the Magistrate or Court directing the commission may think relevant to the

Parties may examine witnesses

issue, and the Magistrate or officer to whom the commission is directed or to whom the duty of executing such commission has been delegated shall examine the witness upon such interrogatories

(2) Any such party may appear before such Magistrate or officer by pleader, or if not in custody in person, and may examine, cross examine and re-examine (as the case may be) the said witness

Change—The italicised words have been added by section 138 of the Cr P C Amendment Act XVIII of 1923. This amendment is consequential to the amendment made in sec. 504

506 Whenever in the course of an inquiry or a trial or any other proceeding under this Code before any Magistrate other than a Presidency Magistrate or District Magistrate it appears that a commission ought to be issued for the examination of a witness whose evidence is necessary for the ends of justice and that the attendance of such witness cannot be procured without an amount of delay expense or inconvenience which under the circumstances of the case would be unreasonable such Magistrate shall apply to the District Magistrate, stating the reasons for the application and the District Magistrate may either issue a commission in the manner hereinbefore provided or reject the application

1323 Where a case is pending before a subordinate Magistrate the District Magistrate cannot issue a commission for the examination of a witness in that case without a reference by the subordinate Magistrate under this section—2 S L R 8

507 (1) After any commission issued under Sec. 503 or Sec. 506 has been duly executed it shall be returned together with the deposition of the witness examined thereunder, to the Court out of which it issued and the commission the return thereto and the deposition shall be open at all reasonable times to inspection of the parties and may subject to all just exceptions be read in evidence in the case by either party and shall form part of the record

(2) Any deposition so taken if it satisfies the conditions prescribed by Section 33 of the Indian Evidence Act, 1872, may

inconvenience, having due regard to the prejudice which is likely to be thereby caused to the opponent—*Ishnoo v Dipchand*, 27 Cr L J 89 (Sind)

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507 (1) After any commission issued under Sec. 503 or Sec. 506 has been duly executed, it shall be returned together with the deposition of the witness examined thereunder, to the Court out of which it issued, and the commission the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record

(2) Any deposition so taken, if it satisfies the conditions prescribed by Section 33 of the Indian Evidence Act, 1872, may

is desirable and necessary that if there are previous convictions they should properly be proved—17 Cr L J 179 Magistrates are not absolved from the ordinary rules of evidence in taking proof of previous convictions Whenever it is required to prove a previous conviction against a man whether it be for the purpose of enhancement of punishment under section 75 I P C, or in proceedings under Chap VIII of the Cr P C, such previous conviction must be proved strictly and in accordance with law Unless it is so proved, no Court can properly take such previous conviction into consideration—43 Cal 1128

Previous convictions should regard being had to the provisions of this section, be proved by copies of judgments or extracts from judgments or by any other documentary evidence of the fact of such previous convictions, and the exemption of the accused in respect of those convictions is, having regard to sec 342, without legal warrant or jurisdiction—28 Cal 689, 28 Bom 129

When the previous conviction has been put to the accused and he denies it, the certified extract from the records of the Court in which he was convicted should be put in evidence, proof should be given that he and the person named therein are one and the same person and the Court should record a specified finding upon that point—1881 A W N 144 15 W R 53 But a mere *Koifiat* from the record office is not sufficient to prove a previous conviction—15 W R 53

Finger impression—The manner in which a previous conviction may be proved is not limited to the method laid down by this section Any relevant evidence upon which the Court can properly base a finding that the accused was on a previous occasion convicted of an offence will do as well as the methods indicated by this section Thus, a previous conviction may be proved by *finger impressions* See 3 N L R 1, 6 C P L R 3 32 Cal 759 1 C W N 33, 1906 P L R 3 If the identity of the accused is to be proved by a comparison of finger prints, the one taken in Court being compared with certain finger prints contained in the record of previous convictions there ought to be evidence to prove the similarity between the two, and the identification of the last mentioned finger prints as those of the person who has been previously convicted—*Ramdas v King Emp* 21 C W N 469 The papillary ridges on the bulbs of the fingers and thumbs, by means of which finger impressions are made, while proved to be almost beyond change from birth to death, are never wholly repeated in the case of the fingers of any other person and they therefore furnish a surer test of identity than any other comparable bodily feature Where two prints made on different occasions resemble one another in the *minutae* and contain no points of disagreement, an irresistible conclusion arises that they were made by the same finger—3 N L R 1

512 (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial

Record of evidence in
absence of accused

such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or transportation has been committed by some person or persons unknown, the High Court may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence. Any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of British India,

1331 Scope of section—This section has been specially enacted for enabling the Magistrate to record evidence in the absence of an absconding accused and therefore a Magistrate cannot reject an application of the complainant to summon witnesses or to call on them to produce documents because the accused has absconded—2 Bom L R 707

The Magistrates can only record the evidence, and cannot convict or sentence the accused in his absence—1917 P R 36

A pardon can be tendered to a co-accused under sec 337 even though the principal accused has absconded; in such a case the approver's evidence will be recorded under this section—46 Bom 120

Proof of absconding—In order to give jurisdiction to the Court to examine witnesses in the absence of the accused it must be proved to the satisfaction of the Court that the accused has absconded and that there is no immediate prospect of arresting him—1890 A W N 100, 1896 A W N 182. So where evidence was recorded by the Magistrate while there was no proof that the accused had absconded, there was no judicial proceeding and any witness giving false evidence therein could not be prosecuted for an offence under sec 193 I P C—*Emp v Makhni* 1890 A W N 100.

According to the Lahore High Court, to satisfy the requirements of this section, all that is necessary is that it should be proved that the accused has absconded and it is not necessary that a finding should be given by the Court to that effect—*Daya Ram v Emp*, 6 Lah 489 27 Cr L 247 26 P L R 845. But in an earlier case the Punjab Court held that where the accused had absconded the Court

as to the accused person having absconded, and should record a finding to that effect. In the absence of such proof and finding, the recording of the deposition of witnesses in the absence of the accused was illegal—*Wahid v Emp.* 1883 P R 21. In an Allahabad case also it has been held that the Court which records the deposition under sec 512 must first of all record an order that in its opinion it has been proved that the accused has absconded and that there is no immediate prospect of arresting him—*Emp v Rustam* 38 All 29 13 A L J 1043 16 Cr L J 801. But in a later case the same Court has held that where the Magistrate clearly found that the accused had absconded the mere fact that he did not recite in his order a finding that there was no immediate prospect of arresting the accused would not render the evidence taken in the absence of the accused inadmissible against them when arrested—*Emp v. Bhagwati* 41 All 60 16 A L J 602 20 Cr L J 6. In *Ghurbin v Q F* in Cr L 1097 the Calcutta High Court has laid down that evidence can be recorded against the accused in his absence only if the fact of his absconding is alleged, tried and established before the deposition is recorded, but nothing is said in this case as to whether the Court should record a finding as to the absconding of the accused as in fact the evidence in this case was not recorded under sec 512.

Value of the deposition given in absence of accused—The latter part of sub-section (1) seems clearly to indicate that the witnesses who were examined during the absence of the absconding accused should be examined in the presence of the accused, when he is found, unless it is impracticable to obtain their attendance. The statements recorded by a Magistrate under Sec 512 in the absence of the accused cannot be treated as evidence in the Sessions Court, if the witness is living and can be procured—*Pakhia v Emp* 1911 P L R 157. Where it was not impracticable to obtain the attendance of the witnesses when the accused was found and the accused was committed to the Sessions merely on the strength of the recorded deposition of those witnesses, the commitment was held to be illegal—22 W R 33. But if the accused pleads to the charge, the commitment cannot be quashed—12 C L R 120. If, however, upon such commitment, the Sessions Judge in the course of the trial is of opinion that the prosecution has not laid a basis for the reception of the deposition taken before the Magistrate in the absence of the accused, he should adjourn the trial and under Sec 540 summon such witnesses as he may deem material—12 C L R 120.

'Incapable of giving evidence'—Where a witness who had been examined under section 512 appeared in Court at the trial but could not remember the details of the occurrence, held that he could not be considered as 'incapable of giving evidence' within the meaning of this section. What the Court should do in such a case is to refresh the memory of the witness by reading out his deposition and then ask him if he remembers the details of the occurrence—*Bhika v Emp* 25 Cr L J 95 (Lah).

CHAPTER XLII.

PROVISIONS AS TO BONDS

513 When any person is required by any Court or officer to execute a bond, with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory note to such amount as the Court or officer may fix, in lieu of executing such bond

Deposit instead of recognizance

Except in case of bond for good behaviour—The object of law in making this exception in good behaviour cases, is to secure the good conduct of the person bound over, not by means of money but by a bond and sureties, and by making the sureties responsible for the good behaviour of the person bound down. See 2 N W P H C R 295

1332 Deposit of money—The deposit of money is in lieu of executing a bond. Where a person was ordered to execute a bond for good behaviour and also to deposit a certain sum in addition thereof, the order as to deposit was illegal, because it was not in lieu of but in addition, to, execution of bond, and also because it is a good behaviour case—Ratnivil 671

Where money has been deposited in Court as bail, the Magistrate is bound to return the amount, on the appearance of the accused to the person who made the deposit. It has no jurisdiction to attach this money in order to realise out of it the fine imposed on the accused—Raghunandan v Emp 11 O I J 296 Girdhari Lal v Emp, 19 A L J 887

514 (1) Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate, or a Magistrate of the first class,

Procedure on forfeiture of bond

or when the bond is for appearance before a Court, to the satisfaction of such Court,

that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid

(2) If sufficient cause is not shown and the penalty is paid, the Court may proceed to recover the same by issue

warrant for the attachment and sale of the moveable property belonging to such person or his estate if he be dead

(3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it and it shall authorize the attachment and sale of any moveable property belonging to such person without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found

(4) If such penalty is not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable by order of the Court which issued the warrant, to imprisonment in the civil jail for a term which may extend to six months

(5) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only

(6) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond * * *

(7) When any person who has furnished security under section 106 or section 118 or section 562 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond or of a bond executed in lieu of his bond under section 514 B a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties and if such certified copy is so used the Court shall presume that such offence was committed by him unless the contrary is proved

Change—This section has been amended by section 139 of the Cr. P. C. Amendment Act XVIII of 1923. In sub-section (3) the word 'attachment' has been substituted for the word 'distress' as the former word is more appropriate. In sub-section (6) the words 'but the party who gave the bond may be required to find a new surety' have been omitted but a separate provision to the same effect is made in the new section 514 A. Sub-section (7) has been newly added, the reason is stated below

1333 What amounts to forfeiture—Bonds for appearance should be strictly construed. If the bond requires the accused to appear on a day fixed and if he appears on that day the bond is complied with and the failure of the accused to appear on any other day on which the case is called does not entail a forfeiture of the bond—a Weir 663 4 M H C R App 44 36 Cal 749. Where bonds were taken from the accused and his sureties to appear on Sunday when the Court was closed and when on the next Monday the case was called on and the accused not being pre-

sent the bonds were forfeited, it was held that as the bond required the attendance of the accused on the day fixed, *i.e.*, on Sunday and not on the next day, the failure of the accused to appear on Monday did not cause a forfeiture of the bond—2 C W N 519 If, however, the bond requires the accused to appear *from day to day* until the close of the trial, the bond is not illegal—6 M H C R App 38, and the accused will forfeit his bond if he fails to appear on any adjourned hearing Where a bond required the accused to appear 'on the first hearing or at other times required and the accused appeared on the first day as mentioned in the bond, and was verbally directed to appear on a subsequent date on which he failed to appear, it was held that the failure to comply with the verbal direction would entail a forfeiture of the bond—2 Weir 658 Where on a person being arrested under Sec 55 of this Code, the usual security bond was taken for his appearance, held that the bond was only with respect to the offence for which the person was arrested under Sec 55, and the failure of the surety to produce the person in connection with *any other offence which he might be suspected of having committed subsequently* did not entail a forfeiture of the bond—*Manu v Emp*, 25 Cr L J 131 (Lah.) A bail bond should not be forfeited for failure of the surety to produce the accused person, where the failure to produce is due to an act of law, *e.g.*, on account of the accused being arrested for another offence—*Alauddin v Emp* 4 Pat 259, 6 P L T 397 26 Cr L J 833

Where a bond requires the accused to appear before a particular Court, the failure of the accused to appear before *another Court* to which the case has been transferred, does not work a forfeiture of the bond, if no obligation to appear in the latter Court has been specified in the bond—*Shamsuddin v Emp*, 30 Cal 107, 36 Cal 749, 18 A L J 631, *Maung Aye v A E*, 2 Rang 581 (585) 26 Cr L J 389

As to the forfeiture of bond for keeping the peace or for good behaviour, see Notes 297 and 298 under sec 121

Proof of forfeiture of bond—The words whenever it is proved show that no person who has entered into a recognizance bond should be called upon to show cause why he should not have his recognizance declared forfeited, without *prima facie* proof that the bond has been forfeited—11 B H C R 170, 3 P J T 381 An order for forfeiture of recognizance or of a bail bond must be made upon evidence in the case and not upon evidence taken in other cases—10 C L R 571, 12 W R 54

The Court must record the grounds of forfeiture Failure to do so will vitiate the proceedings—3 P L T 381

Illegal bonds cannot be forfeited—A bond which is null and void has no effect at all, such a bond cannot be forfeited Thus, where by mistake a bond under sec 110 was taken from a person ordered to execute a bond under sec 107, the bond is illegal and an order forfeiting the security furnished under the bond is illegal and will be set aside—1904 P L R 42 Where a warrant was issued to a woman in the first instance instead of a summons, without recording reasons under sec 90, the is wholly illegal and the bond given by the surety for the woman -

warrant for the attachment and sale of the moveable property belonging to such person or his estate if he be dead

(3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it: and it shall authorize the attachment and sale of any moveable property belonging to such person without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found

(4) If such penalty is not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable, by order of the Court which issued the warrant, to imprisonment in the civil jail for a term which may extend to six months

(5) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(6) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond * * *

(7) When any person who has furnished security under section 106 or section 118 or section 562 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond or of a bond executed in lieu of his bond under section 514 B, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved

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once has no legal force and cannot be forfeited if the woman does not appear—1918 P W R 7, 1907 P W R 23.

Death of accused—The death of the accused discharges the sureties from all liabilities. "The object of the surety bonds is to ensure that the accused person shall not evade justice by flying from the jurisdiction of the Court. But if the accused elects to die sooner than face his trial, that can hardly be a sufficient reason for forfeiting the bonds of sureties: it cannot impose upon them any moral obligation or responsibility to the Court.—18 Bom L R 683 37 Mad 156

1334 What Court can proceed under this section:—So far as bonds generally are concerned, action may be taken under this section by the Court by which the bond was taken or by the Court of a Presidency Magistrate or a Magistrate of the first class. But in the case of a bond for appearance before a Court, the tribunal indicated is the Court and there is no other tribunal. Where the bond is for appearance before a Sessions Court, a Deputy Magistrate cannot take action for the forfeiture of the bond. The Sessions Judge cannot delegate that function to the Deputy Magistrate under sec 516 which deals with the levy of the amount only—14 C W N 259. Where a bail bond was executed for due appearance of the accused before a certain Court, and no provision was made therein for his appearance before any other Court to which the case might thereafter be transferred, held that after such transfer, the former Court had no jurisdiction to forfeit the bond on the ground of the non appearance of the accused either before the Court to which the case was transferred or before itself—*Maung Nge v A B* 2 Rang 581 (586). A personal recognizance to appear was taken from the accused by the Magistrate of Karjat. The accused having failed to appear on the day fixed, the Magistrate at Karjat issued a notice to the accused under this section. In the meanwhile, the accused was transferred to the Court of the Magistrate at Khalapur who forfeited the bond and directed the accused to pay the penalty. It was held that the Magistrate at Khalapur had no jurisdiction to make the order under this section, as he was not the Magistrate who had taken the bond or before whom the accused had to appear on the date of default—*In re Mir Husen* 16 Bom L R 84. The Presidency Magistrate of Bombay has no jurisdiction under section to order the forfeiture of a bond for appearance before the Police taken by the Police under sec 106 of the City of Bombay Police Act (Bom Act IV of 1902)—42 Bom 400.

1335 Notice to show cause:—If an order of forfeiture is passed without any notice to the person whose bond is forfeited, it amounts to a failure of justice, and the defect cannot be cured by sec 537—*Sarju v Jas Raj Kumar*, A I R (1925) Oudh 51. Before a warrant can be issued for the attachment of his property, the surety should be called upon to show cause why he should not pay the penalty mentioned in the bond; and it should be clear on the face of the record that he was so called upon. A mere verbal and unrecorded order to show cause is not sufficient—15 W R 82. A summary order for recovering the amount due on the security bond from a surety without serving upon him any notice to pay the same or to show cause why it should not be paid, is invalid—9 W R 4.

Procedure, if party appears to show cause—If the party appears to show cause, he should be allowed an opportunity to cross-examine the witnesses upon whose evidence the rule to show cause was issued—4 Cal 865, 25 Cal 440 If the accused appears and shows cause, and the Magistrate still considers that the recognizance should be forfeited, it is his duty to record the evidence upon which it is proved that the accused has acted in such a way that it becomes necessary to forfeit the recognizance There must be a regular judicial trial and legal inquiry before punishment can be inflicted—12 W R 54 Before it can be declared that a bond executed by a surety is forfeited, there must be a formal finding arrived at after taking evidence in the presence of such surety, which evidence must prove that the principal person has so acted as to necessitate or render it advisable that the surety should, by reason of the act of the principal, forfeit his bond—25 Cal 440

1336 Order when to be passed:—If the accused's bond is forfeited, the Court may at once proceed to pass an order of forfeiture If the accused fails to appear on the day fixed, the order of forfeiture of the bond of appearance is not illegal if it is passed on the very next day—2 Bom L R 589 Indeed a Magistrate ought to take action immediately otherwise it will be deemed that the Magistrate has decided not to take action under this section Thus, where a person who is already bound over under Chapter VIII is charged with an offence before a Magistrate, and the Magistrate at the time of passing his sentence in the second offence knows that there is an outstanding recognizance, he should decide once for all whether he will proceed on it or not If he does not make any order for the forfeiture of the recognizance, it must be taken that he has decided not to forfeit the recognizance, and he cannot afterwards, in a subsequent and separate proceeding, reconsider his decision and direct forfeiture of the recognizance—*Munshi v Emp* 25 Cr I J 4 (Felt), 1913 P R 13, 1904 P R 26, 1 C L R 131, 3 C L R 406 But it is sufficient if the Magistrate passes an order of forfeiture in substantially the same proceeding in which he convicts the accused though he does not pass such order immediately on conviction Thus where the Magistrate did not pass an order of forfeiture of security at the time of conviction of the principals but while convicting them he plainly wrote in his judgment that "in as much as the sureties would forfeit Rs 4000 presently, I refrain from passing a heavy sentence on the accused," and then the Magistrate issued process to the sureties and confiscated the security in full it was held that the Magistrate having plainly showed in his judgment his intention to confiscate, the order of forfeiture of security though passed subsequently after conviction was legal—*Hussain Khan v Crown*, 1917 P R 15 But the Allahabad High Court holds that the mere fact that no immediate action is taken against a person under this section is no bar to his taking such action at a subsequent time, the Magistrate can wait till the time of appealing has expired or till the appeal has been dismissed, and then he can proceed under this section—26 All 202

If a person is bound down to keep the peace, say for one year, the bond is forfeited, proceedings for forfeiture of the bond must

uated within the term of the bond, i.e., within one year from the date of the bond, and if the proceedings are started within that period, the termination of the period of the bond before the proceedings are finished will not invalidate the subsequent order of forfeiture—20 A L J 692; 44 All 657

Movable property—During the surety's lifetime, only movable property can be attached and sold for recovery of the penalty—16 A I J 503 (see this case cited under sec 118) But a surety can offer house property as security under sec 118, though his movable property alone can be attached and sold—Ibid

'His estate if he be dead'—These words were introduced into the Code of 1898 to meet 1894 P R 22, where it was held that the legal representative of a deceased surety could not be proceeded against under the provisions of this section

1337 Liability of sureties:—The bond executed by the principal and the bond executed by the surety are to be considered as one bond for one amount and is discharged on forfeiture by the payment of the amount due by either the principal or the surety—*Laku v Q E*, 1894 P R 26 In no case can an amount in excess of the amount secured by the bond be demanded or recovered from the person bound or his sureties, individually or collectively—Ib *Mahomed v Emp*, 1911 P L R 226 12 Cr L J 404 Where the principal accused was bound over (under sec 107) in the sum of Rs 500, and his surety in the same amount, and on forfeiture of the bond the Magistrate ordered that the principal should forfeit the whole amount of his bond, viz Rs 500, and the surety should forfeit Rs 250, held that the order was illegal the Magistrate could not demand a sum in excess of Rs 500, whether from the principal or from the surety or from both The High Court modified the order of the Magistrate by directing the principal to pay Rs 250 and the surety to pay Rs 250—*Harnam v Crown*, 5 Lah 448 (449) When the amount of the bond has been recovered from the principal, the sureties are not liable to any further amount The liability of the surety is only a joint and several liability with the principal and there is no warrant to collect the amount twice over—U B R (1905) 31, 2 L B R 235, 1894 P R 26, 4 Lah 462 But the Calcutta High Court dissents from this view and holds that when a person executes a bond for keeping the peace under sec 107, and another stands surety for him, then on the breach of the bond both the surety and principal are liable to pay the penalty of their respective bonds, and the surety is liable quite irrespective of the question whether the amount of the bond of the principal has been realised or not The liability of the surety is not co-extensive with that of the principal as in the ordinary case of a surety for a debtor for the payment of his debt, where the surety is discharged as soon as the principal debtor pays the money due from him Here the surety is an additional safeguard against a breach of the peace Therefore where the principal accused was bound down in the sum of Rs 100, to keep the peace under sec 107, and the surety bound himself in the sum of Rs 50 that the former would not commit a breach of the peace, and upon the bond of the accused being declared forfeited, both he and his surety were ordered

to pay the amounts of their respective bonds (viz, Rs 100 and 50), held that the order was not illegal and that the surety was bound to pay Rs 50 in spite of the fact that the accused had already paid Rs 100—*Saligram v Emp* 36 Cal 562

A regards the liability of sureties *per se*, if three sureties sign a bond, they are jointly and severally liable to pay the amount of the bond, but every one of them cannot be called on to pay the whole amount, the sum named can only be recovered once—*Mahomed Ibrahim v Crown* 8 S L R 173 16 Cr L J 100

Since sureties on a bond are required in order that the failure of the principal to appear may be to their peril it follows that the object of this provision is defeated if the principal and surety are allowed to relieve the latter of the peril and confine it to the former by an arrangement among themselves. Therefore, an agreement by an accused with his surety that he will indemnify the surety if the bail is forfeited on account of the accused's non-appearance, is void—*Jodhraj v Bishaulal* 20 N L R 166

Sub section (4):—Imprisonment—When default is made in payment, the Magistrate cannot forthwith direct imprisonment. He should order the attachment and sale of the defaulter's moveable property, and if the penalty cannot be recovered from such attachment and sale, then and then only can he direct imprisonment—10 C 1 R 371

1338 Sub section (5):—Remission of penalty—This sub section gives the Court power to remit the penalty or to reduce its amount. Under the Codes of 1872 and 1861, neither the Magistrate nor even the High Court in revision had power to reduce the amount of the penalty under a recognizance bond which had been forfeited. See 8 C 1 R 72, 3 Cal 757, 19 W R 1. If the Magistrate thought that the amount of recognizance was excessive, he was to refer the matter to Government—*Ibid*

1339 Sub section (7):—Admissibility of judgment of convictions—This sub section has been newly enacted. Under the old law there was a conflict of opinion among the High Courts. The Allahabad and Punjab Courts laid down that where a person who had given a security bond with a surety for good behaviour, was convicted of an offence, the production of the judgment of conviction and the proof, if necessary, of the identity of the principal was sufficient evidence upon which a Magistrate was competent to issue notice to the surety. It was not incumbent on the Magistrate to prove that the principal was properly convicted, by re-summoning the witnesses on whose evidence the principal was convicted—21 All 86, 1903 P R 32, 1911 P W R 35. But in 25 Cal 440 and 11 Cal 77, it was held that the mere production of the original record or a certified copy of the trial in which the principal was convicted would not be conclusive evidence to show that the accused had really committed an offence, such fact must be proved by evidence taken in the presence of the surety, unless it was admitted by him. The present sub section adopts the view of the Allahabad and Punjab decisions. 'There has been a conflict of opinion whether a judgment convicting the principal in a bond taken under the Code and ordering the forfeiture of the bond is sufficient *prima facie* pr

tiated within the term of the bond, *i.e.*, within one year from the date of the bond, and if the proceedings are started within that period, the termination of the period of the bond before the proceedings are finished will not invalidate the subsequent order of forfeiture—20 A L J 692, 44 All 657

Moveable property—During the surety's lifetime, only moveable property can be attached and sold for recovery of the penalty—16 A L J 503 (see this case cited under sec 118) But a surety can offer house property as security under sec 118, though his moveable property alone can be attached and sold—*Ibid*

His estate if he be dead These words were introduced into the Code of 1898 to meet 1894 P R 22, where it was held that the legal representative of a deceased surety could not be proceeded against under the provisions of this section

1337 Liability of sureties:—The bond executed by the principal and the bond executed by the surety are to be considered as one bond for one amount, and is discharged on forfeiture by the payment of the amount due by either the principal or the surety—*Kaku v Q E*, 1894 P R 26 In no case can an amount in excess of the amount secured by the bond be demanded or recovered from the person bound or his sureties, individually or collectively—*In Mahomed v Emp* 1911 P L R 226 12 Cr L J 404 Where the principal accused was bound over (under sec 107) in the sum of Rs 500, and his surety in the same amount, and on forfeiture of the bond the Magistrate ordered that the principal should forfeit the whole amount of his bond, *viz* Rs 500, and the surety should forfeit Rs 250, held that the order was illegal the Magistrate could not demand a sum in excess of Rs 500 whether from the principal or from the surety or from both The High Court modified the order of the Magistrate by directing the principal to pay Rs 250 and the surety to pay Rs 250—*Harnam v Crown*, 5 Lah 448 (449) When the amount of the bond has been recovered from the principal the sureties are not liable to any further amount The liability of the surety is only a joint and several liability with the principal and there is no warrant to collect the amount twice over—*U B R* (1905) 31, 2 L B R 235, 1894 P R 26, 4 Lah 462 But the Calcutta High Court dissents from this view and holds that when a person executes a bond for keeping the peace under sec 107, and another stands surety for him, then on the breach of the bond *both the surety and principal* are liable to pay the penalty of their respective bonds, and the surety is liable quite irrespective of the question whether the amount of the bond of the principal has been realised or not The liability of the surety is not co-extensive with that of the principal as in the ordinary case of a surety for a debtor for the payment of his debt, where the surety is discharged as soon as the principal debtor pays the money due from him Here the surety is an additional safeguard against a breach of the peace Therefore where the principal accused was bound down in the sum of Rs 100, to keep the peace under sec 107, and the surety bound himself in the sum of Rs 50 that the former would not commit a breach of the peace, and upon the bond of the accused being declared forfeited, both he and his surety were ordered

to pay the amounts of their respective bonds (viz, Rs 100 and 50), held that the order was not illegal, and that the surety was bound to pay Rs 50 in spite of the fact that the accused had already paid Rs 100—*Saligram v Emp* 36 Cal 562

A regards the liability of sureties *per se*, if three sureties sign a bond, they are jointly and severally liable to pay the amount of the bond, but every one of them cannot be called on to pay the whole amount, the sum named can only be recovered once—*Mahomed Ibrahim v Crown* 8 S L R 173 16 Cr L J 100

Since sureties on a bond are required in order that the failure of the principal to appear may be at their peril it follows that the object of this provision is defeated if the principal and surety are allowed to relieve the latter of the peril and confine it to the former by an arrangement among themselves. Therefore, an agreement by an accused with his surety that he will indemnify the surety if the bail is forfeited on account of the accused's non appearance is void—*Jodhraj v Bishalal* 20 N L R 166

Sub section (4):—Imprisonment—When default is made in payment, the Magistrate cannot forthwith direct imprisonment. He should order the attachment and sale of the defaulter's moveable property, and if the penalty cannot be recovered from such attachment and sale, then and then only can he direct imprisonment—10 C L R 571

1338 Sub section (5):—Remission of penalty—This sub section gives the Court power to remit the penalty or to reduce its amount. Under the Codes of 1872 and 1861, neither the Magistrate nor even the High Court in revision had power to reduce the amount of the penalty under a recognizance bond which had been forfeited. See 8 C L R 72, 3 Cal 757, 19 W R 1. If the Magistrate thought that the amount of recognizance was excessive, he was to refer the matter to Government—*Ibid*

1339 Sub section (7).—Admissibility of judgment of convictions—This sub section has been newly enacted. Under the old law there was a conflict of opinion among the High Courts. The Allahabad and Punjab Courts laid down that where a person who had given a security bond with a surety for good behaviour, was convicted of an offence, the production of the judgment of conviction and the proof, if necessary, of the identity of the principal was sufficient evidence upon which a Magistrate was competent to issue notice to the surety. It was not incumbent on the Magistrate to prove that the principal was properly convicted, by re-summoning the witnesses on whose evidence the principal was convicted—21 All 86, 1903 P R 32, 1911 P W R 35. But in 25 Cr L 440 and 11 Cal 77, it was held that the mere production of the original record or a certified copy of the trial in which the principal was convicted would not be conclusive evidence to show that the accused had really committed an offence, such fact must be proved by evidence taken in the presence of the surety, unless it was admitted by him. The present subsection adopts the view of the Allahabad and Punjab decisions. "There has been a conflict of opinion whether a judgment convicting the principal in a bond taken under the Code and ordering the forfeiture of the bond is sufficient *prima facie*

in proceedings under this section against the sureties. The amendment permits the use of such a judgment as evidence in such proceedings and directs that the Court shall presume that such offence was committed unless the contrary is proved.—*Statement of Objects and Reasons (1914)*

The judgment of conviction is undoubtedly evidence against the principal himself. Thus, where the bond is given by the person bound down to keep the peace, the judgement convicting him of a breach of the peace is admissible in evidence against him, and may form a sufficient basis for an order under this section, he having had an opportunity of cross-examining the witness on whose evidence the forfeiture is held to be established—25 CrL 440, 4 Cal 865

Revision.—The High Court can revise all orders made under this section. See notes under section 515

1340 Nature of proceedings under this section:—The proceeding to realise a penalty is of the nature of a civil proceeding (3 P L T 381) and the person against whom it is taken is competent to give evidence on oath in his own behalf—15 W R 87. It is not a criminal proceeding and no charge need be drawn up. After the Magistrate has satisfied himself that the bond has been forfeited, he can at once call upon the person concerned to pay the penalty. The proceeding therefore cannot be held to be a trial in the sense of the Code—2 Mad 169

514-A *When any surety to a bond under this Code becomes insolvent or dies, or when any bond is forfeited under the provisions of Section 514, the Court, by whose order such bond was taken, or a Presidency Magistrate or Magistrate of*

Procedure in case of insolvency or death of surety or when a bond is forfeited

the first class, may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and if such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order

This section has been newly added by sec 140 of the Cr P C Amendment Act, XVIII of 1923, to make up the deletion of certain words in sub-section (6) of section 514. It also covers the case of a surety who becomes insolvent.

514-B *When the person required by any Court or officer*

Bond required from a minor to execute a bond is a minor, such Court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only

We have added a new section 514B to provide for the case of a bond being required from a minor.—*Report of the Select Committee of 1916*

Under the old law, where a person released on probation under sec 562 and ordered to execute a bond for good conduct was a minor, the bond could not be executed by his sureties, see 4 L B R 12 This is no longer good law, having regard to the provision of this section

515 All orders passed under Section 514 by any Magistrate other than a Presidency Magistrate or District Magistrate, shall be appealable to the District Magistrate, or, if not so appealed, may be revised by him

Appeal from and revision of orders under Section 514 -

1341 Appeal and revision—Under the old Codes of 1861 and 1872 there was no provision for appeal or revision of orders forfeiting a security bond under sec 514 see 2 Wld 169 This section makes provision for such appeal or revision

Under this section all orders passed by the subordinate Magistrates shall be appealable to the District Magistrate, but not to any first Class Magistrate—Ratanlal 384

A bond for keeping the peace or for good behaviour is not given to any particular person but to the Court, and no private party is entitled to appeal against an order of a Magistrate refusing to forfeit the bond, but it is open to the District Magistrate to take action in revision—Swynn v Jai Raj Kumar A I R (1925) Oudh 51

Orders passed by a District Magistrate under this section may be subject to revision by the High Court—1905 P R 15

516 The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court or Court of Session

Power to direct levy of amount due on certain recognizances

This section empowers the Court of Session to delegate his power of levying fine to a Magistrate, but he cannot delegate his power of initiating proceedings for forfeiture of the bond—14 C W N 259 (cited in Note 1334 under sec 514)

CHAPTER XLIII

OF THE DISPOSAL OF PROPERTY

516A When any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of any offence, is before any Criminal Court du

Order for custody and disposal of property pending trial in certain cases

inquiry or trial the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy or natural decay, may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of

This section has been newly inserted by section 141 of the Cr. P. C. Amendment Act XVIII of 1933. It is proposed to add to the chapter a new section to enable the Court to give orders for the custody or disposal of property during an inquiry.—*Statement of Objects and Reasons* (1914). Under the old law an order for disposal of property could be made only when the inquiry or trial was concluded (see 517) but no order could be made while the offence committed in connection with such property was still under inquiry and the trial was not yet entered.—*হাইদারাবাদ* 5 C. L. J. 229, 24 M. L. J. 1. This section enables a Court to make an order for disposal of property during the inquiry or trial.

517 (1) When an inquiry or a trial in any Criminal Court is concluded, the Court may make such

Order for disposal of property regarding which offence committed

order as it thinks fit for the disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise of any property or document produced before it or in its custody or regarding which any offence appears to have been committed or which has been used for the commission of any offence.

(2) When a High Court or a Court of Session makes such order and cannot through its own officers conveniently deliver the property to the person entitled thereto, such Court may direct that the order be carried into effect by the District Magistrate.

(3) When an order is made under this section in a case in which an appeal lies, such order shall not (except when the property is live stock or is subject to speedy and natural decay) be carried out until the period allowed for presenting such appeal has passed or, when such

(3) When an order is made under this section, such order shall not, except where the property is live stock or subject to speedy and natural decay, and save as provided by subsection (4), be carried out for one month, or when an appeal is presented, until such appeal has been disposed of.

appeal is presented within such period, until such appeal has been disposed of

(4) Nothing in this section shall be deemed to prohibit any Court from delivering any property under the provision of sub-section (1) to any person claiming to be entitled to the possession thereof on his executing a bond with or without sureties to the satisfaction of the Court engaging to restore such property to the Court if the order made under this section is modified or set aside on appeal

Explanation—In this section the term "property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise

Change—This section has been amended by section 142 of the C. P. C. Amendment Act XVIII of 1923. The following changes have been introduced—

(1) The italicised words have been added in sub-section (1) "any such words are added to elucidate the order for disposal of property of a person before a Court by explaining that this means disposal by confiscation or restoration to the person claiming to be entitled to the possession thereof"—*Statement of Objects and Reasons* 1923

(2) Sub-section (3) has been changed as shown in *proposed section* "It allows one month for the presentation of an appeal or an application for revision where this is allowed"—*Report of the Select Committee of 1926*

(3) Sub-section (4) has been newly added "By this clause a Court is enabled, if it sees fit, to restore the property to the person claiming to be entitled to it, who is willing to execute a bond for its return if need be"—*Statement of Objects and Reasons* 1923

1342 Scope of section—Under the Code of 1861 the operation of this section was much restricted, and the Court could exercise its power under this section only with reference to property which was the subject of any offence had been committed or which had been the subject of the commission of any offence, otherwise not—24 Cal 449, 25 Cal 434, 26 Cal 434, 27 Cal 434, 28 Cal 434, 29 Cal 434, 30 Cal 434, 31 Cal 434, 32 Cal 434, 33 Cal 434, 34 Cal 434, 35 Cal 434, 36 Cal 434, 37 Cal 434, 38 Cal 434, 39 Cal 434, 40 Cal 434, 41 Cal 434, 42 Cal 434, 43 Cal 434, 44 Cal 434, 45 Cal 434, 46 Cal 434, 47 Cal 434, 48 Cal 434, 49 Cal 434, 50 Cal 434, 51 Cal 434, 52 Cal 434, 53 Cal 434, 54 Cal 434, 55 Cal 434, 56 Cal 434, 57 Cal 434, 58 Cal 434, 59 Cal 434, 60 Cal 434, 61 Cal 434, 62 Cal 434, 63 Cal 434, 64 Cal 434, 65 Cal 434, 66 Cal 434, 67 Cal 434, 68 Cal 434, 69 Cal 434, 70 Cal 434, 71 Cal 434, 72 Cal 434, 73 Cal 434, 74 Cal 434, 75 Cal 434, 76 Cal 434, 77 Cal 434, 78 Cal 434, 79 Cal 434, 80 Cal 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Under the 1898 Code, the scope of the section has been enlarged, and an order can be made with regard to any property produced before the Court or in its custody even though it has not been used for the commission of any offence or though no offence in regard to it has been committed—34 Cal 347, *In re Pyde Ramanma*, 20 Cr J 135 42 Mad 9, 21 Cr L J 414 (Nag), or though the offence actually under investigation is not in connection with the property or is not proved—2 Weir 666 The ruling in 2 Weir 665 is no longer good law The decision in 30 Cal 690 is erroneous as it did not notice the change in the law in the 1898 Code

1343 Property:—Property produced in Court—When a portion of a property (e.g. a portion of salt or other article in bulk) is produced in Court and received in evidence as a sample, the whole bulk is taken to have been produced before the Court and the Magistrate can make an order with respect to the entire bulk—2 Weir 670

Property in respect of which an offence has been committed—These words mean property which has been the subject of offences like theft or criminal misappropriation—34 Cal 986 Where the accused gave false information that his jewels were stolen, and afterwards these jewels were found in his possession, and the Magistrate after convicting him of an offence under sec 182 I P C confiscated those jewels under this section, it was held that the order under this section was illegal, because the jewels were neither produced before the Court, nor was there any offence committed with regard to them—9 C W V 597

Cash is not, strictly speaking property, except in so far as it is capable of being possessed and identified in specie If, however, it is certain that the coins found on the person of thieves are the actual coins which have been the subject of theft, then it is permissible to treat such coins as stolen property and the Magistrate can pass an order as to their disposal (e.g. an order to pay them to the complainant as compensation) But coins which have been put into circulation and passed on to other persons can not be treated in the same way as stolen coins actually remaining in the possession of thieves—*Parsh v Emp* 18 S I R 218 26 Cr L J 1315 But in an Allahabad case, where the accused embezzled some money from a Bank and sent part of the embezzled money to one of his creditors in notes under insured cover which was traced and seized by the police, and the Magistrate after convicting the accused ordered the money to be handed over to the Bank, held that the order was strictly justified under the provisions of this section, as the money was "property in respect of which an offence was committed" and it was property to which the Bank was entitled—*Bankey Lal v Allahabad Bank*, 23 A L J 889 26 Cr L J 1232 A I R 1926 All 47

The Magistrate can dispose of property stolen in British territory, though the Police might have seized it in foreign territory—1878 P R 20

Property used for the commission of an offence—This means property which has been instrumental in committing an offence e.g. guns or swords—34 Cal 986 But any instrument of thing which is too remotely connected with the commission of an offence can not be confiscated under

this section. Thus it is illegal to confiscate a press in which a sed matter has been published because the press is a too remote instr and cannot be said to be property which has been used for the comm of the offence—34 Cal 486 1907 P W R 37. A Magistrate conv a person for gambling under section 6 and 7 of the Madras Nuisances Act cannot confiscate the money found in his waistcoat p when there was no evidence to show that the money was actually sta 41 Mad 644. S also a boat which has been used by the accus going to commit a theft or in escaping from pursuit cannot be sa be property used for the commission of an offence—8 C W N see also Ratnaji 688. Similarly where the accused has been guil rash driving it is illegal to pass an order that the cart and pos the accused should be sold and the sale proceeds paid over to complainant is compensation—1904 P L R 9.

Property must be movable—This section has no application to moeable property. Where the accused dispossessed the complainant his garden by breaking the padlock of its gate and were convict the offence of criminal trespass, the Court had no power to orde restoration of the garden to the complainant under this section or sec 522—18 C W N 1146. See also 36 Cal 44 1900 A W N and 12 I W 227. *Contra*—4 I B R 220 where the word 'pro was held to include immovable property.

Property must have been in existence—No order can be made this section with respect to property which was not in existence at the of the offence. Thus an innocent purchaser of a stolen cow can ordered to deliver up the calf which was not even in embryonic ex when the theft took place but which was given birth to by the while she was in his possession—in Mad 25.

1344 Order, when can be made—According to the wor this section an order for disposal of the property can be made only the conclusion of the trial, and not long after the conclusion of the 24 Cr I J 804 (M). An order for disposal of property pass days after the date of the passing of judgment in the trial is not in *Kishan Chand v Nanak Chand* 7 Lah L J 625 26 Cr L J. But in another Lahore case it has been held that the order under se and the judgment in the trial must be contemporaneous. And so, order is passed by a Court in respect of the disposal of the property conclusion of the trial of the accused the Court has no jurisdiction pass order at any subsequent time directing delivery of the prop to the complainant—*Ibduf v Ghulam Muhammad* 4 Lah 460 (461) case has been dissented from in 7 Lah L J 625 cited above.

No order as to the disposal of property can be made under this if the trial is barred under sec 403. The words 'when an inquiry c is concluded' cannot apply to a case in which the Court is prohibite conducting a trial at all—4 I B R 229. Similarly, an order di delivery of property cannot be made by a Magistrate without any proceeding before him or any other Magistrate, but merely on the cation of the person in whose favour the order is made—6 C L J.

Where a person charged with criminal breach of trust in respect of certain jewels died before the day fixed for his trial, and there was no trial, no order could be made by the Magistrate under this section. The jewels were ordered to be returned to the person from whom the Police recovered them—29 Mad 375

Order discretionary—Orders under this section are discretionary. This section invests the Magistrate with a discretionary power and it is a rule of law that such power must be exercised judicially, i.e., according to the sound principles of law and not in an arbitrary manner—11 Bom L R 16. This discretion is open to correction by the High Court where it has been exercised in violation of judicial principles—40 Bom 186

1345 Nature of order under this section:—The old section stated that the Magistrate could make such order as he thought fit for the disposal of the property. This is a general term and the nature of the order to be passed for disposal was not specified. It depended upon the discretion of the Magistrate to say what order was to be passed having regard to all the facts of the case—11 Bom L R 16. Under the present section the word 'disposal' has been elucidated by certain explanatory words.

Order in a bribe case—When the accused was convicted of taking bribe and the money paid as bribe was deposited in Court by the complainant, the Magistrate could order a portion of the bribe to be confiscated and the rest to be paid to the complainant—1873 P R 9

Order in respect of currency note—Where the accused stole a currency note from the complainant and changed it at the Government Treasury, then on conviction of the accused for this the currency notes should be delivered to the Treasury and not to the complainant. Currency note is money and the ownership passes by mere delivery and the original owner cannot claim the amount is against the Treasury—19 Cal 52. The accused purchased some gold ornaments and handed to the jeweller a currency note which he had stolen. The jeweller not having had adequate cash took the note to a neighbouring shopkeeper who cashed it in good faith. Afterwards, during the prosecution of the accused, the note was attached from the shopkeeper, and on conviction of the accused the Magistrate ordered it to be returned to the Crown whose property it was found to have been. Held that the currency note should be returned to the shopkeeper, for property in it had passed to him by mere delivery—40 Bom 186. See also 7 N H C R 233, 3 Cal 379, 1 N W P H C R 298

So is the rule in respect of current coins. But *Dabashahi* coin is not current coin in British India, and it is to be delivered to the complainant from whom it is stolen, like any other common article or property—25 Bom 702

Order of forfeiture—An order of disposal under this section includes an order of forfeiture or confiscation—Ratanlal 492. This is now expressly provided for in the present section. In 5 N L R 59 it was held that the disposal of property could not be held to include confiscation or forfeiture, as the penalty of confiscation or forfeiture having been expressly provided for in secs 62, 121 etc of the Indian Penal Code and in numerous other sections of other Acts, it could not be included in the general word

'disposal' used in this section. The same view was taken in 5 P L J 321 34 Cal 986 1907 P W R 37. These rulings are no longer correct in view of the express words of the present section.

An order for the confiscation of property which is the subject matter of an offence cannot be made without first giving notice to and hearing the person to whose prejudice the order would be. Want of notice would be a good ground for setting aside the order—17 Cr L J 207 (Bur.)

Order of destruction of counterfeit coin—If the accused is convicted of an offence under sec 241 I P C, and counterfeit coin is found in his possession the Magistrate can order the destruction of the coin—2 Weir 669.

Order of restoration of property—If no offence is proved to have been committed in respect of any property produced before the Court, and the accused is acquitted, the Magistrate should restore the property to the person from whom it was last taken—14 C P L R 60 1897 A W N 26, 2 Weir 669, 18 C W N 959 27 Bom 844, 1 C W N 561, 2 Weir 668, 1 Bom 630, 10 Bom 197, 7 Bom 748 9 Mad 448, 14 Cal 834, 5 W R 55. In such a case, an order of confiscation is not proper—16 Cr L J 811 (Mad). See also 17 Bom L R 79, 42 Mad 9. The property should be restored especially when there is no finding in the case that it belongs to some one else—3 M L T 334.

But if a case of theft fails because the dishonest intention of the accused is not proved, the property can be restored to the complainant, and need not be given back to the accused—16 M L J (Sh N) 4. So also where the Magistrate, though he discharges the accused, believes that the property in his custody is the subject of some offence, he is not bound to restore the property to the person from whom it was taken, but can make an order of disposal under this section—9 Mad 448.

A Magistrate cannot, on dismissal of a complaint, restore the property to the accused, if he disclaims the property. In such a case the Court should retain the property until one or other of the parties has established his right in the Civil Court—1913 P W R 37.

If a complaint of theft of a certain property is dismissed on the ground of there being a *bona fide* dispute about the ownership of the property, the Magistrate should take custody of the property, sell it (if it is perishable) and retain the sale proceeds until they are shown to be payable to one or other of the parties, either by virtue of a decree of Court, or of an agreement between themselves—16 Bom L R 951, 16 Cr L J 104 (Mad). In 2 Weir 667, it has been held that in such a case, the Magistrate may deliver the property to the person from whose possession it was last taken, with a condition that the property, or its value, must be forthcoming in case the rival claimant establishes a title. But if it is found that the property belongs partly to the accused and partly to another person, it is not illegal to deliver the property to both of them on their joint receipt—34 Mad 91.

1346 Order, when rights of third parties are concerned.—A property with regard to which an offence has been committed should not be delivered to the owner of the property when it has been pledged to another person (see 19 Cr L J 785) without allowing the pledgee an opportunity of being heard. But when the evidence disclosed that the

property was obtained by fraud from the owner and subsequently pledged the property should be delivered to the owner and the remedy of the pledgee was to bring a suit in the Civil Court to enforce his lien on the property—4 L B R 13 But where certain jewels were given to the accused to sell but the accused instead of selling them gave them to another person who pledged them to a third person it was held that the jewels should be restored to the pledgee and not to the owner because the owner, having parted with the jewels to be disposed of for money was not entitled to the assistance of a Criminal Court in recovering them from a pawnee to whom they were so disposed of—3 Bur L T 111 4 L B R 25, 23 Cr L J 216 But if in such a case the pledgee was not a *bona fide* pledgee and knew that the pledgor had no authority to pledge the articles, held that the articles should be delivered to the owner and not to the pledgee—*K E v Nga Po Chit* 1 Rang 199 Where a pledged property was stolen from the possession of the pledgee by the pledgor who was thereupon convicted of theft the Court should pass an order restoring the property to the pledgee and not to the person to whom the pledgor had sold it for value after the theft—*Gour Mohan v Bansidhar* 24 Cr L J 238 (Cal) A goldsmith was entrusted with a certain quantity of gold and diamonds for making a comb for the complainant When the article was nearly completed the goldsmith pledged it to a diamond merchant who had no knowledge that the property was the property of the complainant The Court ordered the jewel to be returned to the complainant Held that the order was justifiable—*Chaganlal v Maung Po Kauk* 2 Bur L J 152 Where certain jewels were given to a broker for sale and the broker sold the jewels and misappropriated the sale proceeds and was convicted of criminal breach of trust the jewels ought to be restored to the purchaser and not to the owner because the offence was committed not with respect to the jewels but with respect to the sale proceeds and therefore the Magistrate was not competent to make any order with respect to the jewels which validly belonged to the purchaser—4 Bur L T 170

1347 Question of title —An order under this section does not decide the question of ownership of the property It merely decides the question of the right to possession till a Civil Court decides the question of ownership—11 Bur L T 267 Where a question of *bona fides* and of title by purchase or otherwise clearly arises, the duty of the Criminal Court is not to pass any order under this section, but to leave the complainant to his remedy in the Civil Court if he thinks he has one—*Naimi Mall v Emp* 24 Cr L J 804 (All) If conflicting claims are put forward to the property by different parties, the Magistrate cannot give a decision as to the ownership of the property the proper procedure would be to keep the property in Court pending any order which may be made by a competent Civil Court—*Ram Khelawan v Tulsi* 28 C W N 1094 Where the property in dispute was a certain quantity of wood the proper order would be to sell the property and retain the sale proceeds in Court until they were shown to be payable to one or other of the parties either in virtue of a decree or in virtue of an agreement among themselves—16 Bom L R 951

1348 Improper orders:—(1) *Disposal in charity*—The section does not place the property at the disposal of the Magistrate in the sense of enabling him to bestow it in charity. He is to make such legal disposition thereof as seems right i.e. to direct its restoration to some one to whom it seems to belong or permit it to continue in the possession in which it is found or otherwise—2 Weir 666

(2) *Order regarding custody of children*—Orders regarding custody of children cannot be passed under this section—1 Weir 348

(3) *Order for removal of building*—Where the accused built a new wall abutting on the road in contravention of the rules of the Municipality, and the Magistrate after convicting and fining the accused ordered the wall to be pulled down, it was held that the order as to the removal of the wall was illegal—1900 A W N 81

(4) *Order demanding security*—The Magistrate cannot take a bond from the accused to produce the property (with respect to which an offence is alleged to have been committed) in Court whenever required. There is no provision of the law which enables a Magistrate to make an order demanding security. He can proceed under sec 94 in order to secure the production of the property, and on failure of the accused to produce it, he can proceed under sec 96—7 C W N 522. Sub section (4) does not apply to the case, because under that sub section a Magistrate can take a bond from a person at the time of delivering the property to him.

(5) *Detention of property*—If no offence is proved in respect of the property produced in Court the proper order that the Court may pass is to restore the property to the person from whom it was originally taken. It cannot detain the property until the title of the rightful owner is declared by a Civil Court—22 Bom 844

Sub section (4)—If no offence is proved to have been committed, the Magistrate may restore the property to the accused, and at the same time demand security from him for its production whenever required—2 Weir 668

1349 Explanation.—The words 'conversion and 'exchange' used in the Explanation to the section must be taken in their ordinary sense. They apply to such acts as melting down of gold and silver into ornaments or the exchange of notes for cash. When therefore a person fraudulently obtained a decree upon a forged promissory note and in execution of that decree purchased a garden and was subsequently convicted of cheating it was held that the convicting Court could not direct restoration of the garden to its owner, because it could not be said that the garden was acquired by the conversion of the forged promissory note into a decree—4 Bur L R 211. A gold ornament was stolen from the complainant and sold by the thief for Rs 184 to the applicant who converted it into gold and sold it in pieces to different persons. In the course of the trial of the theft case, the applicant was made to produce Rs 184 and at the end of the trial the Magistrate ordered the sum to be paid over to the complainant. It was held that the money could not be paid over to the complainant, since it merely represented the sum which the applicant paid.

the accused as the price of the gold bangles, and it could not be treated under the Explanation to this section as the exchanged property with reference to which an offence had been committed—20 Bom. L. R. 604

In view of this Explanation, the objection that the coins directed to be returned are not the identical coins stolen cannot be sustained—4 S. L. R. 255

Appeal:—See section 520

1350 Revision:—The High Court has jurisdiction to interfere with an order of the Magistrate passed under this section—2 Weir 669; 40 Bom. 186. An order made under this section may be revised by the High Court either under sec. 520 or by virtue of the powers conferred on it by sec. 439 read with secs. 435 and 423 (d) of the Code—18 C. W. N. 959. But where the case is one in which an appeal lies, any party aggrieved by an order as to the disposal of property must go to the Court of appeal. In such a case, a Court of revision has no jurisdiction to interfere with an order as to the disposal of property. It is only when there is neither an appeal nor a confirmation that a Court of revision or reference can interfere—35 Bom. 253. The High Court will not exercise its revisional powers against an order under this section except as a Court of last resort—14 C. P. L. R. 107, 11 C. P. L. R. 47.

1351 Power of Appellate Court to make orders under this section:—Under clause (d) of sec. 423 the Appellate Court is competent to make any incidental or consequential order that may be just or proper. An order directing the disposal of property is a 'consequential or incidental order' within the meaning of sec. 423 (d). Therefore where such order was not passed by the Court of first instance, the Appellate Court is entitled to do so—3 A. L. J. 770, 35 All. 374. See notes under sec. 423 (d). *Contra*—2 Weir 674, where it is held that an Appellate Court cannot pass an order under this section when the Subordinate Court has not done so.

Since the High Court in Revision possesses all the powers of an Appellate Court, the High Court can in revision pass an order under this section. See notes under sec. 439.

518 In lieu of itself passing an order under Section 517,

the Court may direct the property to be delivered to the District Magistrate or to a Sub-divisional Magistrate, who shall in such cases deal with it as if it had been seized by the police and the seizure had been reported to him in the manner hereinafter mentioned.

Scope of section:—An order under this section can be made only in respect of property regarding which an offence appears to have been committed or which has been used for the commission of an offence,—Ratanlal 496

519 Where any person is convicted of any offence which includes or amounts to theft or receiving stolen property and it is proved that any other person has bought the stolen property from him without know-

Payment to innocent purchaser of money found on accused

ing or having reason to believe that the same was stolen, and that any money on his arrest has been taken out of the possession of the convicted person, the Court may, on the application of such purchaser and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him

'Any money has been taken out of the possession etc'—The Magistrate can give compensation to an innocent purchaser only out of any money found on the person of the accused, when no money was found in the possession of the person convicted, the Magistrate cannot grant compensation to the innocent purchaser out of the fine imposed on the accused—2 Weir 671, 3 Bom L R 449, 3 Bom L R 764 See also Ratanlal 631

The Magistrate cannot call upon the owner to pay the purchase money of the stolen property to the *bona fide purchaser*, and an order delivering the property to the purchaser from the thief because the original owner would not pay him the purchase money, is illegal—1896 A W N 91

520 Any Court of appeal, confirmation, reference or revision may direct any order under Section 517, Section 518 or Section 519 passed by a Court subordinate thereto,

Stay of order under section 517, 518 or 519

to be stayed pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just

1352 "Any Court of appeal or revision":—The words "any Court of appeal" are not necessarily limited to a Court before which an appeal in the main case is pending. The orders under Secs 517—519 are appealable quite independent of the fact whether an appeal has been preferred or not from the main order of conviction or acquittal—3 Cal 379, 9 Mad 448. Therefore where a second class Magistrate restored certain property to the complainant when no offence was found to have been committed, the District Magistrate was competent to annul the order and restore the property to the person from whose possession it was taken, although there was no appeal pending before the District Magistrate—2 Weir 673. So also, even where no appeal has been preferred from a conviction by a subordinate Court, the District Magistrate has got jurisdiction to interfere as a *Court of revision* under sec 520 with an

passed by the trial Court under sec 517—*Emp v Nga Po Chit*, 1 Rang 199

But the Sessions Judge is not a Court of appeal or revision in respect of an order passed by a second class Magistrate. So also, a Sessions Judge is not a Court of appeal in respect of an order passed by a sub-divisional Magistrate on appeal from the decision of a second class Magistrate because there can be no second appeal to the Sessions Judge. Moreover, the Sessions Judge has no revisional powers over the order of a sub-divisional Magistrate passed on appeal—*Sonu Pillai v Krishna Pillai* 47 M L J 481 25 Cr L J 1247 20 L W 521

Moreover, the words 'Court of Appeal' imply the Court to which an appeal lies in the particular case and not the Court to which appeals would ordinarily lie from the Court deciding the particular case. And therefore where a 1st class Magistrate in acquitting the accused person charged with theft of cattle, ordered the cattle to be restored to him, but the complainant appealed to the Sessions Judge as regards the order relating to the disposal of property, whereupon the Sessions Judge revised the order and held that the complainant was entitled to the cattle, held that the Sessions Judge had no jurisdiction to act under sec 520 since he was not a Court of appeal in this particular case, because no appeal could lie to him against a judgment of acquittal the appeal ought to have been preferred to the High Court—*In re Khema* 42 Bom 664. The trying Magistrate acquitted the accused who was charged with theft of a drum, and under sec 517 directed the drum to be returned to the accused. On appeal the District Magistrate set aside the order under sec 517 and directed the drum to be delivered to the complainant. Held that the District Magistrate had no jurisdiction to do so, because he was not a Court of appeal within the meaning of sec 520, since no appeal could lie to him against an order of acquittal. The District Magistrate was also not a Court of confirmation, reference or revision, the only Court which could pass orders on a reference or revision being the High Court—*Emp v Devi Ram* 46 All 623 (624) 22 A L J 505 25 Cr L J 1168. An appeal from an order of a second class Magistrate ordinarily lies to the District Magistrate but if the District Magistrate has directed an appeal or a certain class of appeals to be heard by a Sub-divisional Magistrate, the Court of the Sub-divisional Magistrate, and not that of the District Magistrate is the Court of Appeal under this section. Therefore where an appeal in the main case lies to the Sub-divisional Magistrate, that Magistrate has jurisdiction to pass an order as to the disposal of property under this section—*In re Arunachala Thevan* 46 Mad 162

But when no appeal is preferred against the main order in the case (i.e. against the acquittal or conviction), but the appeal is confined entirely to the question of disposal of property, the appeal would lie to the Court to which an appeal ordinarily lies i.e. to the District Magistrate (from an order of a second class Magistrate) and not to the Sub-divisional Magistrate—46 Mad 162 (165), *Jogi Venkiah v Station House Officer*, 42 M L J 534. But see 42 Bom 664 (cited above) where the appeal was not against the main order of acquittal, but against the order as to disposal

of property, but still the High Court held that the Court of appeal was not the Sessions Judge to whom the appeal would ordinarily lie, but the High Court to which the appeal would lie against the main order in the particular case (i.e. against acquittal)

But when an appeal has been preferred to a particular Court from the main order of conviction or acquittal, no appeal or revision against an order as to the disposal of property can be preferred to any other Court. The jurisdiction of the other Courts as to the revision of the order is suspended owing to the seizure of the whole case by the Court of Appeal—17 C. P. L. R. 107. But where the Appellate Court in dealing with an appeal has left untouched the order passed by the original Court under Secs. 517—519, there exists no bar to an application for revision of that order being made in any other Court having jurisdiction to revise that order—17 C. P. L. R. 107.

Where a Magistrate disposing of a criminal appeal fails to pass an order under section 520, it will be open to his successor to do so—*In re Subba Naidu*, 43 M. L. J. 87. See sec. 559.

Notice—An order under this section should not be passed without giving notice to the opposite party—35 Bom. 253, 4 Lah. 49 (51). Although there is no rule of law which requires that such a notice is absolutely necessary, still if there is some interval between the date of the main order in the appeal and the order as to disposal of property, it is desirable that notice should be given to the opposite party before passing the second order—46 Mad. 162.

1353 "And make any further orders that may be just";—These words did not occur in the old Codes and were for the first time introduced into the Code of 1898. Under the old Codes it was doubted whether the Appellate or Revisional Court could direct restitution of property when setting aside the order of the Lower Court. But now the addition of the words "and make any further order that may be just" in this section gives such power to the Superior Court beyond any doubt. See 46 Mad. 162 (at p. 167), 18 C. W. N. 959, and 19 Cr. L. J. 995 (Pat.). Owing to this change in the section, the following rulings are no longer good law—9 W. R. 57, 14 Cal. 834, 1 Bom. 630, 8 Bom. 575, 22 Bom. 434.

It is not necessary that an order as regards the property should be passed under this section by the Appellate Court simultaneously with the disposal of the appeal. Thus, where a conviction for theft of bulls was set aside by the Appellate Magistrate but at that time he forgot to pass any order as to the bulls, and some time after the disposal of the appeal he passed an order for restoration of the bulls to the accused, held that the second order was not illegal as it could be treated as part of the proceedings of the main appeal (the interval being a short one)—46 Mad. 162.

When an application is made to the Superior Court "to make any further order as may be just," such application should not always be deemed as an appeal and need not be presented within the period of limitation prescribed for filing an appeal from the order of a Magistrate. Thus, a person was convicted by the Magistrate in June 1920 for dishonestly receiving

currency notes to the value of Rs 400, and was ordered by the Magistrate to make over the money to the complainant. On appeal, the Sessions Judge in July 1921 reversed the conviction and acquitted the accused but passed no order as regards the amount of Rs 400. Subsequently, in January 1922, the accused made an application to the Sessions Judge for the restoration of this money. The Sessions Judge rejected the application as barred by limitation. *Held*, that the application for the return of Rs 400 was in no sense an application by way of an appeal against the order of the trying Magistrate, but an independent application to the Sessions Judge with a view to his taking action under Sec 520 and 'passing any order that may be just. No period of limitation is prescribed for such an application, and it can be made within a reasonable time from the date on which an accused person is acquitted of the crime with which he is charged—*Kanshi Ram v Crown*, 4 Lah 49 (51)

1354 Revision.—When an order of the Lower Court has been set aside by the Sessions Court under this Section, the order of the Sessions Court is not appealable, the remedy is by way of revision to the High Court—1898 A W N 40. The words 'any proceeding' in sec 435 are wide enough to empower the High Court to revise an order passed under this section—2 Weir 669

521 (1) On a conviction under the Indian Penal Code
 Section 292, Section 293, Section 501 or
 Destruction of libel
 lous and other matter
 Section 502, the Court may order the
 destruction of all the copies of the thing
 in respect of which the conviction was had and which are in the
 custody of the Court or remain in the possession or power of the
 person convicted

(2) The Court may, in like manner on a conviction under the Indian Penal Code, Section 272, Section 273, Section 274 or Section 275 order the food, drink, drug or medical preparation in respect of which the conviction was had, to be destroyed

522 (1) Whenever a person is convicted of an offence
 attended by criminal force or show of
 Power to restore pos-
 session of immovable
 property.
 force or by criminal intimidation and it
 appears to the Court that by such force
 or show of force or criminal intimidation
 any person has been dispossessed of any immovable property,
 the Court may, if it thinks fit, when convicting such person or at
 any time within one month from the date of the conviction order
 the person dispossessed to be restored to the possession of the
 same

(2) No such order shall prejudice any right or interest

to or in such immoveable property which any person may be able to establish in a civil suit

(3) In order under this section may be made by any Court of appeal, confirmation,, reference or revision

Change:—The italicised words and sub section (3) have been added by section 143 of the Cr P C Amendment Act, XVIII of 1923 " This amendment provides for the order of restoration being passed within one month from the date of conviction secondly, it extends the scope of the section to ouster from possession by show of criminal force or criminal intimidation and thirdly, it gives power to an Appellate Court or to the High Court in revision to pass such an order —*Statement of Objects and Reasons* (1914)

1355 Scope of section.—Sec 522 which enables a Magistrate to deprive a wrong-doer of possession, is limited only to cases in which possession has been obtained by criminal force attending an offence and the wrong-doer has been convicted of such offence—2 Weir 98

An order under this section should not be made where the accused person has not been convicted of an offence attended by criminal force—12 C W N 269, 37 All 654 Thus, no order can be passed under this section, where the trespass which the accused was alleged to have committed was not a criminal trespass but merely a civil one—12 C W N 269 If the conviction is set aside in appeal or revision, the order under Sec 522 resulting from the conviction must also be set aside—24 Cr L J 493

1356 Criminal force.—To justify an order under this section, the Court must find that the offence of which the accused is convicted was attended with criminal force as defined in Sec 350 of the I P Code, and therefore where a person was convicted of criminal trespass, in which no criminal force was used, the Magistrate could not make an order under this section—*Churaman v Ramlal* 25 All 341 *Chunni v Baldeo*, 21 A L J 593, *Ishan v Dena Nath* 27 Cal 174, 3 L B R 20, *Balram v Chamru*, 2 P L T 120, 1919 P R 16, 1906 P R 12, 23 W R 54, 24 O C 352, (1922) M W N 356 If the accused armed with sticks and lathis rushed at the complainant and used threats, whereupon the complainant was obliged to run away from his field, held that there was criminal force as defined in secs 349 and 350 I P C although actual physical force was not used, and an order under this section was justified—*Emp v Ishiq Hussain* 45 All 25 (26)

But the words attended by criminal force do not mean an offence of which criminal force is an ingredient, to hold such view is to put a narrow construction on the general words—26 Mad 49, 31 Cal 691. *Contra*—25 Cal 434, 23 W R 54, 12 L W 227 and 4 P L W. 329 where the words were interpreted to mean an offence in which criminal force formed an ingredient

The word 'force' means force to a person as defined in section 349 I P C and not force to property Thus where the accused dispossess the complainant of his garden by breaking open the padlock of the gate but used no force or violence to any person, it was held that the case

not fall under this section—18 C W N 1146 Where the accused committed rioting and used violence to the complainant's fencing but not to any person, it was held that this section did not apply—18 C W N 1150 This section does not apply to a case of criminal trespass and dispossession of the complainant unless it is found that the trespass was attended with use of criminal force on the person of the complainant—2 P L T 120 Where trespass was committed in the absence of the complainant, an order for restoration cannot be passed—*Mangi Ram v Emp*, 26 P L R 500

1357 Show of force.—An order may now be passed under this section even if the offence is attended with mere show of force On this point there was a conflict of opinion prior to the present amendment In some cases it was held that there must be actual criminal force and not mere show of criminal force Thus, it was held that the offence of being members of an unlawful assembly was one in the composition of which the use of criminal force did not enter, though the show of criminal force might exist, and therefore an order under this section could not be passed on conviction for being members of an unlawful assembly—25 Cal 434, 5 C W N 250, 27 Cal 174, 23 Bom 494, 4 P L W 329, *Mahesh v Emp*, 20 Cr I J 270 (Pat) But these cases were dissented from in 11 C W N 467 1918 U B R 3rd Qr 111 and 20 Cr L J 115 (Bur), where it was held that an order as to possession of property could be passed by a Magistrate even where a person was dispossessed by mere show of criminal force The Legislature has now given effect to the ruling in the latter set of cases by inserting the words *show of force or criminal intimidation* in this section, and the former set of cases must be deemed as overruled And thus it has been held under the amended Code that where the accused succeeded in taking possession of the complainant's house by means of criminal trespass *threatening* to use force to the complainant and his men, the accused is not clearly crime within this section and an order for restoration of the house to the complainant was just and proper—*Rameshar v A J* 4 Pat 438 27 Cr L J 137 A I R 1925 Pat 683

1358 Dispossession.—To justify an order under this section it must be shown that a party has been *dispossessed* by criminal force Where there is no evidence of such dispossession, an order under this section cannot be sustained—2 Weir 674, 1917 P W R 38 There should be an express finding that the person in whose favour the order was made had been dispossessed by the use of criminal force—23 W R 54 Where the accused was convicted of rioting and an order was passed under this section to the effect that one of the witnesses be put in possession of certain land until ousted by a Court of competent jurisdiction, held that as there was no evidence that the witness had been *dispossessed* by criminal force, the order of the Magistrate was bad—2 Weir 674 If the Magistrate purported to act under sec 145, he should have instituted separate proceedings

Where it is found that neither party is in actual possession, an order under this section cannot be made—2 Weir 675

Order affecting possession of third person—The object of the provisions of this section is to enable the criminal Court, by a summary order, to restore the state of things which existed at the time of the dispossession

by the convicted person or persons. It cannot go behind the state of affairs existing at the time of forcible dispossession leading to the criminal prosecution. Where an auction purchaser of a mortgaged property was put in possession of the property by ejecting the tenant, and the auction purchaser was forcibly dispossessed by the accused, it was held that upon the conviction of the accused the auction purchaser was entitled to be restored to actual possession which he held of the house at the time of his dispossession, that the tenant had no right to any possession and that he should seek his remedy in the Civil Court.—C W N 374

An order under this section can only be binding between the parties to the order and can have no finality in favour of one who was not a party to the order and does not claim under a party—*Adinarayana v. Suramma* 48 M L J 372

1359 Order when can be made:—An order under this section, although it can be made only on the conviction of an offence is an independent order and need not be made simultaneously with the conviction—23 Bom 494. It is not essential in law that an order restoring possession should find a place in the actual judgment. But it must be immediate, that is, directly arising out of the judgment of the Court convicting in the case, and without any fresh materials having in the meantime been produced—14 Cr L J 172 (Cal), see also 16 A L J 489. It is proper if it is made within a reasonable time from the date of conviction—U B R, (1918) 3rd Qr 111. 20 Cr L J 115 (Bur). It is not necessary for the Magistrate to pass an order under this section simultaneously with the conviction and there is no illegality if he passes the order at any time after the conviction if the cause of delay in applying for the order is fully explained to his satisfaction and the complainant moves the Court promptly after the cause of delay has ceased—*Ghulam Muhammad v. Karan Singh*, 1914 P R 15. In this case there was 20 months delay owing to the filing of a civil suit by the accused, and the Court excused the delay, since the complainant applied for restoration immediately after the civil suit had terminated in his favour. It should be noted that the present section as now amended gives only *one month's time*.

In 4 C W N 308 however, it has been held that an order under this section must be made *simultaneously* with the order of conviction of the accused, and cannot be made subsequently. But this ruling is no longer good law in view of the words "or at any time within one month" newly added in this section. We do not think that an order of restoration need be made simultaneously with the conviction, but we think that any application for such an order should be made promptly, and that one month is sufficient time to allow for this purpose.—*Report of the Select Committee of 1916*

1360 Notice to party.—Since an order under this section is to be immediate, that, is directly arising out of the judgment of the Court convicting the accused, and without any fresh materials having in the meantime been produced, it is not necessary that any notice should go to the accused before the order is passed—14 Cr L J 172 (Cal). But the Magistrate should give the party an opportunity to show cause as a

of due exercise of judicial discretion—3 L B R 20 Where an order under this section was made in respect of a house on a conviction of rioting and hurt, and the Sessions Judge on appeal set aside the conviction but directed the order under sec 522 to be in abeyance pending a reference to the High Court, and subsequently in the absence of the complainant declared the order to be void, it was held that the Sessions Judge's order should not have been made behind the back of the party affected by it—23 C W N 862

Subsection (2) —Limitation for civil suit—See Art 47 of the Indian Limitation Act, which provides a period of three years from the date of the order

1361 Subsection (3)—This subsection has been newly added Prior to this amendment it was held that an Appellate Court had no power to pass an order under this section where the convicting Magistrate had not passed any order hereunder—*Bhagabat v Sadiq Ostagar*, 39 Cal 1050, *Mahammad Din v Crown* 1919 P R 14, *Azis Ahmad v Budhu*, 45 All 553 (554) These rulings are no longer correct Under the present amendment the High Court acting in reference or revision has power to pass the order even though no such order might have been made by the trial or appellate Court—*Lachman v Emp* 21 A L J 871

An order under this section may be passed by the Court of appeal or revision at any time howsoever long after the conviction by the Magistrate, and not necessarily within one month from the date of conviction—*Rameshwar v A B* 4 Pat 438 A I R 1925 Pat 689

1362 Appeal or Revision.—Since an Appellate Court can pass an incidental or consequential order under section 423 (d) an order under this section (which is in the nature of an incidental or consequential order) is also subject to appeal and is similarly subject to the revisional powers of the High Court under sec 439—29 Cal 724 The ruling in 25 Cal 630 is not correct in view of section 423 (d) An Appellate Court may set aside an order under this section, while affirming the conviction—19 C W N 990 The High Court has full power to interfere with an order passed by a Magistrate under this section, although this section is not mentioned in sec 520—36 Cal 44

523 (1) The seizure by any police officer of property

taken under Section 51 or alleged or
 Procedure by Police suspected to have been stolen, or
 upon seizure of property taken under Section 51 or stolen found under circumstances which
 create suspicion of the commission of
 any offence, shall be forthwith reported to a Magistrate, who
 shall make such order as he thinks fit respecting the disposal
 of such property or the delivery of such property to the person
 entitled to the possession thereof, or, if such person cannot be
 ascertained, respecting the custody and production of such
 property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish the claim within six months from the date of such proclamation.

Section 517 and 523—Section 517 applies only when an inquiry or trial in a Criminal Court is concluded. But Sec 523 applies even though there has been no inquiry or trial as in a case where a complaint has been dismissed under sec 203—24 M L J 1.

1363 Scope of section:—This section does not apply where the property was not taken possession of by the Police under sec 51 or 54 i.e. where it was not seized by the police under the suspicion of its being stolen property nor had the petitioner committed any offence in respect to the property. This section does not apply where the police obtained possession of the property in question in the course of an investigation into an offence which is in no way related to the property—*Chun Lal v Ishar Das* 4 Lth 38 (42-43). This section applies only to property seized by the Police of their own motion in the exercise of the powers conferred on them i.e. under secs 51, 54, 165 and 166. Such property should be disposed of by the Magistrate under this section. But property seized by the Police under a search warrant issued by the Magistrate during the course of an inquiry or trial comes under sec 517 and not under this section—17 Bom 748. So also this section does not apply where the property is seized by the Police on the complaint of certain persons claiming as owners thereof—29 Mad 375 (377). *Contra*—26 Bom 552, where it has been held that the words 'seized by the Police' apply equally whether the seizure was under a warrant of the Magistrate or without such warrant, and the Magistrate has power under this section to dispose of the property seized under a search warrant.

Property—Standing crops do not come under the provisions of this section—23 Bom 494.

1364 Order under this section:—Under this section the Magistrate may make such order as he thinks fit. The discretion given by these words should be properly exercised. If there is no evidence as to the ownership of the property, it should be delivered to the person from whose possession it was taken—5 Bom L R 25, 17 Bom L R 79, 4 L B R 14, 8 S L R 141. A Magistrate is also competent to order the property seized by the Police to be made over to the complainant if the Magistrate finds on the materials before him that the complainant is entitled to property—12 Bom L R 232. But if the property is alleged or

to have been stolen or found under circumstances which create suspicion of the commission of any offence, the Magistrate can pass order that the property should be at the disposal of the Government even though the complainant may be entitled thereto—24 M I J 1 So also, if neither party succeeds in establishing his title to possession, the property would be at the disposal of the Government—*Ibid*

Conditional order regarding property—The Magistrate cannot demand security (either under this section or under sec 517), from the person in whose possession the articles are, for their production if required—7 C W N 522 (see the case cited under sec 517) But if before the inquiry or trial, it becomes necessary to pass an immediate order to save the property from possible loss or decay, the Magistrate can order the property to be delivered to one of the parties on certain terms—5 C W N 415

1365 Inquiry—It has been pointed out in a Bombay case that the provisions of this section are wider than those of the corresponding section of the Code of 1872, and the Magistrate, instead of delivering the property to the person from whom it was taken, may now hold an inquiry and then deliver it to the person legally entitled—8 Bom 338 In another case it has been held that the Magistrate is bound to make a proper inquiry before making an order concerning the right of possession of property under this section—*In re Ratanlal* 17 Bom 748 See also 26 Bom 552 But the Madras High Court rightly holds that from a study of the section it appears that there is no obligation on the Magistrate to hold an inquiry for the purpose of determining as to which of the contending parties is entitled to the property 'It does not appear that it is authorised to usurp the functions of a Civil Court and convert the trial of an accused person into an inquiry in regard to property—29 Mad 375 (378) In another Bombay case also it is laid down that the Magistrate need not hold an inquiry but may proceed on such evidence as is available and pass an order under this section He can base his order on a mere statement made by the accused to the Police that the property was stolen by him from the adjudged owner—Q E v Tribhovan 9 Bom 131 The Magistrate is not bound to make a judicial inquiry by examination of witnesses on oath before making an order under this section All that the law requires is that he should have materials before him to satisfy himself as to who is entitled to possession—12 Bur L T 265, 4 Lah 78 (42) An order under this section can be passed on police reports and papers alone without any independent inquiry on oath with regard to the question of ownership—*Chuni Lal v Ishar Das*, 4 Lah 38 (42) If there is no question that the property was taken out of the complainant's possession, the Magistrate can return the property to the complainant without making any inquiry—*Ratanlal* 365

When the Magistrate has issued a proclamation under sub-section (2), he is not bound to make any inquiry till after the expiry of the six months from the date of the proclamation—22 Cal 761

Question of title—The Magistrate deciding a case under this section should not decide any question of title but must be confined only to the question of possession—*Musansha v Mashaksha*, 12 Bom 1 R 232 The order under this section does not conclude the right of any person The

real owner may proceed in the Civil Court against the holder of the articles for damages—9 Bom 131 5 P I J 321

1366 Proclamation—When the person legally entitled to the property is known, the Magistrate need not make a proclamation nor wait for six months before delivering the property to him. He may deliver the property to the person entitled whether he has issued a proclamation or not. If he has issued a proclamation that fact will not invalidate an order for immediate delivery of the property to such a known person—3 I B R 197

1367 Revision—On a proper case being made out the High Court in revision has jurisdiction to examine an order passed under this section—*Chuni Lal v Ishar Das* 4 I R 38 (42). The High Court has power in revision not only to set aside a Magistrate's order for the disposal of property passed under this section but also to order restitution of the property to the person entitled thereto—11 Bur L T 165

Review—Orders under this section cannot be reviewed. When once a Magistrate has passed an order restoring possession of the property he cannot reconsider it and pass another order subsequently—4 Bom L R 12

524 If no person within such period establishes his claim to such property, and if the

Procedure where no claimant appears within six months person in whose possession such property was found is unable to show that it was legally acquired by him

such property shall be at the disposal of Government and may be sold under the orders of the Presidency Magistrate, District Magistrate or Subdivisional Magistrate or a Magistrate of the first class empowered by the Local Government in this behalf

(2) In the case of every order passed under this section an appeal shall lie to the Court to which appeals against sentences of the Court passing such order would lie

1367A Unable to show that him —When the proclamation has been issued under Sec 523 and the six months have expired, then the provisions of Sec 524 come in, and the person in whose possession the property was found can come up and prove his title to the property—22 Cal 761. If he is unable to show that the property is his own, it may be forfeited to Government. But the words "unable to show that it was legally acquired by him" do not reverse the presumption laid down in Sec 110 of the Evidence Act, i.e. it should be presumed that the accused is the owner of the property in the absence of any proof to the contrary. Where the police seized certain property from the accused and no claimant came forward to claim the same though a proclamation was issued, and several items of the property bore the name of the accused, but the Magistrate said that the evidence produced by the accused was suspicious, though no evidence was elicited to show clearly that the accused's claim was false.

it was held that under the circumstances the proper and safest course is to follow the presumption laid down in Sec 110 of the Evidence Act—8 S L R 141 Where no offence is found to have been committed the property should be returned to the accused and not be confiscated to the Government—17 Bom L R 79

1368 Appeal—The appeal allowed by subsection (2) is an appeal in the full sense of Chapter XXXI and the provisions of that chapter must be fully complied with Where an appeal to the Court of Session from an order of the District Magistrate was treated as a sort of miscellaneous application and decided *ex parte* without a notice to the other party, and none of the procedure of Chapter XXXI was followed, the order of the Sessions Judge was set aside—1881 A W N 150

Civil suit—As this section allows an appeal from an order under the section it is doubtful whether the law contemplates a remedy by suit—19 Bom 668

525 If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or if the Magistrate to whom its seizure is reported is of opinion that its sale would be for the benefit of the owner or that the value of such property is less than ten rupees the Magistrate may at any time direct it to be sold and the provisions of Sections 523 and 524 shall, as nearly as may be practicable, apply to the nett proceeds of such sale

The italicised words have been added by section 144 of the Cr P C Amendment Act XVIII of 1923

CHAPTER XLIV

OF THE TRANSFER OF CRIMINAL CASES

High Court may transfer case or itself try it **526** (1) Whenever it is made to appear to the High Court—

- (a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or
- (b) that some question of law of unusual difficulty is likely to arise, or
- (c) that a view of the place in or near which any offence has been committed, may be required for the satisfactory inquiry into or trial of the same, or

- (d) that an order under this section will tend to the general convenience of the parties or witnesses, or
- (e) that such an order is expedient for the ends of justice, or is required by any provision of this Code,

it may order—

- (i) that any offence be inquired into or tried by any Court not empowered under sections 177 to 184 (both inclusive) but in other respects competent to inquire into or try such offence
- (ii) that any particular * * * case or appeal or class of * * * cases or appeals be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction
- (iii) that any particular * * * case or appeal be transferred to and tried before itself or
- (iv) that an accused person be committed for trial to itself or to a Court of Session

(2) When the High Court withdraws for trial before itself any case from any Court other than the Court of a Presidency Magistrate it shall except as provided in Section 267 observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn

(3) The High Court may act either on the report of the lower Court or on the application of a party interested or on its own initiative

(4) Every application for the exercise of the power conferred by this section shall be made by motion which shall, except when the applicant is the Advocate General be supported by affidavit or affirmation

(5) When an accused person makes an application under this section, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if so ordered, pay any amount which the High Court has power under this section to award by way of costs to the person opposing the application

(6) Every accused person making any such application shall give to the Public Prosecutor

Notice to Public Prosecutor of application under this section

notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall

be made on the merits of the application unless at least twenty four hours have elapsed between the giving of such notice and the hearing of the application

(6A) *Where any application for the exercise of the power conferred by this section is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of costs to any person who has opposed the application any expenses reasonably incurred by such person in consequence of the application*

(7) Nothing in this section shall be deemed to affect any order made under Section 197

(8) If, in any criminal case

or appeal, be

Adjournment on application under this section before the commencement of the hearing, the

Public Prosecutor, the complainant or the accused notifies, to the Court before which the case or appeal is pending, his intention to make an application under this section in respect of the case, the Court shall exercise the powers of postponement or adjournment given by Section 344 in such a manner as will afford a reasonable time for the application being made and an order being obtained thereon, before the accused is called on for his defence, or, in the case of an appeal, before the hearing of the appeal

(8) If in the course of any

inquiry or trial

Adjournment on application under this section or before the commencement of the hearing

of any appeal, the Public Prosecutor, the complainant or the accused notifies to the Court before which the case or appeal is pending his intention to make an application under this section in respect of such case or appeal, the Court shall adjourn the case or postpone the appeal for such a period as will afford a reasonable time for the application to be made and an order to be obtained thereon.

(9) Notwithstanding anything hereinbefore contained, a Judge presiding in a Court of Session shall not be required to adjourn a trial under sub-section (8) if he is of opinion that the person notifying his intention of making an application under this section has had a reasonable opportunity of making such an application and has failed without sufficient cause to take advantage of it

Change:—This section has been amended by sec 145 of the Cr P C Amendment Act, XVIII of 1923. In clauses (ii) and (iii) the word 'criminal' has been omitted, in subsection (5) the words "any amount application" have been substituted for the words "the costs of the prosecutor", subsections (6A) and (9) have been newly added, and subsection (8) has been materially altered as shown in parallel columns. The reasons are stated below in their proper places

Secs 526 and 269—Sec 269 in no way limits the powers of transfer conferred on the High Court by this Section. The High Court has power to transfer a case from a jury district to a non jury district—10 S L R 154 (cited under sec 269)

1369 Conditions precedent—Before an application is made to the High Court for transfer, the District Magistrate must be moved first. The High Court will not ordinarily entertain an application for transfer when the applicant can under the law move the District Magistrate for the same relief but has not done so. The High Court will interfere only in the last resort—*Ravi Chandra v Sundar* 26 Cr L J 960 (All) 6 Bom L R 480, 24 Cr L J 466 (Lah). The case to be transferred must be a case pending before a competent Court. The High Court cannot under this section transfer a case which is not properly before a Subordinate Court of competent jurisdiction to receive and try it—10 Bom 274 9 All 191 9 Mad 356. *In re Sikka* 17 L W 69 6 Cal 30 7 Bom L R 104 3 Bom L R 121. If the complaint has been made to a Magistrate who is not competent to take cognisance of the case he shall return the complaint for presentation to the proper Court with an endorsement to that effect (see Sec 201). The application for transfer must be made before the disposal of the case. A case cannot be transferred after acquittal. This Section contemplates interference by the High Court by way of transfer, when a person is aggrieved or injured by any order of the Magistrate before the disposal of the case. It is not intended to give power to interfere in order to set aside an acquittal or discharge—2 Cal 290, 1 Bom L R 782

1370 Cases which can be transferred.—In clauses (i) and (ii) of the old section, the Legislature used the words *criminal case* and so the word *criminal* led to a divergence of views in several cases. Thus, as regards cases under Chapter VIII, it was held in 28 Cal 709, 41 Cal 719, 33 All 642, 12 A L J 262, 1913 P R 1 and 1 S L R 98 that such cases were criminal cases and were therefore covered by this section, but in 1914 P R 5 and 1916 P L R 78 it was held that those cases not being criminal cases could not be transferred from one Court to another.

So also, as regards cases under Chapter XII, in 2 C L J 614, 26 Mad 188 34 All 533 and 11 O C 61, it was held that proceedings under section 145, being criminal proceedings could be transferred from one Court to another, whereas the contrary view was taken in 25 Bom 179 and 8 S L R 215. The Legislature has now wisely omitted the word 'criminal' so that all cases inquired into and tried in any criminal Court can now be transferred under this section. "The word *criminal* has been omitted to make it clear that the powers of a High Court to transfer criminal cases extend to the transfer of miscellaneous proceedings under the Code"—*Statement of Objects and Reasons* (1914). Proceedings under Sec. 14 of the Legal Practitioners Act are neither civil nor criminal, but as they are held in criminal Courts they can be transferred from one Court to another under this section. The contrary view held in 1888 P R 41 is no longer correct.

This section applies to proceedings pending in Courts subordinate to the High Court. Panchayet Courts established under the U P Act VI of 1920 are not subordinate to the High Court, and the power under this section cannot be exercised to transfer a proceeding pending in one Panchayet Court to another—*Sat Narain v Sarju*, 46 All 167 (168, 169). In this case, Kanhuji Lal J is of opinion that the High Court cannot transfer a case from one village Panchayet to another under the provisions of this section but it can do so under sec. 22 of the Letters Patent—Ibid (p. 170).

Future cases cannot be transferred—The High Court can transfer actual cases only i.e. cases actually pending before a Court it cannot direct that cases that may be filed in future should, when filed, not be heard by the authority to which they are presented but should be transferred to some other Court—*Ratnial* 973.

Inquiry—An inquiry under the Workmen & Breach of Contract Act is an inquiry contemplated by this section and can be transferred from one Court to another—*Bansi v Lakshmi* 45 All 700 (701).

1371 Clause (a) —Reasonable apprehension of not having a fair trial!—The basis of all applications for transfer of criminal cases must be that the accused must have a reasonable apprehension that he will not receive a fair trial—1 P L J 399. When there are circumstances existing to create a reasonable apprehension in the mind of the accused that he will not receive a fair and unprejudiced trial, a transfer should be directed, though there is really no bias in the mind of the Court from which the transfer is sought and though the circumstances may be capable of explanation—2 Weir 678 28 Cal 297, 23 CrL 495, *Kali Churn v Emp* 33 Cal 1183 18 Cal 247 19 All 64, 25 Bom 179, 3 Lah 443 15 C P L R 192 1 P L T 522 2 P L T 297, *Benode Behari v Emp* 5 P L T 63 25 Cr L J 590, 20 Cr L J 566 (Pat), 25 Cr L J 638 (Lah). Confidence in the administration of justice is an essential element of good Government, and a reasonable apprehension of failure of justice in the mind of the accused person should therefore be taken into serious consideration on an application for transfer—*Kali Churn v Emp*, 33 Cal 1183 10 C W N 793; *Sardari Lal v Emp*, 3 Lah, 443.

When a transfer is asked for, it is not sufficient merely to allege that the applicant would not get an impartial trial, but he must place before the Court the facts which give rise to this belief in his mind—*Amar Singh v Sadhu Singh* 6 Lah 396 7 Lah L J 241 26 Cr L J 853

When sufficient grounds are made out for a transfer, the High Court is bound to act under this Section. It is precluded from considering the possible effect which the transfer may have on the reputation or authority of the Magistrate concerned—10 C W N 441. One of the most important duties of the High Court is to create and maintain confidence in the administration of justice, and this can be done by giving to every citizen an assurance that so far as practicable he will never be forced to undergo a trial by a Judge or Magistrate when he has reasonable apprehension that a fair and impartial trial cannot be obtained from that Judge or Magistrate—1 S L R 8. In transferring a case from one Magistrate to another, the High Court ought not to be guided by the impressions produced in its own mind as to the impartiality of the Magistrate but must look to the effect likely to be produced in the minds of the parties and their witnesses by the selection of a Magistrate whose personal antecedents or circumstances have however unavoidably connected him with either one party or the other—25 Bom 179.

It is the duty of the Magistrate not only to conduct the case impartially, but also to conduct himself in such a manner that the parties may have absolute confidence in him that only full justice will be dealt out to them. If the Magistrate though not actually biased, still conducts himself in such a manner and utters such words as to impair the confidence of any of the parties then there is good ground for the transfer of the case from his file to that of some other Magistrate—25 Cal 727, 28 Cal 709 *Mid Akbar v Emp* 47 All 288 23 A L J 133. Magistrates should not fail to remember that it is their duty no less to preserve an outward appearance of impartiality than to maintain the internal freedom from bias which is incumbent on all judicial officers and that if they allow their executive zeal to appear to outrun their judicial discretion their action is certain to induce the party to make an application to the High Court for transfer—1 S L R 8.

What is a reasonable apprehension should be decided according to the incidents of the case and in reference to the special circumstances. It is difficult to lay down any hard and fast rule under which a transfer should be made for the circumstances in one case might differ from those of the other—33 Cal 1183 5 P L T 63 36 Cal 904 1 P L T 494. It is not sufficient if the accused merely alleges that a fair and impartial trial cannot be had. He should also place before the Court the facts and circumstances from which he is led to entertain such belief and if these will reasonably give rise to that belief, a transfer will be made—10 O C 165, 1917 P W R 13. It is not every kind of apprehension that will entitle an accused person to get a transfer of the case, the apprehension of the accused must be shown to be reasonable—1 P L T 494 *Pulin v Asutosh* 39 C L J 330. The High Court will not order a transfer merely in deference to the susceptibilities of the accused when there is no reasonable

ground for the apprehension—10 C W N 441 What is a reasonable apprehension must of course depend on the degree of intelligence of the accused—*Ahmad Din v Emp*, 25 Cr L J 638, *Sardari v Emp*, 3 Lah 443 In determining whether an application is reasonable, it is the duty of the High Court to place itself in the position of the accused and to consider the facts and circumstances attending his position Abstract reasonableness ought not to be the standard—33 Cal 1183, 15 Cal 455, 8 C W N 77, 29 Cal 211, *Pulni v Asutosh*, 39 C L J 330 In a Sind case it is laid down that the apprehension to be established must be an apprehension reasonable in the opinion of the Court, and not such apprehension as would appear reasonable in the mind of the accused The Court itself should be satisfied on that point, and the real test is not what the accused may reasonably have been led to think about it—10 S L R 183 But this would be putting a wrong construction on the section See 25 Bom 179 cited above. For, it has been rightly observed that the law of transfer of cases is based not so much upon the motives which might be supposed to bias the Judge as upon the susceptibilities of the litigant parties One important object at all events is to clear away everything which might engender suspicion and distrust of the tribunal and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security—a P L T 198, following *Sergeant v Dale*, 2 Q B D 558 (567), *Anant v Emp*, 7 N L J 155, *Mochal v Matru* 10 N L R 15 25 Cr L J 196

1372 Instances of reasonable apprehension—When the District Magistrate and the Sessions Judge expressed an opinion that an impartial jury could not be obtained if the case was tried in the district, it was held that the expression of such belief was sufficient to shake the confidence of the public and of the parties in the fairness and impartiality of the jury, and to create in their minds a reasonable apprehension that a fair and impartial trial could not be had if the case was tried there, and therefore an order for transfer was expedient for the ends of justice under this section—25 Cal 727 When in a case of petty theft, the Magistrate issued non bailable warrants against the accused in the first instance, and exacted very heavy bail from them, there was a sufficient ground for apprehension that a fair trial could not be had from him, and therefore a transfer should be directed—8 C W N 589 Where in a summons case the Magistrate had issued a warrant without any apparent reason, and there was reason to believe that in other proceedings connected with the case the Magistrate had formed an opinion unfavourable to the accused, there ought to be a transfer of the case—18 Cal 247 The issue of a warrant for the arrest of a complainant who has not appeared is not justifiable, and this action on the part of the Magistrate is a sufficient ground for transfer of the case from his file—*Fazal Ahmad v Abdulla* 26 P L R 701 7 Lah L J 571 Where it appeared that during the course of an inquiry preliminary to commitment some entries in the order sheet were not made by the Magistrate daily as required by the rules of the High Court, and certain orders were not recorded either on the particular day or possibly even on the following day, and in one instance the Magis-

trate did not record the order with reference to the order of proceedings before him, and it further appeared that the Magistrate, even after the receipt of the order of the High Court staying all further proceedings in the case, proceeded to record the evidence of a medical officer, *held* that the Magistrate had acted with impropriety and the case should be transferred to another Magistrate—2 C W N 639 Where a Magistrate acquitted the accused on a consideration of the complainant's statement alone, and without examining his witnesses, it showed that the Magistrate had formed a decided opinion before hearing the evidence for the prosecution, the High Court set aside the order of acquittal and directed the transfer of the case to another Magistrate—20 Mad 388 Where the Magistrate makes inordinate delay in examining the complainant, or disregards the preliminaries prescribed by this Code for dealing with complaints, or awaits the consideration of the evidence in another case with which the accused has no concern, in order to decide whether any action should be taken upon the complaint, these may give rise to a reasonable apprehension that a fair trial cannot be had, and the case should be transferred—1 P L T 494 Where the complainant made a verbal statement in chambers before the District Magistrate who at once arrested the accused before making any inquiry, and there was a likelihood of the Magistrates of the district figuring as witnesses in the case, *held* that the case should be transferred to a different district altogether—1 P L T 522 Where after the application of the accused for adjournment of the case to enable them to move the High Court for transfer, the Magistrate raised the amount of bail of some of the accused from Rs 100 to Rs 250, and cancelled the bail bonds of others, it was *held* that the action of the Magistrate might be absolutely *bonâ fide* but it was sufficient to create a reasonable apprehension in the minds of the accused that they would not have a fair trial before him—1 P L T 652 Where the Magistrate exhibits haste in recording the statement of an accused person before all the evidence for the prosecution is concluded, this fact may create an apprehension in the mind of the accused that he will not get a fair trial and entitles him to a transfer of the case—18 A L J 1145 Where in a proceeding under sec 107, the persons against whom the proceeding was taken were appointed special constables, it might raise a reasonable apprehension that they would not have a fair and impartial trial, and a transfer ought to be allowed—11 C W N 121, 10 C W N 82 Where it was alleged by the accused that the District Magistrate had cancelled his license for arms and refused to see him when he called to pay his respects, it was *held* that these incidents were likely to lead the accused to believe that the District Magistrate was displeased with him and there was a reasonable apprehension of his not having a fair trial from the Magistrate—35 All 5 Where the trying Magistrate stopped the cross-examination of the complainant in a case because in his view the complainant had been fully cross-examined for one hour, it was *held* that the act of the Magistrate was indiscreet and might reasonably lead the accused to believe that they would not get a fair trial at his hands, and the case should therefore be transferred to another Magistrate—20 Cr L J 559 (Pat) Where there was an order of the Superintendent of Police that the accused was to be allowed facilities for instruct-

ing legal advisers only on application to him, it was held that there might be a reasonable apprehension in the mind of the accused that his movements were unduly restricted by that order, and the High Court therefore allowed a transfer of the case to another place—23 C W N 481, see also 23 C W N 479 Where the Magistrate refused to dispense with the personal appearance of pardanashin ladies belonging to respectable families, and repeatedly insisted on their appearance in Court, the High Court transferred the case from that Magistrate—17 C W N 1248 A complaint of murder had been preferred against the accused before the Subdivisional Magistrate During the pendency of the complaint the Deputy Commissioner of the District made a speech in the presence of all the Magistrates of the District including the Subdivisional Magistrate in question, that the rumours were baseless that the accused was innocent and that baseless charges had been imputed from malicious motives Held that under the circumstances, the apprehension on the part of the complainant that he would not get justice at the hands of the Magistrate was reasonable and that there was a sufficient ground for transferring the case from the file of the subdivisional Magistrate—*Rup Narain v Abdul Hamid*, 11 O L J 657 25 Cr L J 1374

The applicant who wants the transfer of the case on the ground of bias in the mind of the Magistrate must show the very clearest grounds for believing that the Magistrate is likely to be prejudiced or influenced by any improper motive in the decision of the case In the absence of such ground, it is highly improper to transfer a case from his Court and thus to throw a gratuitous slight upon the Magistrate—6 B H C R 69 *Ratanlal* 323 1887 A W N 139

The transfer of a criminal case should not be necessarily ordered simply because an accused person thinks that he would not get an impartial trial but the real question to be considered is whether on the facts disclosed in the application for transfer, there arises a reasonable inference that the Magistrate who is seized of the case may be prejudiced willingly or unwillingly against the accused—12 A L J 33 Moreover, to justify a transfer it must be shown that the Magistrate possessed such a substantial interest in the result of the case as would justify a conclusion that he had a real bias in the matter—*Ratanlal* 685

For a transfer of a case on the ground of bias on the part of the Magistrate it is rarely possible for an accused person to prove actual bias, it is sufficient to show circumstances which may raise a reasonable apprehension in the mind of an accused person that he will not have a fair and impartial trial although the circumstances may be susceptible of explanation and may have happened without any real bias in the mind of the Magistrate—2 Weir 6-8 18 Cal 247, 23 Cal 495, 25 Cal 727, 28 Cal 709 28 Cal 297 33 Cal 1183, 19 All 96, 25 Dom 179, 1 P L T 522, 20 Cr L J 566 (Pat) *Bisar Singh v Sadhu Singh* 7 Lah L J 241 26 P L R 273 15 C P L R 192 The grounds of transfer need not show actual bias but it is sufficient if there are grounds alleged for suspecting bias But if false charges of bribery and corruption are trumped up against the Magistrate, no transfer will be ordered, even when there are sufficient grounds for suspecting bias—2 L B R 220

Although each of the circumstances alleged may not be by itself sufficient to show that there was a bias on the part of the Magistrate, a transfer would nevertheless be justified, where having regard to all the circumstances taken together, the accused might reasonably apprehend that he would not have a fair trial—9 C W N 619, 1 P L T 652, 1 P L T 522

1373 Expression of opinion on the case:—A Magistrate who has already formed a decided opinion about the case before him and has expressed a strong opinion as to the guilt of the accused, is precluded from trying the case and a transfer ought to be directed—10 Bom L R. 201, 31 All 642, 7 A L J 813, 22 A L J 430, 20 Cal 857, 18 Cal 247; 8 C W N 641, 3 C W N 278, 20 Cr L J 566 (Pat), 23 Cr L J 168, 6 Bom L R 856 Where a case was sent to a Magistrate for disposal with a remark by the District Magistrate that it was quite a clear case and the defence was ridiculous, it was a good ground for transfer of the case to another district—*Md Yakub v Emp*, 2 O W N 688, 26 Cr L J 152, A Magistrate in recording the evidence of a witness made a note regarding the demeanour of the witness (sec 363) to the effect that the witness faltered and that from his demeanour it appeared that he had not told the truth, held that as the witness was altogether disbelieved by the Magistrate, this was a sufficient ground for transfer of the case to some other Magistrate—*Golam Lari v Yar Ali*, 29 C W N 316, 26 Cr L J 852

Expression of opinion in a connected or counter case—A Judge is not disqualified from trying a case of rioting merely because he has decided a counter case of rioting and expressed an opinion. But the Judge should be careful to confine himself in the trial to the evidence before him and should not let his mind be influenced by the evidence given in the former case—1 C W N 420, sec also, *Rajom Kanta v Emperor* 36 Cal 904 Judges are presumed to be upright men who will approach each case from the point of view of that case alone and not permit their minds to be affected in any way by anything that has gone before that case. The mere fact that the Judge in a former proceeding arising out of a counter case to the one now coming before him expressed certain views upon the evidence in the former case as to which of the two versions is correct, is not a reasonable ground of apprehension that the accused will not have a fair trial—1 P L J 399, *Emp v Hargobind*, 33 All 583 Interest or bias on the part of the Magistrate is not to be inferred from opinions formed on evidence judicially recorded, otherwise a Magistrate would, after disposing of one of two counter cases, be disqualified from trying the other—1 S L R 37, 6 Bom L R 1092 But when in a case and a counter case, the Magistrate in discharging the accused in one case expressed a strong opinion on the guilt of the accused in the other case, a transfer of the case pending will be directed—*Rangasami v Emp* 30 Mad 233 Where in a proceeding it appeared that the Magistrate had expressed his opinion in a very strong language against the petitioner in a connected case, a transfer should be directed—1916 P L R 78, *Isranath v Emp*, 27 Cr L J 210 (Nag) 11 O L J 556

1374 Inspection by Magistrate—The inspection of a locality by the Magistrate acting fairly and judiciously during the inspection is not only not illegal, but under certain circumstances proper for the right understanding of the evidence. The Magistrate does not constitute himself a witness by a mere local inspection, and such inspection is no ground for transferring the case—1901 P L R 89, 1901 P R 13. But if the Magistrate goes to inspect the locality accompanied with one party (e.g., a partisan of the complainant) the action of the Magistrate is improper and is a sufficient ground for transferring the case—1901 P L R 165, 12 C W N 748. It is not only not objectionable but in many cases highly advisable that a Magistrate trying a criminal case should himself inspect the scene of occurrence in order to understand fully the bearing of the evidence given in Court. But if he does so, he should be careful not to allow any person on either side to say anything to him which might prejudice his mind one way or another. If the Magistrate goes out of his way in making a local inspection and makes the inspection with the complainant without notice to several of the accused and in their absence, the accused may very rightly apply for a transfer under this section—21 Cr L J 166, 6 O L J 680, *In re Lalji*, 19 All 302, *Atiar Rai v Emp*, 39 Cal 476. See also notes under sec 556, under heading "Local Inspection."

Magistrate being a witness in the case—The fact that the Magistrate may be a witness in the case for the defence is a ground of transfer, but in applying to the High Court for a transfer on that ground, it must be shown that the Magistrate will be a necessary and essential witness for the defence—19 Cr L J 632 (Cal). When in a criminal case the evidence of the Magistrate is found necessary by the defence, it is proper that the case should be transferred to another Magistrate—26 All 536. In 1897 A W N 17, it has been held that the mere fact that a Magistrate in whose Court a case is pending may be summoned as a witness for the defence, is not of itself a ground for the transfer of the case from the Court of such Magistrate but it may be a ground for such Magistrate committing the case to the Court of Session, instead of passing sentence himself, in the event of a conviction.

1375 Magistrate having previous knowledge of the case:—When a Magistrate initiates proceedings under sec 110 on information within his own knowledge, he is not the proper person to conduct the inquiry under sec 117, the case must be transferred to some other Magistrate—6 C W N 595, 28 Cal 709. But in an Allahabad case it has been held that there is nothing to limit the source or the nature of the information on which a Magistrate can act under sec 110, and therefore the mere fact that the Magistrate has initiated proceedings on information based upon his own personal knowledge is not a ground for transfer—27 All 172. Where a Magistrate became aware of some of the facts in connection with a case by his taking part, or at any rate by his being present, at a search made by the Police during the investigation, it was expedient that the case should be transferred to the file of some other Magistrate—5 C W N 864. Where a Magistrate has dealt with the dispute in an In-

formal manner as a private arbitrator, it is desirable that the case should be transferred to another Court, as his previous informal knowledge would necessarily hamper him at every turn—18 C L J 150

1376 Magistrate being friend or relation of complainant — The mere fact that the Magistrate is the master of the complainant does not deprive him of his jurisdiction, but in such a case it would generally be expedient for him to refer the complainant to another Magistrate—9 Bom 172

The fact that the Magistrate is a friend or remote relation of the complainant is no ground for transfer—1912 P W R 4 The fact that both the complainant and the accused are acquainted with the Magistrate who sometimes gets medical help from each, is not a ground of transfer—1917 P W R 13 So also, the fact that the Magistrate is a relation of the Sub Inspector of Police or that he is in private life a guardian of a person who has a claim to the estate whose manager or servant instituted the proceeding is not a valid ground of transfer—28 Cal 297 But in 13 C W N 1 (note), the fact that the prosecution witness was a relation of the Magistrate was held to be a sufficient ground for transfer And in a recent Calcutta case the fact that the complainant's mukhtar was a near relation of the Magistrate was held to be a ground for transfer—*Nityaranjan v K E*, 29 C W N 648 26 Cr L J 1183

1377 Magistrate being interested in the case.—Where the District Magistrate's letter showed that he had taken a keen personal interest in the matter which had led up to the proceedings being taken against the accused and that he had even taken part in the inquiry and had himself instituted the proceedings (under sec 107) and was more or less convinced of the accused's guilt, held that the proceedings ought to be transferred to another district—7 A L J 813, 32 All 642 Where the accused was connected with a Raj estate which was under the management of the District Magistrate as Collector and Agent to the Court of Wards, the High Court granted the application for transfer of the case from the file of the District Magistrate, lest there might be some bias in the mind of the Magistrate inducing him to look with favour upon the interests of any party—8 C W N 77 Where a Magistrate has interested himself in a case pending before him in the way of obtaining a settlement by the parties it is to the interest of both the parties and it is but fair to the Magistrate himself that he should not hear the case—*Muraffar Husain v Md Yalub* 47 All 411 23 A L J 191 26 Cr L J 869, *Gobinda Chandra v Gopal Chandra* 18 C L J 150 14 Cr L J 602 But the mere fact that the District Magistrate in his capacity as Collector is concerned in the management of an estate under the Court of Wards is no ground for transfer of a case instituted by a servant of the estate against a tenant of the estate and pending before a Subordinate Magistrate in the district especially where there was not even a suggestion that the Collector or Manager knew of the institution of the case—28 Cal 297 See also notes under sec 536

Magistrate proceeding with the case after issue of rule for transfer:
—See Note 1388 under sub-section (8).

1378 Other cases:—Where from the number of witnesses on both sides the case could not be finished in one day but the Judge insisted on finishing the case in one day and was unwilling to grant an adjournment to another date, *held* that this constituted a sufficient ground for the transfer of the case from that Magistrate—17 A L J 48 Where the trying Magistrate ordered that he would examine only one witness a day during the trial and would devote no more time each day, and thus prolonged the trial of the case, *held* that this was a sufficient ground for transfer of the case—*Narain Das v Emp*, 26 Cr L J 1363 (Lah) Where during a trial a prosecution witness made certain statements which showed his complicity in the offence and the Magistrate ordered him to be put on trial along with the accused, *held* that the action taken by the Magistrate was quite right but inasmuch as the witness had been examined on oath before the Magistrate who might to a certain extent have been prejudiced, the case against him should be tried by a different Magistrate—20 Cr L J 385 (Cal) Where in a case of rioting and murder committed to the Sessions Court, which had apparently aroused considerable local interest, it appeared that the Civil Surgeon had been discussing the case at the local club with the officers of the station including the Sessions Judge, *held* that this fact by itself was sufficient to justify an order of transfer of the case from the Sessions Judge—19 A L J 946 Where the Magistrate had asked the pleader for the defence not to defend the accused, *held* that under such circumstances the accused could not have confidence in the impartiality of the Magistrate and the case should be transferred—3 Lah L J 528 Where no practitioner in a District ordinarily employed in criminal cases is willing to act for the accused, it is a good ground for transfer of the case to another district—*Lalla v Zahoor Ahmed* 2 O W N 682 26 Cr L J 1272

Where at the request of the complainant, his case is sent to a particular Magistrate for trial, the accused will be justified in asking for a transfer from that Court—25 Cr L J 989 (Lah)

1379 What are not grounds of transfer:—Want of temper and discretion on the part of the Magistrate in dealing with the petitioner's written statement and failure to give satisfactory explanation to the High Court are not, by themselves sufficient grounds for granting an application for transfer—2 W R 58

The mere fact that the complainant is a man of importance in the place where the trial is held is not sufficient to justify a transfer to another place—*Ratanlal* 474

A *bona fide* mistake of law is not a ground of transfer Thus in a case under sec 380 I P C the Magistrate should at once give the accused an opportunity to cross-examine the prosecution witnesses if he so desires, even though the charge may not be framed, but a refusal to give such opportunity, when the Magistrate acts *bona fide* under a mistaken view of the law, is not a good ground for transferring the case—8 C W N 838 So also the mere fact that a trial Court has committed an error of judgment in admitting an evidence is no ground for transferring a case from such Court—20 Cr L J 609 (Pat) So also,

errors of judgment, e.g., refusing to summon a prosecution witness for cross-examination insisting on his being summoned as a witness for the defence, disallowing objections as to the fitness of a person to serve as assessor, and permitting the prosecution to examine in chief a witness on the substantive case of the prosecution after the defence has disclosed its case in the cross-examination of the witnesses, are insufficient by themselves to justify a transfer of the case—3 P L T 32 The fact that a Magistrate erroneously refused to admit a document in evidence or asked a party to deposit the probable expenses for summoning a person as witness is no ground for transferring a case—*Nand Kishore v Kalka* 5 P L T 487 25 Cr L J 458

The fact that the Magistrate has released the accused on bail and thus shown a tendency to treat the accused with undue leniency is not a ground of transfer—22 Bom 539 The fact that the trying Magistrate had already tried certain other persons charged with the same offence is not a ground of transferring the case of the accused now being tried for the same offence—24 Cr L J 800 (Oudh) It is not a sufficient ground for transfer of a case that the presiding Judge belongs to the Hindu or Moslem faith and cannot be expected to deal impartially with a communal dispute—*Bhagwan Das v Emp* 22 A L J 1103

The mere refusal by the Magistrate to allow the accused to cross examine the complainant is not a ground of transfer especially when the case has reached a very advanced stage—1917 P W R 29 So also the mere fact that the trial Magistrate frequently cross examined the witnesses of the complainant or disallowed questions as irrelevant is no ground for a transfer of the case—*Shadi Lal v Gaurish* 25 Cr L J 1185 (Oudh)

The fact that the Magistrate accepted the complaint at a late hour in the evening and issued warrant forthwith or the fact that the Magistrate recorded statements of only one of the accused persons or the fact that the complainant and the accused are both acquainted with the Magistrate who sometimes gets medical help from each is not a sufficient ground for transfer—1917 P W R 13 When a case is adjourned the Court can award costs of adjournment whenever it thinks proper and the passing of such order of costs against a party does not disclose any prejudice on the part of the Magistrate and is not a valid ground for the transfer of the case to another Magistrate—2 P L W 218 When the District Magistrate refuses to produce the papers called for by the defence on the ground that some are missing and others are confidential it cannot be said that the trial Court entertains any bias against the accused or that the accused should reasonably apprehend any such bias—20 Cr L J 609 (Pat) The mere fact that the Magistrate's son is a pleader and that he has been engaged by the other side is no ground for granting a transfer to another Court—*Peary Lal v Paltan* 26 Cr L J 440 (Oudh) But see 29 C W N 648 cited in Note 13-6 It is not a ground of transfer that the Magistrate is a subordinate of the officer making the complaint—*Nasudeo v Emp* 26 Cr L J 1425 (Nag)

1380 Onus of proof.—When an application for transfer is

jected to by the accused, the prosecution must bring forward the very best evidence to prove that a fair trial cannot be held in the district in which the case is ordinarily triable—6 Cal 491

Clause (b)—Since the Code allows appeals and revision applications from convictions, and since the verdict of the jury is not in all cases final, the High Court is loath to transfer a case to itself on the ground of any difficult question of law arising in the case. If the Lower Court errs in any point of law, it can be set right afterwards by the High Court in appeal or revision. See 15 W R 69 (per Phear J)

1381 Clause (d) — Convenience of parties—When all the acts constituting the offence took place in Bombay, but the complainant chose to lodge his complaint in the Ratnagiri Sessions Court and the accused also wished to be tried there, the High Court ordered the trial to proceed before the Sessions Judge of Ratnagiri—2 Bom L R 394. In transferring a case no consideration should be had to the fact that by the transfer to a particular district the accused will have the benefit of a trial by a jury, where previously he had none. The real question is that of convenience of parties—8 C L J 59. The convenience of defence witnesses when they are numerous will outweigh the convenience of the prosecution witnesses especially when they are few, and a transfer will be directed to suit the convenience of the former—Ratanlal 927. A transfer will be allowed from one Court to another, where the accused are residents within the jurisdiction of the latter Court, and all the witnesses belong to the same place so that it will be conducive to the convenience of parties if the case is inquired into in the latter place—Bansi v Lakshmi 45 All 700 (1901)

1382 Clause (e) — Expedient for the ends of justice—When a Magistrate who had seized of the case did not know English and there was a large amount of evidence oral and documentary in English in the case, a transfer was necessary in the interests of justice—16 Cr L J 73 (All). But the fact the Magistrate was not well versed in Telugu and Sanskrit in which a book produced in evidence was written is not a ground of transfer, because it is a difficulty which is of common occurrence—(1911) 2 M W N 50

Where the case was relating to a dispute between Hindus and Mahomedans in respect of a mosque it is desirable that the case should be tried by the District Magistrate or some other European Magistrate—Kader Baksh v Sundar Lal 1915 P L R 127 16 Cr L J 213, Mangal v Crown 26 P L R 267 26 Cr L J 1056

Unnecessary delay in the disposal of a petty case is a good ground for transfer—2 Weir 679 12 A L J 262 8 M L T 222

The fact that the accused is in acquaintance of the Magistrate and that it would be in the interests of justice if the trial were held by a stranger Magistrate who knew nothing about either party, is not a ground of transfer—16 A L J 490

1383 Clause (i)—From a criminal Court subordinate to its authority—The High Court has no jurisdiction to direct the transfer of a case

from a Court not subordinate to its jurisdiction Sec 185 does not empower such a transfer. Thus, the High Court at Madras has no power to transfer a case from the Court of the Presidency Magistrate of Bombay to the Court of the Presidency Magistrate at Madras—40 Mad 835

The Courts of the District Magistrate and Sessions Judge of Bangalore are subordinate to the High Court of Madras, and the High Court can transfer the cases pending before those Courts—9 Mad 356 The Perim Sessions Court and the Court of the Cantonment Magistrate at Secunderabad are subject to the Bombay High Court, and that High Court can transfer any case pending before those Courts to any other Court of equal or superior jurisdiction—10 Bom 274 9 Bom 333

The village Panchayet is not subordinate to the authority of the High Court, and the High Court cannot therefore transfer a case from one village Panchayet to another—46 All 167 (168 169)

1384 To what Court case may be transferred:—The transfer must be from one Court to another Court. Therefore the High Court cannot transfer a case from the file of one Presidency Magistrate to another, both being Magistrates presiding over the same Court—13 M L J 69 In 35 Mad 739 however the High Court transferred a case from the file of the Chief Presidency Magistrate to the file of another Presidency Magistrate

The transfer must be to a Court of competent authority and of equal or superior jurisdiction. Where the High Court directed the District Magistrate to transfer a case (under Sec 107) to another Magistrate and the District Magistrate transferred the case to a Second Class Magistrate, the transfer was illegal because the Second Class Magistrate was not competent to hear the case under sec 107 and also because he was of inferior jurisdiction to the District Magistrate—37 All 20 The transfer should have been made to a First Class Magistrate as in 24 All 151

* In selecting a Court to which the case is to be transferred, regard must be had to the gravity of the offence. Where a case under Sec 211 I P C was transferred from the Court of a Joint Magistrate to that of an Honorary Magistrate with first class powers where the case remained pending for four months, it was held that the case, being of a serious nature, ought to have been transferred to the Court of Session or to the Court of a more experienced Magistrate—16 A L J 294

Power of the Court to which case is transferred—See 19 All 249 and 1917 P R 30 cited in Note 606 under sec 192

1385 Subsection (3) — A party interested —Ordinarily, the only persons who are recognised by the Code as parties to a criminal case are the persons who have the right to control the proceedings, these are the Crown, the accused and the parties engaged in conducting certain proceedings within the meaning of this Code. The Code does not recognise a private prosecutor, who is a complainant, as a party to the case, and he consequently is not competent to apply for a transfer as a party interested—*Jamuna v Rudra Kumar* 4 P L J 656 (per Mulla J) *Jwala Prasad J* held in this case that the person at whose criminal case is lodged, (i.e., the complainant) is a person inte-

the prosecution and is entitled to apply for transfer but his rights are subordinate to those of the Crown, that is, if the Public Prosecutor or the person who is conducting the case on behalf of the Crown is unwilling to have the case transferred, the private prosecutor has no right to get the case transferred. The opinion of Jwala Prasad J has been followed in a recent case of the Patna High Court in *Sheodhan v Jhingur*, 7 P L T 49 26 Cr L J 1249, and by the Lahore High Court in *Bagh Ali v Md Din* 6 Lah 541 27 P L R 80 27 Cr L J 411

A person alleging himself to be the complainant, but who in fact is not the complainant and from whose hands the prosecution has been taken away by the order of the Magistrate, is not a party interested within the meaning of this subsection—5 Bom L R 869

1386 Sub section (4) —Mode of making an application for transfer

—An application for transfer should be made by motion supported by affidavit or affirmation and not by a letter addressed by the Sessions Judge to the High Court—1 Cal 219 8 Cal 63, 1894 A W N 154 An application for transfer should not be made by a mere written statement prepared by Counsel but should be made by an application supported by affidavit or by a properly verified petition—1891 A W N 37

Affidavit—When the transfer is asked for on the ground that the appellant wishes to call the Magistrate as a witness the application must be supported by an affidavit showing that the evidence required from the Magistrate is relevant and material—1886 A W N 257

The Madras High Court holds that an application for the transfer of a criminal case by the accused is a criminal proceeding within the meaning of sec 5 of the Indian Oaths Act, and no oath can be administered to the accused. Therefore no affidavit can be put in by the accused person. If only affidavit is put in it is a nullity, and the accused cannot be convicted for any false statement contained therein—1 Weir 176 This is also the view of the Allahabad High Court see *In re Barkat*, 19 All 200, *Emp v Bindeshri*, 28 All 331 and *Emp v Matan*, 33 All 163 But in 3 Lah 46 it has been held that the affidavit is not a nullity, the provision in section 342 (4) that no oath can be administered to an accused has reference only to the statement made by him during his examination under that section, it does not preclude him from making an affidavit in support of his application under sec 526

Counter affidavit by District Magistrate—When an application for transfer is made on the ground of partiality of the Magistrate before whom the case is pending, it is highly improper for the District Magistrate to make an affidavit swearing as to the impartiality of that Magistrate—25 Bom 179

Sub section (5) —Costs—When the case is transferred at the instance of the accused, he will be ordered to pay all the complainant's costs incurred before the Magistrate from whose file the transfer was ordered—8 C W N 583 In 8 C W N 75, the Crown bore all the expenses of the complainant's witnesses

Sub section (6 A) —"We have found section 526 somewhat difficult to deal with. One class of opinion presses for greater safeguards against

frivolous, vexatious or dilatory applications for transfer. Another class deprecates any measure which makes a transfer more difficult to obtain. We think it is unavoidable to retain in the Code some provisions for the compulsory adjournment of a case when an intention to apply for a transfer has been notified. But we recognise that the provisions of the section, as they stand, have lent themselves to gross abuse, and therefore we feel that greater safeguards are necessary. For these reasons in the first place, we maintain the principle of the new sub section (6 A) which enables the High Court to award costs in dismissing an application. We have, however, modified it to this extent, that it will enable the High Court, in cases where it is of opinion that the application was frivolous or vexatious to award such amount by way of reasonable costs in the High Court and Court below as it thinks fit—*Report of the Joint Committee (1952)*

1387 Sub section (8)—Under the old section an application for adjournment had to be made before the commencement of the hearing—29 Cal 211, 8 C W N 77 and therefore an application for adjournment made after the charge had been read and explained to the accused was not an application made before the commencement of the hearing and could not therefore be granted—35 Mad 701. The present section lays down that in case of an inquiry or trial the application may be made at any time during its course even when the case has been completely heard on both sides and the Magistrate has only to write his judgment.

In case of appeal the application for adjournment must be made before the commencement of the hearing in this respect the law is the same as before.

Court whether bound to adjourn—Under the old section there was a difference of opinion as to whether the Court was bound to adjourn the trial on an application for adjournment. In 15 Cal 455 8 C W N 77, 2 Weir 685 33 Cal 1183 and 1 S L R 35 it was held that the words of this section were obligatory and the Court was bound to adjourn. But in 19 Mad 375 6 C W N 717, 18 A L J 1145 and 31 Cal 715 it was held that the Court was not bound to grant an adjournment if there was sufficient time, between the date of the application for adjournment and the date fixed for the hearing of the case to have moved the High Court for transfer and to have obtained its order thereon.

The words of the present sub section have been made more imperative by omitting certain words which occurred at the end of the old sub section and which took away the force of the word 'shall'. The Joint Committee remarks. Our amendment provides for a compulsory adjournment at any stage of the case, except that a Sessions Court may refuse to adjourn (sub section 9) when it is of opinion that the application has been unreasonably delayed. See *Sarla Singh v Emp* 22 A L J 430 26 Cr L J 139 (decided under the amended Code).

The postponement should be for a reasonable time to allow the party to move the High Court for transfer. A postponement for too short a

time is useless—19 Mad 375 An adjournment for six days is not a reasonable time within which to move the High Court—2 Weir 686

1388 Magistrate proceeding with the case after issue of rule for transfer—When an application was made under sub-section (8) and the Magistrate without passing any orders thereon proceeded with the case and even though a telegram to the effect that a rule nisi by the High Court staying proceedings had been issued was shown to the Magistrate he examined some more witnesses for the prosecution and committed the accused it was held that the action on the part of the Magistrate was enough to show a bias and consequently a transfer was necessary—11 C W N 507 5 C W N 110 2 C W N 498 16 C W N 1031 If the Court entertains any doubt about the truth of the telegram it should have satisfied itself by telegraphing to the Registrar of the High Court—5 C W N 110 2 C W N 498 Where upon the High Court having issued a rule staying further proceedings, the petitioner sent a telegram which was laid before the trying Magistrate but the petitioner having failed to appear on the date previously fixed the Magistrate issued a warrant upon the petitioner it was held that the sending of the telegram did not in any way absolve the petitioner from the obligation to appear before the Court on the date fixed and the issue of the warrant upon the petitioner was no ground for transfer of the case—17 C W N 536 But where further proceedings having been stayed by the High Court's order one of the complainants appeared before the Magistrate on the date fixed for a hearing and apprised him of that order but the Magistrate instead of staying further proceedings issued a warrant for the arrest of the complainant who had not appeared held that the Magistrate's action was unjust and hostile to the complainants and the case must be transferred—*Fa al Ikhad v Ibdilla* 7 Lah 1 J 571 26 P I R 701 27 Cr L J 104

Where the High Court granted a transfer on the 26th and on the 28th a telegram to that effect was shown to the Magistrate and the Magistrate adjourned proceedings till the 30th so that the order of the High Court might reach him and on the 30th the Magistrate proceeded with the case and convicted the accused and on the 31st the order of the High Court reached the Magistrate it was held that the Magistrate's though not illegal was indiscreet, in as much as he did not wait sufficient time for the order of the High Court to reach him—*Ratanlal* 46

Sub-section (9)—Under this sub-section the Sessions Court may refuse to adjourn when it is of opinion that the application has been reasonably delayed. The reason is that the calendars of Sessions Courts involving the convenience of jurors assessors and parties are liable to be upset by the postponement of cases.—*Statement of Objects and Reasons* (1914)

526-A. (1) Where any person subject to the Discipline Act or to the Army Act or the Air Force Act is accused of offence such as is referred to in (a) to section 41 of the Army Act, or

High Court to transfer for trial to itself in certain cases

Advocate General shall, if so instructed by the competent authority, apply to the High Court, for the committal or transfer of the case to that High Court, and thereupon the High Court shall order that the case be committed for trial to or be transferred to itself and shall thereafter proceed to try the case by jury

(2) The Governor-General in Council may, by notification in the Gazette of India, declare any officer to be the competent authority for the purpose of issuing instructions under subsection (1) in regard to any class of cases specified in the notification

This section has been added by sec 32 of the Criminal Law Amendment Act, XII of 1923

527 (1) The Governor-General in Council may, by notification in the Gazette of India, direct the transfer of any particular * * case or appeal from one High Court to another High Court, or from any Criminal Court subordinate to one High Court, to any other Criminal Court of equal or superior jurisdiction subordinate to another High Court, whenever it appears to him that such transfer will promote the ends of justice, or tend to the general convenience of parties or witnesses

(2) The Court to which such case or appeal is transferred shall deal with the same as if it had been originally instituted in, or presented to, such Court

The word 'criminal' has now been omitted from this section by sec 146 of the Cr P C Amendment Act XVIII of 1913

528 (1) Any Sessions Judge may withdraw any case from, or recall any case which he has made over to, any Assistant Sessions Judge subordinate to him

(2) Any Chief Presidency Magistrate, District Magistrate or Subdivisional Magistrate may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

(3) The Local Government may authorize the District Magistrate to withdraw from any Magistrate subordinate to him either such classes of cases as he thinks proper, or particular classes of cases.

Power to authorize District Magistrate to withdraw classes of cases

(4) Any Magistrate may recall any case made over by him under Section 192, sub Section (2) to any other Magistrate and may inquire into or try such case himself

(5) A Magistrate making an order under this section shall record in writing his reasons for making the same.

(6) The head of a Village under the Madras Village-Police Regulation, 1816, or the Madras Village-Police Regulation 1821, is a Magistrate for the purposes of this section

Change.—Sub sections (1) and (4) have been newly added, and sub-section (6) has been slightly amended, by sec 147 of the Cr P C Amendment Act VIII of 1923

Sub section (1).—In order to facilitate arrangements for the disposal of sessions business, it is proposed to empower Sessions Judges to withdraw or recall cases from the file of Assistant Sessions Judges. This question does not arise in the case of appeals as they are heard by Sessions or Additional Sessions Judges.—*Statement of Objects and Reasons (1921)*

1389 Sub section (2).—District Magistrate and Sub-divisional Magistrate—Under this section the District Magistrate and the sub-divisional Magistrate within his sub-division have co-ordinate jurisdiction. The District Magistrate cannot set aside a transfer made by the Sub-divisional Magistrate for that would be virtually entertaining an appeal against an order of the Sub-divisional Magistrate passed under this section. He can take action under sec 435 or 438, or can withdraw the case to his file and transfer it to some other Magistrate.—22 Bom 549, 26 Mad 130. Magistrates of co-ordinate jurisdiction should not interfere with each other's jurisdiction. Where a Magistrate acts on his own initiative in transferring a criminal case, his order is not vitiated by the fact that another Magistrate of co-ordinate authority has refused it. But if he examines the reasons given by the latter and finds them to be wrong, that amounts to interfering by way of appeal and the new order passed by him is not sustainable in law.—5 L. W. 372. But in 14 Mad 399 it has been held that a Magistrate subordinate to the Sub-divisional Magistrate is also subordinate to the District Magistrate within the meaning of this section and the District Magistrate can interfere with an order of transfer made by the Sub-divisional Magistrate.

But this section cannot be so read as to imply that after a District Magistrate has transferred some cases from one file to the file of another Magistrate a Sub-divisional Magistrate who is subordinate to the District

Magistrate has jurisdiction to nullify that order by ordering a fresh transfer of the cases to his own file—*Id Akbar v Emp.* 47 All 288 23 A L J 133 26 Cr L J 538

Chief Presidency Magistrate—The Chief Presidency Magistrate has under this section power to withdraw any case from one of the Presidency Magistrates and refer it for inquiry or trial to any other Presidency Magistrate—*In re Agesar* 1 Bom L R 387 The Chief Presidency Magistrate has power to transfer to his own file a case which had been transferred to the Fourth Presidency Magistrate for disposal by the Additional Chief Presidency Magistrate who took cognizance of the offence—*Mohini Mohan v Punam Chand* 51 Cal 820 28 C W N 903 26 Cr L J 101

1390 Transfer:—Cases which can be transferred—This section is applicable to—(1) proceedings under Chapter VIII—8 Cal 851, (2) proceedings under Chapter VII—22 Cal 898 2 C L J 614, 5 C W N 686, 2 P L T 186 and (3) proceedings under sec 488—1905 P R 5

The term 'case' includes a proceeding upon a complaint as soon as the complaint has been received by the Magistrate who takes cognizance of the offence complained of. A case can be transferred even before the Magistrate decides to issue process against the accused—7 N L R 97

Case when can be transferred—(1) A case may be transferred as soon as the complaint is filed and the Magistrate takes cognizance of the case and before he issues process. A person who apprehends that a complaint made against him will not be impartially tried by the Magistrate is entitled to have the case transferred even before issue of any process against him—7 N L R 97 But when a complaint has been dismissed by a Magistrate under sec 203 and the Sessions Judge has directed further inquiry into the case the District Magistrate cannot transfer the case from the file of that Magistrate to any other Magistrate—11 C W N 316 (2) A case cannot be transferred at a very late stage of the trial, when the prosecution evidence has been taken and all that remains to be done is to pass an order of commitment or discharge—2 Weir 691 (3) A District Magistrate ought not to transfer a case pending before a subordinate Magistrate after the whole of the prosecution evidence has been taken and the Magistrate has expressed an opinion that the evidence for the prosecution is not sufficient to support the charge—14 W R 12, 2 Pat 333 (4) A case which has been disposed of by a competent authority cannot be withdrawn by the District Magistrate to his file under this section—17 C W N 451 But where several persons were charged before the police with rioting and only one of them was sent up by the police for trial and convicted, whereupon the complainant asked the Magistrate to issue process against the other persons, but the Magistrate refused, and the District Magistrate thereupon withdrew the case to his own file, it was held that the District Magistrate had ample jurisdiction to do so the refusal of the subordinate Magistrate to issue process against the other accused did not dispose of the case finally, but the case was still pending before the subordinate Magistrate—5 C W N 488 (5) Where the records of a case have been sent to a Head Assistant Magistrate under sec 349 for enhancement,

punishment, the case can be validly transferred at that stage by the District to a Joint Magistrate—2 Weir 690

To whom cases may be transferred—The District Magistrate, after withdrawing a case, can refer it to any subordinate Magistrate. An Additional District Magistrate is now subordinate to the District Magistrate under the express provision of Section 10 (3) and the latter can transfer cases to the former. The contrary ruling in 34 Cal 918 is no longer good law. When a Magistrate is gazetted to the office of the Chairman of the Municipal Board and takes charge of that office, he is thereby divested of his office as Magistrate. He ceases to be subordinate to the District Magistrate and the latter cannot transfer any criminal case to him for trial—36 All 513. Moreover, the case must be transferred to a Magistrate competent to try the case. A District Magistrate cannot transfer a case under Sec 107 to a Second class Magistrate—37 All 20, or to a Magistrate who has no local jurisdiction over the matter—*Honda Reddy v K E* 41 Mad 246

1391 Grounds of transfer:—The District Magistrate's powers under this section are very wide and undefined, and he should exercise the powers with due discretion and for really good reasons—1899 P R 13, 20 Cr L J 402

When personal allegations are made against a Magistrate as grounds of transfer, the District Magistrate must require strict proof of the allegations—*Ratanlal* 590. To move a case from one Magistrate to another on grounds personal to such Magistrate is tantamount to a severe censure on such officer, and the very clearest grounds must exist before a transfer can be allowed—6 B H C R 69, and moreover the Magistrate must be given an opportunity of answering the allegations made against him by the applicant—5 Bom L R 28

Where a Magistrate, in the course of an investigation held a prolonged inquiry during which he made a number of notes, and collected a large amount of information which by reason of the way in which it was acquired he could not properly or legally consider in arriving at a judicial determination, and the notes made by the Magistrate were of such a nature that he ought to be examined as a witness in respect thereto, it was held that in such a case, the Magistrate ought not to try the case, but that it must be transferred to some other Magistrate—21 Cal 920, 20 W R 76. The fact that a Magistrate before whom a case is pending is also the Treasury Officer and has very little time at his disposal by virtue of his duties as a Treasury Officer is not a sufficient ground for directing a transfer of a case from his Court—20 Cr L J 402 (Pat). Where a Magistrate tried and convicted an accused in a case and expressed an opinion that the evidence of the accused was not believable, it was held that the expressed opinion in itself was no ground for a transfer of another case against the same accused by a different complainant under a different set of facts—4 P L W 21. The fact that the trial of a case before a Magistrate extended for a long time (e.g. 3 months) is not a vital ground for withdrawing the case from the file of the Magistrate—19 Cr L J 172 (Pat.)

1392 Recording reasons:—See subsection (5) The reasons for transfer of a case from one Magistrate to another must be recorded—*Ratanlal* 590, 5 Lah L J 230, 16 Cr L J 626 (Mad), and omission to record reasons renders the order of transfer liable to be set aside—*In re Lenkata Reddi*, 1924 M W N 873 26 Cr L J 221 But the Calcutta High Court holds that a failure to record the reasons will not vitiate the proceedings unless it has prejudiced the accused—34 Cal 918 Where by virtue of a Government order the District Magistrate had been directed to withdraw all cases in which complaints had been made against a police officer, the omission to record reasons therefor was a mere irregularity and did not vitiate the subsequent proceedings—28 All 421

1393 Notice:—An order of transfer ought not to be made *ex parte*, i. e. on the allegations of the complainant or accused only, and without giving notice to the opposite party—*Ratanlal* 460, *Ratanlal* 474, *Ratanlal* 655, *Ratanlal* 877 39 M L J 714 Where a case is transferred to another Magistrate, notice of transfer should be given to the complainant as well as to the accused—*Umrao v Fakir*, 3 All 749, *Teacotta v Ameer Vajee* 8 Cal 303, 7 C W N 114, *In re Nageshwar*, 1 Bom L R 347, *Vedu v Bhagwandas* 5 Bom L R 28 *Imp v Sadashiv*, 22 Bom 549, *Baksha v Tahlu* 1902 P R 28, 14 C P L R 190, U B R (1897—1901) 392 Although the section does not provide for the giving of a notice to the opposite party, still on general principle notice should be given to the party affected before an order for transfer is made—7 C W N 114, *Sardara v Emp* 5 Lah L J 230 Where a transfer is made at a late stage of the trial, i. e. when all the prosecution witnesses have been examined, the Magistrate does not exercise a sound discretion in not giving notice to the accused—6 M L T 14, 1887 A W N 53 *Ratanlal* 590 Where at the instance of the complainant a Sub divisional Magistrate after hearing the parties has transferred a case from the file of one Sub Magistrate to that of another, it is not open to the District Magistrate to re transfer the case at the instance of the accused without notice to the complainant—39 M L J 714

But in several other cases it has been held that the issue of a notice is not mandatory, and the want of notice does not amount to illegality but to impropriety The question of propriety is one to be decided on the facts of each case—*In re Hawaji* 21 Bom L R 276 20 Cr L J 320, *In re Iruji*, 6 Bom L R 856 The question is general in its terms, and although as a rule of practice it is desirable that notice should be issued, still it cannot be said that the omission to issue notice is in itself a reason for setting aside the order of transfer—*Gobinda v King Emp*, 2 Pat 333 A 1 R 1923 Pat 228 *Bagh Ali v Md Din*, 6 Lah, 541 27 Cr L J 411 If the opposite party acquiesces in the transfer, he cannot complain on the ground of absence of notice—7 N L R 97 When the District Magistrate transferred a case *suo motu* on administrative grounds, no notice was held to be necessary—1910 P R 3 When the order of transfer was made at the request of the trying Magistrate no notice need be given to either party—24 Mad 317 Where there great delay in disposing of a petty case, an order of transfer.

made without notice to the accused to shew cause against the order—2 Weir 692 When by virtue of a Government order the District Magistrate was directed to withdraw all cases in which complaints had been made against a police officer, no notice to the complainant was necessary before making a transfer—*In re Dukhi* 28 All 421

1394 Power of District Magistrate after transfer:—The District Magistrate after he has transferred the case to a subordinate Magistrate has no jurisdiction relating to the case, so long as the transfer subsists But he can again withdraw the case to his own file if he thinks fit—12 W R 53 When a District Magistrate makes an order of transfer the case is out of his hands, and the District Magistrate has no jurisdiction to make any order in the case when it is properly seized of by a subordinate Magistrate—32 Cal 783 He cannot dismiss the complaint, much less prosecute the complainant—3 C W N 490, nor can he issue process for the apprehension of the absconding accused—27 Cal 979 He can make no order in the case except such order as may be made by him by way of revision—30 Cal 449

Powers and duties of Magistrate to whom case is transferred—When a case has been transferred after process has been issued to the accused, the Magistrate to whom the case has been transferred should proceed from the stage in which the proceedings were left He cannot go back and dismiss the complaint under sec 203—19 W R 28

The Magistrate to whom a case is transferred can act upon the evidence already recorded by the Magistrate from whom the case is withdrawn See notes under subsection (3) of sec 350

The Magistrate to whom a case is transferred cannot further transfer the case to some other Magistrate subordinate to him—36 All 166, 12 A L J 277

1394A Sub sec (6)—This sub section supersedes 15 Mad 94 (decided under the 1882 Code) in which it was held that the village Headman not being a Magistrate no case from his file could be transferred to the file of another Magistrate

Prior to its present amendment, this sub-section applied only to village Headmen appointed under Madras Regulation IV of 1822, and therefore a District Magistrate was not competent to transfer a case from a village Headman appointed under any other Regulation (e.g. Reg XI of 1816)—26 Mad 394 This case is now overruled as the present sub-section expressly mentions the Regulation of 1816

1395 Revision—The High Court will not interfere in revision with an order of the District Magistrate dismissing an application under sec 528 for the transfer of a case The High Court's powers of revision are in express terms limited to those conferred by certain sections mentioned in section 439, section 526 is not one of those The Letters Patent does not confer any power of transfer over and above that conferred by section 526 The remedy of the applicant is to make an independent petition for transfer under section 526 supported by affidavit or affirmation—*Aihu v Maung Po Aha*, 1 Rang 632

CHAPTER XLIV-A

SUPPLEMENTARY PROVISIONS RELATING TO EUROPEAN AND
INDIAN BRITISH SUBJECTS AND OTHERS

528-A (1) *Where, in any case to which the provisions of Chapter XXXIII do not apply, a person claims to be dealt with as an European or Indian British subject, or where any person claims to be dealt with as an European (other than an European British subject) or an American, he*

Procedure of claim of a person to be dealt with as European or Indian British subject, or as European or American.

shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial; and such Magistrate shall inquire into the truth of such statement and allow the person making it a reasonable time within which to prove that it is true, and shall then decide whether he is or is not an European British subject or an Indian British subject, or an European or an American, as the case may be, and shall deal with him accordingly

(2) *When any such claim is rejected by the Magistrate and the person by whom it was made is committed by the Magistrate for trial before the Court of Session and such person repeats the claim before such Court such Court shall, after such further inquiry, if any, as it thinks fit, decide the claim, and shall deal with such person accordingly*

(3) *When any Court before which any person is tried rejects any such claim as aforesaid the decision shall form a ground of appeal from the sentence or order passed in such trial*

This is the old section 453 with certain alterations

1396 Analysis of section—(a) An Indian British subject claiming to be dealt with as such must put in his claim before the Magistrate before whom he is brought for the purpose of inquiry or trial, according to the provisions of sub-section (1) This subsection applies to Presidency Magistrates as well as Magistrates in the mufassal (b) if the Magistrate rejects the claim and tries him, the decision shall form a ground of appeal from the sentence or order passed in such appeal See sub-section (3) This sub-section applies to Presidency Magistrates as well as to Magistrates in the mufassal (c) If the Magistrate rejects the claim and commits the accused to the Court of Session he may repeat the claim the latter Court See sub-section (2) It should be noted that subsection (2) such repetition may only be made before a Court of

(in the mufassal) and not before the High Court Sessions (d) If the Court of Session rejects the claim and tries the accused, the decision shall form a ground of appeal from the sentence or order passed in such trial (e) If a claim is made before a Presidency Magistrate and rejected by him, and the accused is committed to the High Court, there is no provision for repetition of the claim before the High Court, and the accused will not be entitled to put in, under sec 275 of the Code, before the High Court a further claim for being tried by a jury the majority of whom should be Indians. But the decision of the Presidency Magistrate rejecting the claim is not final, and is subject to revision by the High Court—*Emp v Harendra Chandra* 51 Cal 98a (989, 990) 29 C W, N 384 26 Cr L J 385

1397 Claim as to status:—Evidence—The plea that the accused is an European British subject must be substantiated by ample evidence. Where the prisoner pleaded that he was an European British subject, but the evidence as to his nationality was incomplete, it was held that the plea was not made out—6 M H C R 7. So also, a mere statement by the prisoner that he is an European British Subject cannot be acted upon—5 W R 53. The Judge may be satisfied by the appearance of the prisoner and the circumstances brought forward at the time that the plea is true, but if he is not so satisfied, and the plea is persisted in, it must be substantiated by sufficient evidence—6 M H C R 7.

Opportunity to plead must be given—The Magistrate trying the prisoner ought to give him an opportunity of pleading that he is an European British subject—5 W R 53.

Time for making claim—A claim on the ground of status may be put forward before a committing Magistrate at any time up till the time when the commitment is made—*Emp v Harendra* 51 Cal 98a (991).

528-B If in any such case an European or Indian British subject or an European (other than an European British subject) or an American does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed, or if, when such claim has been made before and rejected by the committing Magistrate, it is not repeated before the Court to which such person is committed, he shall be held to have relinquished his right to be dealt with as an European British subject or an Indian British subject, or an European or an American as the case may be, and shall not assert it in any subsequent stage of the case.

This is the old section 454 with certain alterations

1398 Waiver:—An European British subject can relinquish his rights. The provisions of this Code give certain rights and privileges to the European British Subjects, which rights they are at liberty to give up—6 Cal 83. Failure to make a claim amounts to a relinquishment of

rights—1912 P R 6 Where the Magistrate explained to the accused his rights under this Code and then asked him if he claimed to be dealt with as such, and the accused stated that he did not claim the rights, it was held that he had relinquished the rights—*Barindra Kumar Ghosh*, 37 Cal 467 If no claim is put forward before the committing Presidency Magistrate, the accused will not be allowed to assert before the High Court any claim to be tried by a jury the majority of whom should belong to his own nationality—*Emp v Harindra* 51 Cal 980 (991) 29 C W N 384 But the omission of the accused to avail himself of his right to claim the benefit of section 528A does not conclude the matter and he is not debarred from urging that the conditions mentioned in clause (a) or (b) of sec 443 exist—*Martindale v Emp* 52 Cal 347 29 C W N 447 26 Cr L J 401

The expression any subsequent stage of the case includes the stages of appeal and revision—*Jeremiah v Johnson* 45 M L J 800

Magistrate whether bound to inform accused of his rights—The Calcutta High Court holds that before an European British subject can be considered to have waived the privileges conferred upon him by this Code it must appear that his rights were distinctly made known to him to enable him to exercise his choice and judgment whether he would or would not claim those rights—6 Cal 83 Where this was not done, the conviction was set aside—18 C W N 385 and the records were returned to the Magistrate with a direction that he should explain to the accused all the privileges he was entitled to as an European British subject and definitely ascertain from him whether he waived his claims—7 N L R 93 But the Punjab Chief Court holds that it is not the duty of the Magistrate to ask categorically whether the accused claims his right as an European British subject much less his duty to explain his right to him as such subject The Legislature appears to presume that a person entitled to a privilege knows of its existence and that if he desires to assert it he will assert it—1885 P R 5

Retraction of waiver—The waiver is not irrevocable If the withdrawal of the waiver is made promptly and shortly after the waiver had been made, and if substantially nothing had been done in the interval on the waiver, the withdrawal should be allowed—1908 P R 1, 1878 P R 17

528 C Where a person, not being an European British

<p>Trial of person as belonging to class to which he does not belong</p>	<p>subject, is dealt with as an European British subject or not being an Indian British subject, is dealt with as an Indian British subject or, not being an European (other than an European British subject) or American, is dealt with as an European or American, and such person does not object, the inquiry, commitment, trial or sentence, as the case may be, shall not, by reason of such dealing, be invalid</p>
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This is the old section 455 with certain alterations

528 D (1) Unless there is something repugnant in the

Application of Acts conferring jurisdiction on Magistrates or Courts of Session context, all enactments made by the Governor General in Council or the Indian Legislature which confer on Magistrates or on the Court of Session jurisdiction over offences shall be deemed to apply to European British subjects although such persons are not expressly referred to therein

(2) Nothing in this section shall be deemed to authorise any Court to exceed the limits prescribed by this Code as to the amount of punishment which it may inflict on an European British subject or to confer jurisdiction on any Magistrate of the second or third class for the trial of such subjects

This is the old section 459 with certain alterations

CHAPTER XLV

OF IRREGULAR PROCEEDINGS

529 If any Magistrate not empowered by law to do any of the following things namely —

Irregularities which do not vitiate proceedings

- (a) to issue a search warrant under section 98,
- (b) to order, under section 133, the police to investigate an offence,
- (c) to hold an inquest under section 176
- (d) to issue process under section 186, for the apprehension of a person within the local limits of his jurisdiction who has committed an offence outside such limits
- (e) to take cognizance of an offence under section 190, sub section (1) clause (a) or clause (b),
- (f) to transfer a case under section 192,
- (g) to tender a pardon under section 337 or section 338,
- (h) to sell property under section 524 or section 525 or
- (i) to withdraw a case and try it himself under section 58,

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered

1399 Scope of section:—*Clause (f)* —A case includes cases under Chapter VIII or XII See notes under Sec 192 The irregularity of transfer under Sec 192 by a Magistrate not empowered is cured by this section—36 Cal 869 36 Cal 370

Clause (g) —See 20 All 40 cited under Sec 337

Prejudice to accused —Having regard to the provisions of this section read with Sec 531, it must be shown that the proceedings wrongly held in a case have in fact occasioned a failure of justice before they can be set aside—39 Cal 119

530 If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely —

- (a) attaches and sells property under section 88,
- (b) issues a search-warrant for a letter, parcel or other thing in the Post Office, or a telegram in the Telegraph Department,
- (c) demands security to keep the peace,
- (d) demands security for good behaviour,
- (e) discharges a person lawfully bound to be of good behaviour,
- (f) cancels a bond to keep the peace,
- (g) makes an order under section 133 as to a local nuisance,
- (h) prohibits, under section 143, the repetition or continuance of a public nuisance,
- (i) issues an order under section 144
- (j) makes an order under Chapter XII,
- (k) takes cognizance, under section 190, sub section (1) clause (c), of an offence,
- (l) passes a sentence under section 349, on proceedings recorded by another Magistrate;
- (m) calls, under section 435, for proceedings,
- (n) makes an order for maintenance,
- (o) revises, under S 515, an order passed under S 514,
- (p) tries an offender,
- (q) tries an offender summarily, or
- (r) decides an appeal,

his proceedings shall be void

1400 *Clause (j)* —This clause refers only to a case where Magistrate is not competent, by virtue of the position he holds or powers vested in him, to try a case of the character mentioned in S

But where a Magistrate is competent to try a case under Sec 145 the fact that he has no local jurisdiction over the matter will not make the trial void—5 C W N 686

Clause (p)—If a Third Class Magistrate, not being specially empowered by the Local Government tries an offender under sec 2 of the Bombay Public Conveyances Act (IV of 1863) the trial is void—Ratanlal 921 If a Second Class Magistrate tries an accused who has actually committed an offence under sec 409 I P C as though for an offence under sec 406 I P C the trial and conviction are void—1 Bom I R 27 But where the offence consists of circumstances of aggravation which make it triable by a higher Court and a 2nd Class Magistrate tries it ignoring those aggravating circumstances the proceedings are not void *ab initio* under this section—Q E v Gundaya 13 Bom 502 See also 4 Bom I R 26 K F v Ayyan 24 Mad 675 and Dawson v K F 2 Rang 455 26 Cr I J 1108

Where a trial is void under this section sec 403 does not bar a retrial—8 Bom 307 1910 P R 7 29 Cal 412

Clause (q)—Where a Magistrate deliberately disregards the offence actually complained of viz an offence not triable summarily, and tries it summarily his proceedings are absolutely void—5 C W N 252 29 Cal 409 1907 P L R 21 4 Cal 18 *Fmp v Ram Narain* 46 All 446

Clause (r)—The word 'Magistrate' in this section includes a Sessions Judge therefore if a Sessions Judge hears an appeal which ought to have been presented to the High Court the proceedings before the Sessions Judge are absolutely void—*In re Ibdulla* 2 Rang 386 (387) 26 Cr I J 203 A I R 1925 Rang 39

531 No finding, sentence or order of any Criminal Court

Proceedings in wrong shall be set aside merely on the ground place—

that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong sessions division, district, subdivision or other local area, unless it appears that such error has in fact occasioned a failure of justice

1401 *Object and scope of section*—The policy of this Code as shown by secs 531 538 is to uphold in most cases orders passed by a Criminal Court which was lacking in local jurisdiction or which has committed illegalities or irregularities, unless failure of justice has been occasioned or is likely to be occasioned through such want of jurisdiction or such illegalities or irregularities—42 Mad 791

This section only refers to districts subdivisions and local areas governed by this Code and not to tributary Mahals like Beonhar or Mour Dhanj to which the Code does not extend—11 Cal 667 8 Cal 985

The 'order' under this section includes an order of commitment—*Bhagwati v King Fmp* 3 Pat 417 (421) 26 Cr L J 49

Offence in one place trial or commitment in another—See Note 549 under section 1—See also 17 Mad 402 cited under sec 532

Commitment to wrong Sessions —See Note 549 under sec 177

Trial at a place outside jurisdiction —Where a criminal appeal was presented to a Sessions Judge at a place within his jurisdiction but was heard and disposed of at a place which was outside the local limits of his criminal jurisdiction but where he had civil jurisdiction, it was held that the procedure was an irregularity but no failure of justice being occasioned thereby the trial was not a nullity—17 All 36

Jurisdiction of Court to order forfeiture —This section applies only to proceedings in a wrong place and cures defects as to local jurisdiction. But it cannot cure a defect where a bond of appearance taken from the accused by one Magistrate is forfeited by another Magistrate for it is a defect not of local jurisdiction but of personal jurisdiction—16 Bom I R 84 (cited under sec 514)

Failure of justice —Where no objection was taken in the Lower Court, and the petitioner failed to show in the High Court that he had been prejudiced, the High Court declined to interfere—21 W R 88. Even the fact that the objection to jurisdiction was taken at a comparatively early stage of the proceedings was not a conclusive proof that the accused was prejudiced by the irregularity—34 C I J 200

532 (1) If any Magistrate or other authority purporting to exercise powers duly conferred,

When irregular commitments may be validated which were not so conferred, commits an accused person for trial before a Court of Session or High Court, the Court to which the commitment is made may, after perusal of the proceedings, accept the commitment if it considers that the accused has not been injured thereby, unless during the inquiry and before the order of commitment, objection was made on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority.

(2) If such Court considers that the accused was injured, or if objection was so made, it shall quash the commitment and direct a fresh inquiry by a competent Magistrate

1402 Scope of Section.—Sec 531 must be read as complete in itself and not as in any way cut down or limited by the proviso contained in the latter part of sec 532. Sec 531 applies only to cases in which there is no jurisdiction by reason of the inquiry, trial or other proceeding being held in a wrong local area. Sec 532 seems to refer to cases in which the Magistrate is competent to deal with the offence as having taken place within the local limits of his jurisdiction, but has no power to commit to the Sessions either because he is a Second Class Magistrate or for some reasons other than that of want of local jurisdiction—16 Bom 200

This section applies only to cases where the Magistrate or other authority who has assumed to commit has not been duly invested

the powers under which he has assumed to make the commitment :—when the defect is one personal to the committing authority and there is no defect in his proceeding—1890 P R 16 This section does not deal with cases in which the defect in the committal order arises from want of territorial jurisdiction—16 Bom 200, 20 Cr L J 416 (Mrd) It does not apply where the commitment is bad owing to a disqualification of the Magistrate under sec 556—2 I B R 209 It has no application to commitments made by Magistrates acting under sec 346—12 C W N 136 But this section applies where the commitment is irregular by reason of want of sanction under sec 196 or 197—Q E v B G Tilak 22 Bom 112 Q E v Morton 9 Bom 288 It also applies where the commitment of the approver (who has broken the conditions of pardon) is irregular by reason of want of the certificate of Public Prosecutor required under sec 339—Aga Ha v Fmp 3 Ring 55 4 Bur L J 23

Objection to commitment—If a Magistrate, being empowered to commit to the Sessions but having no territorial jurisdiction over the place of offence commits a case to the Sessions, the commitment is valid under sec 531, and it cannot be set aside under section 532, although the objection to such commitment was taken before the commitment—Q E v Reddy 17 Mrd 40

Where objection to the want of jurisdiction of the Magistrate to commit is not taken before the Magistrate the High Court can accept the commitment under this section, if it considers that the accused has not been prejudiced thereby—21 Bom 112

533 (1) If any Court, before which a confession or other

Non-compliance with statement of an accused person re-provision of S 164 or 364 corded or purporting to be recorded under Section 164 or Section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded, and, notwithstanding anything contained in the Indian Evidence Act, 1872, S 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits

(2) The provisions of this section apply to Courts of Appeal, Reference and Revision

1403 Scope of Section:—What this section means is this that where a confession or other statement of an accused person is duly made but in recording it the provisions of the law have not been complied with oral evidence is admissible to prove that the confession or the statement was duly made The defect which this section intends to cure is one not of substance but of form only, as for instance when the Magistrate has omitted to sign the certificate or has omitted to state in the certificate that the statement was taken in his hearing—2 C W N 702, 1915 F

R 17, or where the Magistrate has omitted to record that the required warning was given to the accused under sec 164—*Parlab Singh v Emp* 6 Lah 415 7 Lah 1 J 482 *Ramas v Emp* 3 Pat 872 *Ahemian v Emp* 6 Lah 58 26 Cr D J 1074 *Baan Singh v Emp* 7 Lah 1 J 250 26 Cr L J 1458 But this section will not render a confession admissible when the provisions of the law have been totally disregarded, as for instance where a statement has been neither signed by the accused nor certified by the Magistrate—9 Mad 224 17 Cal 862 or where no warning was given at all under sec 164—*Parlab v Emp* 6 Lah 415 A I R 1925 Lah 605 This section has no application where no record whatsoever has been made of a confession—35 All 260 But in 23 Bom 221 and 21 Bom 495 it has been held that this section applies to omissions to comply with the law as well as to infractions of the law, i.e., to defects not only of form but of substance also

Irregularity in record of confession—See Notes 1037 1038 and 1042 under sec 364

Omission to sign the record—See Note 1040 under sec 364

Want of memorandum or certificate—See Note 519 under sec 164 and Note 1041 under sec 364

Irregularity in recording confession—See Note 516 under sec 164

534 In omission to inform under S 447 any person of his rights under Chapter XXXVIII
Omission to give information under section 447 shall not affect the validity of any proceeding

This section has been amended by section 44 of the Criminal Law Amendment Act XII of 1923

535 (1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the Court of appeal or revision, a failure of justice has in fact been occasioned thereby

(2) If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to frame a charge it shall order that a charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge

1404 Omission to frame charge—An omission to frame a charge does not invalidate an order of acquittal and render it equivalent to an order of discharge such order is a bar to a retrial for the same offence—3 All 129

Where a charge was framed under sec 147 I P C, but the accused was convicted of an offence under sec 323, I P C, it was held in

conviction was illegal on account of the absence of a charge under sec 323 I P C and sec 535 of this Code did not cure the defect. The words 'merely on the ground that no charge was framed' in this section must mean a case where the offence being a petty one, and the evidence being fairly taken, the Court framed no charge at all. But where a charge has been framed (in this case a charge under sec 147 I P C was framed) this section does not apply and it cannot be said that the conviction shall not be deemed invalid merely on the ground that no charge was framed and the persons charged under sec 147 I P C, for rioting with the common object of causing hurt to the complainant cannot be convicted under sec 323 I P C, of causing hurt to another person—40 Cal 168. But in a recent case the same High Court has laid down that this section is not confined to cases where no charge at all has been framed but also applies to cases in which no charge was framed of the particular offence of which the accused has been convicted (though a charge of another offence was framed)—*Ibdu Rahim v A F*, 41 C I J 474 26 Cr L J 1279.

Where a Magistrate framed a charge under section 19 (e) and (f) of the Arms Act, and then submitted the record to the District Magistrate for his sanction and the District Magistrate sanctioned the institution of proceedings whereupon the trial proceeded and the accused was convicted it was held that the omission to frame a charge afresh after sanction was cured by this section—41 B R 247.

538 (1) If an offence triable with the aid of assessors is

Trial by jury of offence triable with assessors	tried by a jury, the trial shall not on that ground only be invalid
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(2) If an offence triable by a jury is tried with the aid

Trial with assessors of offence triable by jury	of assessors, the trial shall not on that ground only be invalid, unless the objection is taken before the Court records its finding
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1405 Sub section (1)—The difference between a trial by jury and a trial with the aid of assessors lies in the summing up of the case, and the manner in which the verdict of the jury and the opinions of the assessors are taken. It is at this latter point that there is a departure of ways, and if the accused does not put any objection at the crucial point, he cannot afterwards be heard to complain. Where no objection was taken at the trial it was too late to take objection on appeal—33 Bom 423.

Sub section (2)—Where a case was triable by jury but was tried with the aid of assessors and no objection was taken at the trial, it was held that the trial was not invalid, even though the accused was materially injured, in as much as the Judge differed from the opinions of the assessors and convicted the accused—33 Cal 132. The objection must be taken at the trial and cannot be taken on appeal—*Ibid*.

537 Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

- (a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code, or
- (b) (Omitted)
- (c) of the omission to revise any list of jurors or assessors in accordance with Section 324, or
- (d) of any misdirection in any charge to a jury, unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice

Explanation—In determining whether any error, omission or irregularity in any proceedings under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings

Change:—Clause (b) (which referred to 'want of or irregularity in any sanction required by section 195 or any irregularity in proceeding taken under sec 476), and the illustration have been omitted by sec 148 of the Cr P C Amendment Act, XVIII of 1923. The Illustration ran as follows—"A Magistrate being required by law to sign a document signs in it initials only. This is purely an irregularity and does not affect the validity of the proceeding." This illustration was given to show the class of irregularity contemplated by this section, as distinguished from substantial departures from law.—4 Lah 376 (at p 380). But as this Code nowhere lays down that the Magistrate must sign his name in full and not in initials, the illustration was thought to be "inappropriate" and has been omitted by the *Select Committee of 1916*

1406 Scope of Section:—This section applies to mere errors of procedure arising out of mere inadvertence and not to substantive errors of law.—8 Bom 200 11 B H C R 237, 12 W R (P C) 32. It does not apply to cases of disregard or disobedience of the whole of some mandatory provisions of the Code, but applies only to cases of failure to comply with some part of such provisions in the course of a general compliance with the whole.—*Gangadhar v Bhangar* 25 Cr L J (Nag). When a trial is contrary to law, it is no trial at all, and a

obedience to an express provision of law as to the mode of the trial is not an irregularity which can be cured by this section, but is an illegality which vitiates the whole trial. This section has not the effect of curing material irregularities and absolute illegalities. The errors which can be cured by this section are formal defects of procedure and not substantive errors of law—25 Mad 61 (P C) 5 P L J 61. This section does not apply to an infringement of statutory requirements. It only applies to errors, omissions and irregularities of a technical nature which may occur by accident or oversight in the course of proceedings conducted in the mode prescribed by statute. If in conducting a trial the Judge adopts a procedure which is a departure from the authorised procedure it would amount to a violation of the law, which cannot be cured by section 537—*Illu v Crown* 4 Lah 376, *Lyme v Crown*, 4 Lah 382 (386). Thus where two cross-cases were at first tried by the Judge separately but were afterwards tried jointly, the evidence for the prosecution in one case was treated at the request of the accused as the defence evidence in the cross-case, only one set of findings was recorded in respect of both cases, and finally one composite judgment was delivered held that the procedure adopted by the Judge was a serious departure from the usual and proper course, and was not only irregular but grossly illegal. Section 537 could not apply to the case—*Illu v Crown* 4 Lah 376. The test to be applied in considering whether a particular infringement of the provisions of the Code does or does not fall within the purview of section 537 appears to be this. Does the error go to the whole root of the trial? Does it in effect vitiate the proceedings? Has the Court assumed an authority which it does not possess? Has it broken the vital rules of procedure? If the error is of such a nature then the proceedings are vitiated in their very inception and section 537 has no application, but the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of the provision vitiates the whole proceeding—*Emperor v Bechu Chande* 45 All 124 (127) 20 A L J 874 24 Cr I J 67. A distinction should be made between a positive enactment by the Code that a certain trial shall not take place and a prohibitive enactment that in the course of such a trial certain detailed procedure should be followed. Both are imperative provisions. But still the one is a different thing from the other. In the former case an infringement of the enactment amounts to an assumption of jurisdiction and vitiates the trial from the very beginning. In the latter case an infringement merely amounts to an error omission or irregularity in the procedure adopted in the course of the trial. This section aims at curing infringements of the latter type—*Agar Illa U v A F* 3 Rang 139 26 Cr I J 1336 A I R 1925 Rang 258.

Subject to provisions herebefore contained—These words do not refer to the provisions of the entire Code preceding this section but only to the provisions of this chapter (i.e. secs 529 to 536)—19 C W N 972 (per Sharfuddin and Beethcroft JJ), *Contra*—22 Cal 176 23 Cal 983 (19) (C W N 972 (per Fletcher J)).

* *Court of competent jurisdiction*—This means a Court of com-

petent jurisdiction in respect of the particular offence charged—10 Bom 319 If a Magistrate in consequence of a personal disqualification (e.g. under section 536) is forbidden by law to try a particular case though he may be authorised generally to try cases of the same class, he cannot be said to be a Court of competent jurisdiction with respect to that particular case—23 Cal 328 Thus a Magistrate who takes cognizance of a case under sec 190 (1) (c) is not competent to try the case, if the accused objects to it and if in spite of such objection he proceeds to try the same himself, he cannot be said to be a Court of competent jurisdiction in respect of that case—13 All 345 If a District Magistrate transfers to a subordinate Magistrate a case which the latter is not competent to try a trial by the latter of that case is a defect which cannot be cured by this section as the trial is not held by a Court of competent jurisdiction—23 Cal 442

1407 Failure of justice—The test in case of errors omissions or irregularities and other matters of like nature referred to in this section is not whether the Court has acted illegally (for in one sense every error or irregularity in so far as it contravenes the provisions of the Code is illegal) but whether there had been a failure of justice—27 Cal 83. Moreover the test (*viz.*, whether the error or irregularity has occasioned a failure of justice) is one which can be properly applied only after the final result of the case is known. Where an objection is taken on the ground of there being a material error before a case is finally disposed of and while there is time to correct the same, it would be unreasonable to hold that the section intends the error to be allowed to remain uncorrected. To hold that would be to give this section the effect not only of curing mere formal defects of procedure when discovered too late but of practically subverting all procedure—23 Cal 983. If, however, the inquiry has proceeded far enough to enable the test required by this section to be applied this section may be called in to cure the error or irregularity—12 Cr 1 J 320 (Sind)

In fact—The words *in fact* have been introduced into the Code of 1898 apparently in order to emphasize the duty of the Court to go into the merits before interfering, in consequence of misdirection or other error—26 Mad 1

1408 Error omission or irregularity—*Error or irregularity in summons or warrant*—Sec 8 All 293 in Note 143 under sec 68 38 Mad 1088 and 18 All J 1140 in Note 182 under sec 90 and Note 285 under sec 115 The error of a Magistrate in proceeding by warrant instead of by summons furnishes no ground for quashing the proceedings—1 W R 36

A search warrant issued illegally under section 96 (1) cannot, by the operation of this section be taken to have been validly issued under sec 98 This section cannot give legal effect to a defective warrant—35 Cal 1076

Issue of fresh summons—Where on an information a summons was issued to the accused and owing to its disclosing no offence a fresh summons was issued without any fresh or supplemental information,

error, omission or irregularity in the fresh summons was not sufficient to upset the finding and sentence unless it had occasioned a failure of justice—31 Bom 611

Irregularity in arrest—Where certain arrests were made without the substance of the warrants being notified to the persons arrested the omission was cured by this section—18 Cr L J 666 (All)

Absence of complaint—The absence of a complaint of Court required by sec 195 of this Code goes to the root of the case and vitiates the whole trial—*Girdhari Lal v Emp*, 12 O L J, 194 2 O W N 174 26 Cr L J 929 *Ameraj v Emp*, 23 A L J 35 26 Cr L J 751

Error or omission in the charge—An omission to set out the guilty intention of the accused in a charge will be cured by this section unless it is shown that the omission has occasioned a failure of justice—22 Cal 391 Where the law and section of the law were mentioned in the charge, the omission of the words "unlawfully and maliciously" in the charge was not so material as to prejudice the accused—42 Cal 957 The omission of the word 'dishonestly' in a charge under sec 411 I P C is not a ground of reversing the conviction and sentence, where the accused person fully understood the nature of the offence with which he was charged and has not been prejudiced by the omission—10 B H C R 373 Where there is ample evidence to show the common object of an assembly, the omission to mention the common object can be cured by this section—2 P L J 541, 18 Cr L J 328 (Pat), 21 Cal 827 But where the charge is defective and the common object of the unlawful assembly is not very precisely set out therein, and moreover the charge does not specify the property the taking possession of which is supposed to be the common object of the assembly, the defect in the charge cannot be cured by this section—33 Cal 295

Errors in frame and contents of charge—See Note 730 under sec 225

Irregularity in proclamation—See 1917 P R 39 in Note 165 under sec 87

Error or omission in judgment—See Note 1051 under sec 367, under sub heading 'Defective Appellate judgments'

Misdirection to jury—See Note 916 under sec 297

538 No attachment made under this Code shall be

Attachment not illegal¹ deemed unlawful nor shall any person nor distrainer a trespasser making the same be deemed a trespasser, on account of any defect or want of form in the summons, writ of attachment or other proceedings relating thereto

The word 'attachment' has been substituted for the word 'distress' by sec 149 of the Cr P C Amendment Act, VIII of 1923 A similar amendment has been made in sections 386 and 387

CHAPTER XLVI

MISCELLANEOUS

539 Affidavits and affirmations to be used before any

Courts and persons High Court or any officer of such Court before whom affidavits may be sworn and affirmed before such Court or the Clerk of the Crown, or any Commissioner or other person appointed by such Court for that purpose, or any Judge, or any Commissioner for taking affidavits in any Court of Record in British India, or any Commissioner to administer oaths in England or Ireland, or any Magistrate authorized to take affidavits or affirmations in Scotland

1409 Affidavits sworn before the Presidency Magistrate of Calcutta cannot be used before the Patna High Court—*B A Ry Co v Sh Makhul* A I R 1925 Pat 755 An affidavit made before a Magistrate who has no seisin of the case or who is not competent to try the case (but is competent only to commit it being a sessions case) is not valid and cannot be used before a High Court—*Ram Chandra v A E* 5 Pat 110 7 P I T 304 A Deputy Magistrate has no power to administer oath to a person making a declaration in the shape of an affidavit and such person cannot be prosecuted for perjury if he makes any false statement in such affidavit—*In re Iswarchandra* 14 Cal 653 But an affidavit to be used in a Civil Court may be sworn to before any Magistrate by virtue of sec 139 of the Civil Procedure Code—*Dmohundhu v Hurrymully* 8 C W N xl

An affidavit must contain nothing but bare facts known to the person who makes the affidavit either personally or upon information from a source which he believes to be a correct source and one on which reliance can be placed As human beings are liable to make mistakes in reciting facts, the law requires that the contents of affidavits should be carefully read over to the deponents in a language which they understand and should be vouched by them to be correct—36 All 13

539-A (1) If then any application is made to any Court

Affidavit in proof of in the course of any inquiry trial or conduct of public servant other proceeding under this Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by affidavit and the Court may if it thinks fit order that evidence relating to such facts be so given

An affidavit to be used before any Court other than a High Court under this section may be sworn or affirmed in the manner prescribed in Section 539, or before any Magistrate.

Affidavits under this section shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable grounds to believe to be true, and, in the latter case, the deponent shall clearly state the grounds of such belief

(2) *The Court may order any scandalous and irrelevant matter in an affidavit to be struck out or amended*

This section and the next have been added by section 150 of the Cr P C Amendment Act, XVIII of 1923. "This new section is intended to discourage the making of false and scandalous statements in petitions filed before the Courts, if such petition seeks to impugn the action of subordinate authorities"—*Statement of Objects and Reasons* (1914). "We think that the provisions of this section should apply to all criminal proceedings, including appeals. We would allow the applicant to give evidence by affidavit, and would leave the Court a discretion to require this to be done in any case"—*Report of the Select Committee of 1916*

539-B (1) *Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection*

(2) *Such memorandum shall form part of the record of the case. If the Public Prosecutor complainant or accused so desires, a copy of the memorandum should be furnished to him free of cost.*

Provided that in the case of a trial by jury or with the aid of assessors, the Judge shall not act under this section unless such jury or assessors are also allowed a view under Section 293

"This section is inserted definitely prescribing that any Judge or Magistrate may, at any stage of any inquiry or trial, visit and inspect any place connected with the occurrence, subject to his recording a note of his inspection.—*Statement of Objects and Reasons* (1914). "We are of opinion that the Judge or Magistrate shall view the *locus in quo* only for purpose of properly appreciating the evidence given at the trial and that in the case of trial by jury or with assessors the Judge should only view if the jury or assessors do the same under sec 293. We also think that notice should be given to the parties of the intention of the Judge or

Magistrate to visit the *locus*. We would also provide that the memorandum to be made by the Judge or Magistrate shall form part of the record of the case, and that a copy of it may be furnished to both sides.—*Report of the Select Committee of 1916*

1410 Local inspection:—A trying Magistrate may visit the scene of an alleged offence to test the evidence he has heard in Court, and act on the opinion he has formed from what he has seen in adjudicating between the parties. The Court ought, in every case in which it has made a local inspection, to acquaint the parties with the opinion it has formed. An immediate report of what is seen should be placed on the record and laid open to the scrutiny of the parties—*Babbon Sheikh v King Emp*, 37 Cal 340 (349 357), *Parameshwar v King Emp*, 3 P L T 347. A Magistrate, when making an inspection of the scene of offence, should invariably be accompanied by both the parties or their pleaders, so as to avoid drawing wrong inferences—*Q E v Chianbasappa*, Ratanlal 854, *Q F v Manikkam*, 19 Mad 263, *Krishnappa v Sengoda* 2 Weir 727. A Magistrate may make a local inspection not only for the purpose of understanding the evidence adduced in Court, but also for the purpose of testing it by the light of his own observations. If the Magistrate has seen a certain state of things in making a local inspection, he can use the testimony of his own senses for testing the veracity of the witnesses disposing before him as regards the features of the locality—*Babbon Sheik v Emperor* 37 Cal 340 (355, 356).

If the Sessions Judge thinks it necessary or desirable to visit the place of occurrence, he should give due notice to the parties and proceed thither with the assessors and the parties, before the close of the trial, and before the opinions of the assessors are recorded—*In re Oudh Behari* 1 C L R. 143, 9 Bur L T 133, *Deja v A E* 9 L B R 88. If no notice is given to the parties it is not competent to the Judge to take into account any observations of the locality made by him. And where the Judge made an inspection of the locality after the assessors had given their opinions the Appellate Court eliminated that portion of the judgment which related to the visit to the spot and the Judge's conclusion therefrom, and decided the case on the other materials—*Deja v A E*, 9 L B R 88.

During the trial of the accused persons, one of whom had made a confession, the Sessions Judge went himself to the scene of the crime accompanied by the assessors and the confessing accused, who showed him the ground and made certain additional statements by way of comment or illustration of his confession and the Judge made note of them. Held that the law does not recognize a procedure of this kind and that the Judge was clearly wrong in allowing the accused to make the additional statements and in recording them—*Kesho Singh v King Emp*, 20 O C 136.

When a Magistrate makes a local inspection he should without unnecessary delay record the result thereof. Where after the Magistrate had made a local inspection, he gave judgment convicting the accused and then after delivering judgment he made a note of the result of

inspection in the order sheet, held that the procedure was irregular, but as the Magistrate's judgment in this case was mainly based on the documents on the record and on the oral evidence before him, and he used the local inspection only to confirm the evidence which he had already before him, the judgment of the Magistrate should not be set aside as the accused was not prejudiced by such irregularity—*Bhola Nath v. Kedar* 25 Cr L J 705 A I R 1925 Cal 353 But in another Calcutta case it has been held that the provisions of sub section (2) are mandatory, and therefore where the Magistrate made a local inspection and drew up a diagram and made an inspection—note thereon but the note did not form part of the record of the case, the procedure was illegal and not merely irregular, and the defect could not be cured even though there was no prejudice to the accused—*Hriday Gobinda v. A. E.*, 52 Cal 148 40 C L J 149 25 Cr L J 1375 A I R 1924 Cal 1035 In a very recent case, however, where the local inquiry was made in the presence of both parties and the Magistrate made no memorandum of the inspection, but the petitioners' pleader who was present at the time did not ask the Magistrate to record a memorandum or to attach a memorandum to the record or to give him a copy, and was content to go on to judgment without seeing the memorandum or even ascertaining whether one was made, it was held that the petitioners could not be allowed to say that for this formal defect the proceedings should be set aside, unless they could show that the Magistrate's omission had caused them prejudice—*Forbes v. Md. Ali Haidar*, 42 C L J 131 26 Cr L J 1524 A I R 1925 Cal 1246 dissenting from *Hriday Gobind v. A. E.* supra

As to the circumstances under which a Magistrate making a local inspection is incompetent to try the case, see Note 1374 under section 526 and notes under see 556

540 Any Court may, at any stage of any inquiry, trial

<p>Power to summon material witnesses or examine person present</p>	<p>or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned is a witness, or recall and re examine any person already examined, and the Court shall summon and examine or recall and re examine any such person if his evidence appears to it essential to the just decision of the case</p>
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1411 Examination of Court witnesses—This section confers very wide power upon a Court in the matter of summoning witnesses, but the wider the powers the greater is the exercise of discretion required of the Magistrate. It was not intended by this section that the Magistrate should exercise his powers at the bidding of any person, but the powers are given to prevent any danger or miscarriage of justice owing to some particular witness not having been called—12 A I J 15 This section is a supplementary provision enabling the Court to examine and in certain circumstances imposing on it the duty of examining a material witness who would not otherwise be brought before the Court

But a Magistrate misuses this power if he uses it to anticipate the defence of an accused to his prejudice, or if he uses it, after satisfying himself that the accused has a good defence, to discharge the accused instead of acquitting him. A Magistrate cannot resort to this section in order to avoid the responsibility of making up his mind as to the value of the prosecution evidence—1886 P R 11

The first part of this section is an enabling provision whereby a Court in the exercise of its discretion is empowered at any time before it actually pronounces judgment, to take further evidence either for the prosecution or for the defence and for that purpose it may adjourn the hearing of a case in order to procure the attendance of the proper persons. In many instances it happens that a new light is thrown on the case by witnesses for the defence and it then becomes desirable, sometimes in the interests of the accused himself that fresh evidence should be called for. The second part of this section is imperative. If the new evidence appears to the Court essential to the just decision of the case, the Court has no choice but to take such evidence. The new witnesses should be examined cross examined and re-examined. Where the defence case could not have been anticipated by the prosecution and it is said that witnesses are available to prove the falsity of the defence case, the Court should allow such witnesses to be examined. The accused should be given liberty to examine any further witnesses whom he wishes to examine to meet the evidence of the fresh witnesses for the prosecution—*Maug Po Hmyin v A E* 1 Rang 308 25 Cr I J 217

Who can summon witnesses—No Magistrate other than the one who is seized of the case can summon witnesses under this section—36 All 13

May summon—It is entirely in the discretion of the Court to call and examine witnesses and the Public Prosecutor cannot demand as a matter of right to call and examine any witness not examined before the committing Magistrate—14 All 212

At any stage—Although it is true that proper discretion has to be exercised under sec 540 still the terms of this section are extremely wide and any Court may at any stage of any inquiry trial or other proceeding summon any person as a witness if his evidence appears to it essential to the just decision of the case. This power can be exercised even after the close of the case for the prosecution and the defence—*In re Chellaperumal* 46 M I J 325 25 Cr I J 354. A Magistrate can, under this section receive fresh evidence after the evidence on both sides has been taken and the case adjourned for judgment in as much as the case is still pending when such evidence is being taken—24 Cal 167. Where in a criminal trial, after the evidence for the defence was closed, the Magistrate examined certain witnesses for the prosecution giving at the same time full liberty to the accused to cross-examine them the High Court declined to interfere in revision—21 O C 95. But although a Magistrate has discretion to admit evidence on behalf of either side at any stage of the inquiry or trial, still he ought not to admit if

evidence for the prosecution after the prosecution has closed its case and the accused has entered upon his defence, unless there be valid reasons which must be recorded—*Ganga v K E* 10 A L J 383 Magistrates should exercise their discretion under this section very cautiously. Where arguments were heard and the case posted for judgment for a certain day, the examination of any further prosecution witnesses under this section cannot be justified—*Notabar v Adjanath*, 27 C W N 675. When the trial has been concluded so far that no witnesses remain to be examined on either side and the assessors have given their opinions, it is not open to the Sessions Judge to fish for witnesses under this section or to order for further inquiry to be made by the committing Magistrate—1892 P R 4.

1412 Who may be examined:—Under this section the Court is bound to summon and examine any witnesses whose evidence seems to be essential to the just decision of the case—6 C W N 98. The Court would not be bound to issue summonses to witnesses, under this section unless it is satisfied that their evidence will be very material—19 All 507. When the committing Magistrate refuses to examine any witnesses mentioned in the list submitted to him under Sec 211, the Sessions Judge can under this section direct those witnesses to be summoned and examined—8 All 668 14 All 212.

Magistrates are at liberty to summon witnesses who are resident outside the limits of their own districts—3 M H C R App 5.

The Magistrate may summon and examine any person as a witness. The power to summon a witness is not limited to the witnesses cited for the prosecution or the defence—1886 P R 11. A person who had been suspected and charged with an offence but was afterwards discharged by the Magistrate for want of evidence, may be examined afterwards as a witness for the prosecution—7 W R 44. Where the prosecution declines to examine any witnesses the Court may on its own initiative cause them to be produced and examine them under this section—*Emp v Satyendra* 37 C I J 173. Where the defence is based on Section 84 I P C, the Sessions Judge may under this section ascertain the behaviour of the prisoner during the years previous to the homicide, and if he has been kept in a lunatic asylum, record medical evidence of the facts observed there—*Ratanlal* 279.

But this section does not enable the Court to examine the accused as a witness, even in appeal, for an appeal is but the continuation of the original case—12 Mad 451.

1413 Right of parties to cross examine:—When a Judge thinks it necessary to examine a witness under this section, and does so the accused as well as the complainant ought to be allowed an opportunity of cross-examining the witness—5 Cal 614 24 Cal 288, *Pita v A F*, 47 All 147. When a witness is called by the Court under this section, both the prosecution and the accused are entitled to cross-examine him on

matters relevant to the inquiry and they are not restricted to the points on which the witness has been examined by the Court—35 Cal 243 Where a witness was at first called for the defence, but afterwards the accused declined to examine him whereupon he was examined as a witness by the Court it was held that the accused would not be deprived of his right to cross-examine the witness—29 Cal 387 It is not a proper cross-examination if the defence counsel is merely allowed to suggest certain questions to the Magistrate and the Magistrate puts those questions to the witness.—Pila v. A. F. 47 All 147 26 Cr. 1 J 575

540 A (1) *It any stage of an inquiry or trial under this Code where two or more accused are*

Provision for inquiries and trials being held in the absence of accused in certain cases.

before the Court if the Judge or Magistrate is satisfied for reasons to be re-

corded that any one or more of such accused is or are incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings direct the personal attendance of such accused

(2) *If the accused in any such case is not represented by a pleader or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him, either adjourn such inquiry or trial or order that the case of such accused be taken up for trial separately*

This section has been added by section 130 of the Cr. P. C. Amendment Act XVIII of 1923. This section is designed to meet a practical difficulty which is occasionally experienced in trials involving a large number of accused persons when one or more of them is incapable of remaining at the bar.—*Statement of Objects and Reasons* (1914) Subsection (1) provides for the case of an accused who is represented by a pleader, and whose personal attendance can be dispensed with. Subsection (2) provides for the case of an accused who is not so represented or whose continued personal attendance may be necessary and allows the Court in such a case either to adjourn the trial of all the accused or to order the particular accused to be tried separately.—*Report of the Select Committee of 1916*

541 (1) *Unless when otherwise provided by any law for*

Power to appoint place of imprisonment. *the time being in force, the Local Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined,*

- (2) If any person liable to be imprisoned or committed to custody under this Code is in confinement in a civil jail, the Court or Magistrate ordering the imprisonment or committal may direct that the person be removed to a criminal jail

Removal to criminal jail of accused or convicted persons who are in confinement in civil jail, and their return to the civil jail.

(3) When a person is removed to a criminal jail under sub section (2), he shall, on being released therefrom, be sent back to the civil jail, unless either—

- (a) three years have elapsed since he was removed to the criminal jail, in which case he shall be deemed to have been discharged from the civil jail under Section 342 of the Code of Civil Procedure, 1882 or
- (b) the Court which ordered his imprisonment in the civil jail has certified to the officer in charge of the criminal jail that he is entitled to be discharged under Section 341 of the Code of Civil Procedure 1882

In sub section (3) the words 'sub section (2)' have been substituted for 'sub section (1)' by the Repealing and Amending Act, VII of 1924 to correct a clerical error

1414 Jail —The term 'prison' and 'jail' do not include a police lock up. A Magistrate has no power to sentence an accused to suffer imprisonment in a police lock up.—7 L. B. R. 62

Duration of imprisonment in different jails —A Criminal Court passing a sentence of imprisonment cannot divide the imprisonment in different jails. From this section and sec 63 (1) of Act IX of 1894, and the Prisoners Act of 1871, it is clear that the power of directing imprisonment to be undergone in different jails belongs to the Local Government and the Inspector General of Prisons and not to the Court passing the sentence.—Rajmal 827

542 (1) Notwithstanding anything contained in the

Prisoners Testimony Act, 1869, any Presidency Magistrate desirous of examining, as a witness or an accused person, any person confined in any jail within the local limits of his

Power of Presidency Magistrate to order prisoner in jail to be brought up for examination.

jurisdiction, may issue an order to the officer in charge of the said jail requiring him to bring such prisoner in proper custody, at a time to be therein named, to the Magistrate for examination

(2) The officer so in charge, on receipt of such order, shall act in accordance therewith and shall provide for the safe custody of the prisoner during his absence from the jail for the purpose aforesaid

543 When the services of an interpreter are required by

Interpreter to be bound any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement

1415 It is not necessary to administer oath to an interpreter—16 W R 61 The omission to administer oath to an interpreter under section 5 (b) of the Oaths Act (X of 1873) renders it necessary for the prosecution to prove that the interpretation of the deposition was made accurately, but omission to do so does not make the deposition inadmissible in evidence—36 Cal 808

544 Subject to any rules made by the Local Govern-

Expenses of complain- ment * * * any Criminal Court
ants and witnesses. may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code

Sec 544, and the Rules framed by the Local Government under this section, give a discretion to the Magistrate in the matter of expenses of complainants and witnesses, but such discretion should be exercised not arbitrarily but on sound judicial principles—9 Bom I R 353

This section empowers the Court to order that the expenses of the complainant and his witness should be paid by the Government under proper circumstances. But it does not empower the Court trying a complaint to order that the diet money of a witness produced before it should be paid by the complainant. That power is vested in the Court under the general rules of the High Court. If the Court orders such payment, in accordance with such rules, the amount cannot be recovered under the provisions of sec 547 as if it were a fine, but can be recovered by a suit in the Civil Court—*Kamal v Paramasukh* 29 C W N 1033

Bengal Rules —1 The Criminal Courts are authorized to pay by these rates the expenses (a) of complainants or witnesses whether for the prosecution or for the defence (i) in cases in which the prosecution is instituted or carried on by or under the orders or with the sanction of the Government, or of any Judge, Magistrate or other public officer, or in which it shall appear to the presiding officer to be directly in furtherance of the interests of the public service and (ii) in all cases entered in column 5 of the Schedule II appended to the Criminal Procedure Code as not bailable, and (b) of witnesses in all cases in which they are compelled

by the Magistrate of his own motion to attend under the provisions of Section 540 of the Code

2 If a witness is summoned at the instance of the complainant or accused under section 244 of the Code, his expenses shall not be withheld from him except on the ground of failure to do his duty as a witness when summoned

3 (1) For the purpose of computing the expenses which the Criminal Courts are authorised to pay under these rules, complainants and witnesses shall be divided into two classes, namely —

(a) labourers and ordinary cultivators and other persons of similar class, and

(b) persons of better position,

and the allowances shall ordinarily be a diet allowance, which may be paid to persons coming under class (b) on demand by them, and to persons in class (a) as a general rule

(2) Such allowance shall be calculated for each class at daily rates within, and never exceeding, the maximum limit specified below opposite the territorial description of the Court in which the complainant or witness appears —

	Class (a) per diem	Class (b) per diem
1 Courts in the districts of Nadia, Murshidabad, Jessore, Khulna and Midnapore	7 annas	Rs 5
II Courts in the rest of the districts in the Presidency	8 annas	Rs 5

Explanation —The rates fixed in this rule are maxima, and are intended to meet the cost of meals for one day. In every case, therefore, the Court should consider the circumstances of the individual and local conditions and grant a reduced allowance in circumstances and localities where the actual expenses fall short of the maximum rate. In cases where no meal is taken away from home, or where only one meal is taken, no allowance or a reduced allowance, as the case may be, should be granted

4 (1) Complainants and witnesses performing the journey or part of the journey by rail, steamer or train may be allowed their actual fares each way according to the class by which persons of their rank and station in life would ordinarily travel. In determining the class by which a person would ordinarily travel, regard should be had to the standard laid down in Section V of the Travelling Allowance Rules published in the *Calcutta Gazette Extraordinary*, December 23, 1921

(2) Charges for toll at ferries shall be allowed at the authorized rates to the extent to which they have been actually incurred

(3) Other travelling expenses will be given only when the journey could not have been performed on foot or in the case of persons whose age position and habits of life render it impossible for them to walk. In such cases in addition to the allowances permitted by the preceding rules travelling allowance shall be given at the following rates —

(a) When the journey is by any kind of conveyance by road, the actual reasonable conveyance charge up to a maximum limit of 4 annas a mile

(b) In the Districts where the usual mode of travelling is by water the actual expenses incurred for boat hire up to a maximum of Rs 2 per diem

(c) In hill districts where it is customary for respectable persons to be accompanied by a man carrying their baggage when such a person is summoned from a distance of more than five miles he may be allowed the actual cost incurred for the hire of one coolie

5 If the Court is of opinion that any person following any trade or profession or engaged in any commercial undertaking has suffered substantial loss by reason of his attendance as a witness or complainant, he may be allowed in addition to the diet money and travelling expenses permissible under the preceding rules compensation according to circumstances

6 Notwithstanding anything contained in these rules, Government servants when summoned to give evidence in their public capacity shall receive no payment from the Court on account of travelling or halting allowance but shall be entitled to draw such allowance under the Civil Service Regulations, on producing a certificate of attendance granted by the Court. Provided that—

(i) when a Government servant is required to give evidence in his private capacity at a Court situated not more than five miles from his headquarters the Court shall be authorised, where it considers it necessary, and notwithstanding anything contained in this rule to pay the actual travelling expenses incurred

(ii) when the salary of the Government servant as summoned does not exceed Rs 10 per mensem he shall be paid his expenses by the Court

7 Notwithstanding anything contained in rules 3 and 4 whenever the Court requires the expenses of a Government officer summoned as witness in his official capacity, to be deposited in advance the term expenses shall be interpreted to mean the travelling and halting allowance admissible under the Civil Service Regulations

8 Government servants when summoned to give evidence in their private capacity shall be paid by the Court such travelling allowance as is paid to persons of similar status under rules 3 and 4 but they shall not be entitled to any diet allowance nor shall they receive any travelling allowance under the Civil Service Regulations

9 Officers will be held responsible that parties of witnesses are brought to Court together as far as possible so as to save expense. The hire of more than one boat shall not be allowed in any case unless the presiding officer is satisfied that the witnesses could not be brought together

10 The number of days for which det allowance should be granted will be determined by the officer ordering payment in each case

11 For this purpose and for regulating the reimbursement of tolls paid a table shall be prepared and kept in each Court showing the distance of each thana from the sutler station and subordinate stations the number of intermediate ferries to be crossed and authorised rates of charges for tolls at each of these ferries the existence or absence of roads or waterways being also noted in the table—*Calcutta Gazette* 1902 Part I August 9 pp 1522 1524

545 (1) Whenever under any law in force for the time being a Criminal Court imposes a fine

Power of Court to pay or confirms in appeal revision or other expenses or compensation out of fine. or confirms in appeal revision or otherwise a sentence of fine, or a sentence of which fine forms a part the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

(a) in defraying expenses properly incurred in the prosecution

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is in the opinion of the Court recoverable by such person in a Civil Court and

(c) when any person is convicted of any offence which includes theft criminal misappropriation criminal breach of trust or cheating or of having dishonestly received or retained or of having voluntarily assisted in disposing of stolen property knowing or having reason to believe the same to be stolen in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto

(2) If the fine is imposed in a case which is subject to appeal no such payment shall be made before the period allowed for presenting the appeal has elapsed or, if an appeal be presented, before the decision of the appeal

Change—Clause (b) has been slightly amended and clause (c) newly added by section 152 of the Cr P C Amendment Act XVIII of 1923

Clause (b) makes it clear that compensation under section 545 may be paid to any person to whom it would be recoverable in a Civil Court the payment of compensation to an innocent purchaser of stolen property is provided for in clause (c) when the property is restored to the possession of the person entitled thereto.—*Statement of Objects and Reasons* (1914)

Criminal Court:—A Police Patel's Court is not a criminal Court and he cannot make an order under this section—Ratanlal 317

1416 Order when can be made:—An order of compensation can be made under this section when the Court imposes a fine. If the accused is discharged or acquitted and no fine is imposed no order under this section can be passed—22 Bom 717, Ratanlal 407. If the accused is convicted of theft and sentenced to imprisonment but no fine is imposed on him, the Court cannot order payment of compensation to the person whose property was stolen—*Bhura v Esip* 26 Cr L J 1495 (Nag). Where a person is dealt with under sec 562 and no fine is imposed on him, the Court has no power to direct him to pay compensation to the other party—*Munney Vir v A E* 25 Cr L J 1116 (Oudh). In a proceeding under sec 107 an order directing the accused to pay the costs of the complainant is *ultra vires*—*Sheo Prasad v Mahangoo* 23 Cr L J 76 A I R 1924 (All) 694. Where the Magistrate does not impose any fine but orders the sale of the boat of the accused and directs the compensation to be paid out of the sale proceeds the order is illegal—Ratanlal 688. Similarly, a compensation cannot be ordered to be paid out of amounts realised by forfeiture of property—Ratanlal 146. A Magistrate cannot, without imposing a substantive sentence of fine order payment of compensation to the complainant—2 Weir 715. The proper course is to impose a fine and out of the fine realised direct payment to the complainant of such amount as the Court thinks fit having regard to the provisions of this section—3 C I R 404.

Order cannot be made after judgment:—The award of compensation should be a part of the sentence and order made upon a conviction of an offence and should be founded upon a statement of the loss, damage or expenses ascertained at the trial—11 W R 53. The order should be made when passing judgment after the judgment is passed the Court becomes *functus officio* and has no further power to make any order under this section—U B R (1892-96) 80.

1417 Clause (a)—Expenses of the prosecution:—The award of costs should not exceed the actual costs of the complainant out of pocket—3 C L R 402.

Expenses under this section do not include such expenses as are incurred in bringing the person of the offender before the Magistrate—Ratanlal 608. Where fine is imposed on a person for destroying land marks a portion of the fine so imposed cannot be ordered to be paid to the Amin for the purpose of paying the expenses of his deputation to restore the land marks destroyed—C W R 93. Such expenses are not expenses incurred in the prosecution. Subsistence allowances and cart hire for prosecution witness cannot be ordered to be paid by the accused—U B R (1892-96) 7. Court fees and process fees are now provided for in Sec 546A.

Expenses under this section should be directed to be paid out of the amount of the fine imposed, and a separate order for such expenses improper—Ratanlal 141, 4 Bom I R 877. An order for expenses

be paid in addition to the fine is illegal—24 Mad 305, 5 Bom L R 126, Ratanlal 196 But the expenses mentioned in sec 546A may be awarded in addition to fine

1418 Clause (b)—Compensation:—*Amount of compensation*—When compensation is awarded under this section the distinction between clauses (a) and (b) of the section should be borne in mind and the order should show whether it is made to defray the expenses of the prosecution or is compensation for injury caused by the offence committed—U B R (1892-96) 200 In awarding compensation, no sum in excess of the loss actually suffered by the complainant should be ordered to be paid Where the accused was convicted of illegally demanding money, and was fined three times the amount of the illegal receipt, and the whole of the fine was ordered to be paid to the complainant, the order was held to be improper—5 I B R 50 In a theft case, it is illegal to award compensation to the complainant in excess of the price of the property stolen from him—1913 P W R 40

Where a complainant cannot recover substantial compensation in a Civil Court compensation cannot be awarded to him under clause (b) but a sum may be awarded to him under clause (a) to defray the expenses of the prosecution—13 (r I J) 535 (Bur) Therefore a Magistrate convicting a person under sec 193 I P C can only order the expenses properly incurred in the prosecution to be defrayed out of the fine, but has no power to award compensation, because substantial compensation is not recoverable by a civil suit for perjury—14 N L R 131

Compensations which are improper—(1) Where in a petty case no pecuniary loss has been sustained by the complainant it is improper for the Court to award compensation—1 Bur S R 538 but see 2 Weir 71 where it has been held that compensation should be awarded where there is substantial cause for it even though the case be frivolous

(2) Where the accused was convicted and fined for being drunk on a public road no compensation could be awarded to the constable who in arresting the accused had to struggle with him and in so doing lost his whistle and Rs 5 because such compensation is not for injury caused by the offence committed—1 B R (1842-96) 70 A Court cannot award compensation for alleged offences other than those which form the subject of the inquiry in the case in which the order is made—Ratanlal 407

(3) Where the accused took his sister who was suffering from plague into a town without informing the authorities and was thereupon convicted for an offence under sec 280 I P C no compensation could be awarded to the Municipality on account of the expenses incurred by it in disinfecting the house into which the accused brought the case of plague—Ratanlal 958

(4) Where the offence is under the I P C no compensation can be awarded under any other special law Thus, where the accused was fined under sec 370 I P C for cutting trees in a field and out of the fine recovered a reward of Rs 5 was ordered to be paid to the complainant (under the Forest Act) for detecting the offence, it was held that the

order of reward was illegal since the offence was under the I P C, and not under the Forest Act—Ratanid 873 See also Ratanid 241

1419 Who is entitled to Compensation.—*Heirs of the deceased*—Under the Code of 1861 compensation could be awarded to the 'person injured, and therefore it could not be paid to the heirs of the person who had been killed—10 W R 30 Under the Code of 1872 also the law was practically the same but in the 1882 Code the language of the section has been changed and no mention is specifically made of the person who is entitled to compensation Still in 12 Mad 352 and 21 Mad 74 the Judges clung to the old view and held that compensation awarded to the widow of the deceased was illegal In 36 Cal 302 and 1898 P R 17 it has been held that the heirs of the deceased are entitled to compensation The present amendment now makes it clear that compensation can be awarded to any person by whom it can be recovered in a Civil Court

In awarding compensation to the heirs of the person killed, the names of the heirs should be mentioned An order of compensation to the 'nearest heirs, without specifying who those heirs may be is bad in law—1913 P R 18

Husband of woman enticed away—Where a person is convicted of enticing away a married woman compensation may be awarded to the husband for injury done to his honour—1878 P R 14

Compensation for injury caused to another—Where the accused was charged with causing hurt to two persons but was fined for causing injuries to one of them only compensation out of the fine cannot be awarded to the other person—2 Weir 718

Refund of compensation—Where a conviction is set aside on appeal and a refund of the fine levied is ordered, and the party who has received a portion of the money as compensation refuses to refund it, the only remedy lies in a Civil Court—2 Weir 717 But in 19 All 112 and other cases it has been held that the amount may be recovered by a process under sec 547 and not necessarily by a suit in a Civil Court See Note 1422 under Sec 547

1420 Clause (C)—*Bona fide purchaser of stolen property*—This clause has been newly added Under the old law it was held that when a person was convicted of theft in order awarding compensation out of the fine imposed to the innocent purchaser of the stolen property was not authorised by this section—6 Mad 286 because the injury to the purchaser was not the consequence of the theft but of the invalid sale—2 Weir 716 On a conviction of theft the stolen property should be returned to the owner but it was illegal to impose a condition that a portion of the fine imposed on the accused should be paid to the innocent purchaser No such condition could be imposed on the return of property to the owner—3 Bom L R 449 When theft was proved the stolen property was ordered to be restored to the rightful owner and not to the bona fide purchaser The rule of English law protecting bona fide purchasers for value in market overt does not apply in India and on conviction of the accused the property with respect to which the theft was committed should be delivered to the

original owner—20 W R 38, 1908, P R 2 See also 1893 A W N 61 In 1878 P R 21, it was held however that when stolen property was in the hands of a *bona fide purchaser*, the proper order to be made was to leave it in his hands and the remedy of the complainant was to secure possession of the property in a Civil Court

Under the present law, as provided by this clause, compensation will be awarded to the innocent purchaser

The clause applies only to a *purchaser* and not to a *mortgagee* or *pledgee* an innocent mortgagee or pledgee who has advanced money on the security of the stolen property will not be entitled to any compensation—Rationalist 631 46 Bom 833

546 At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under Section 545

Take into account—This expression does not mean that in a subsequent civil suit, at the time of awarding damages, the amount of compensation recovered under sec 545 is to be deducted from the damages awarded in the suit—22 W R 336 (Civil)

546-A (1) If whenever any complaint of a non-cognizable offence is made to a Court, the Court, if it contacts the accused, may, in addition to the penalty imposed upon him order him to pay to the complainant—

(a) the fee (if any) paid on the petition of complaint or for the examination of the complainant, and
(b) any fees paid by the complainant for serving process on his witnesses or on the accused,
and may further order that, in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days

(2) In order under this section may also be made by an Appellate Court, or by the High Court when exercising its powers of revision

This section has been added by section 153 of the Cr P C Amendment Act, XVIII of 1923 "It embodies the provisions of section 31 of the Court Fees Act in order that greater prominence may be given to them"—Statement of Objects and Reasons (1924) The provision as to imprisonment in default of payment in sub-section (2) did not occur in the Court Fees Act Section 31 of the Court Fees Act has now been repealed by section 163 of the Cr P C Amendment Act, XVIII of 1923

1421 Scope of section.—This section does not apply, and the costs of the complainant cannot be awarded, where the offence is not a non cognizable one—*Murkhu v Emp.*, 25 Cr L J 1161 (Oudh)

If the complaint is not required by law to be stamped, the fact that the Court fee has been illegally levied by the Court will not be a ground for ordering the accused to pay the fee on conviction—8 B H C R 22. Thus, no fee is leviable on a complaint by Municipal Officers, and the accused on conviction should not be ordered to pay the same—16 Mad 423.

A proceeding under the Workmen's Breach of Contract Act is not a proceeding for an offence and if in such a proceeding the workman admits the advance and repays the same, it is not open to the Magistrate to make him pay the complainant the Court fee paid on the complaint—6 Bom L R 255.

If there are several persons convicted, the order of payment of the value of the Court fee and process fee should be joint and not several—*Reg v Sankara*, Bom H C Cr Ruk, 1872.

The provisions of this section are not to be controlled by section 545, unlike section 545 the expenses awarded under this section are directed to be paid in addition to fine and not out of the fine imposed—24 Mad 303.

According to the Calcutta High Court, the order of payment of Court fee is no part of the principal sentence in the case and is not to be treated as a fine added to a sentence of imprisonment so as to make the sentence appealable—20 Cal 687. But the Madras High Court holds that it is an integral part of the sentence—22 Mad 153. 5 M H C R App 28. See these cases cited in Note 1113 under section 413.

'May' — We think the Court should not be bound to exercise the power conferred by this section in trivial cases and we have accordingly used the word may — *Report of the Joint Committee* (1922)

547 Any money (other than a fine) payable by virtue of any order made under this Code and the method of recovery of which is not otherwise expressly provided for shall be recoverable as if it were a fine

The italicised words have been added by section 134 of the Cr P C Amendment Act, XVIII of 1923. These words provide for the recovery of compensation under sec 250, of costs under sec 148 (3) and of the Court fees and process fees mentioned in sec 546A.

1422 This section only provides a summary method of realising money payable and these words cannot be stretched so as to include live stock or other goods—23 Cr L J 157 (Lah)

An order of refund of compensation paid to the complainant under sec 543 may be enforced by process under this section. It is not necessary that the accused should bring a civil suit for recovery of the money—19 All 112, 6 All 96. 7 Mad 563. 1884 P R 14. *Ratnial* 213. 2 Weir 717.

An order by the High Court setting aside an award of compensation (sec. 250) to the accused must be deemed to be an order directing refund of the money and such order is enforceable under this section—188, P. R. 12. See also 1903 P. R. 29.

An order directing the complainant to pay the diet money of his witness cannot be enforced under this section: the remedy of the witness to recover the money is by a civil suit—*Kamal v. Paramsukh* 29 C. W. N. 1033 (see this case cited under sec. 544).

548 If any person affected by a judgment or order passed by a Criminal Court desires to have a copy of the Judge's charge to the jury or of any order or deposition or other part of the record, he shall, on applying for such copy, be furnished therewith.

Provided that he pays for the same, unless the Court, for some special reason, thinks fit to furnish it free of cost.

1423 *Affected by judgment order etc.*—A complainant whose complaint is dismissed is a person affected by the order of dismissal and therefore he is entitled to ask for a copy of the Magistrate's order of discharge—*Ratanlal* 305 8 Cal. 166. But a 'charge' is not an order of a Criminal Court by which an accused person can be said to be affected within the meaning of this section so as to entitle him to copies of deposition where the trial has not proceeded beyond the frame of charge and the examination of the prosecution witnesses—1892 A. W. N. 140.

Accused entitled to copies.—A prisoner is entitled to copies of all documents for which he applies and which he thinks necessary for his defence and a Magistrate will be acting contrary to law in determining whether such copies are necessary or not—14 W. R. 77.

549 (1) The Governor General in Council may make rules, consistent with this Code and the Army Act or any similar law for the time being in force, as to the cases in which persons subject to military law shall be tried by a Court to which this Code applies, or by Court martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable under the Army Act S. 41, to be tried by a Court martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps or detachment to which he belongs or to the commanding officer of the nearest military station, for the purpose of being tried by Court martial.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any body of troops stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence

550 Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Such police-officer, if subordinate to the officer in charge of a police-station, shall forthwith report the seizure to that officer

Powers to Police to seize property suspected to be stolen.

1424 If a Police officer has reason to suspect certain property to be stolen he must himself seize the property. He cannot order any other person to detain the same—16 O. C. 371

This section gives the Police officer power to seize only the property suspected to be stolen but it does not empower him to seize any other property which is mixed with the stolen one—1909 P. W. R. 14

551 Police-officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station

Powers of superior officers of Police

552 Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a woman, or of a female child under the age of sixteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order using such force as may be necessary

Power to compel restoration of abducted females.

Change:—The word sixteen has been substituted for "fourteen" by the Criminal Law Amendment Act VIII of 1924, for the purpose of affording greater protection to girls. By the same Act, the age limit has been raised from sixteen to eighteen in sections 372 and 373 of the Criminal Code.

1425 Unlawful detention:—The detention of a child in a missionary school against the will of her parent or guardian with a view that she should be brought up in a religion which such parent or child disapproved of and the adoption of which would not only involve a total change in the child's mode of life, but would also deprive the parent or guardian of any control in the education or bringing up of the child, would amount to unlawful detention—16 Cal 487

The detention of a girl by the father in his house against the will of her husband does not amount to unlawful detention, unless it is shown that the detention was contrary to the wish of the girl—15 Cr I J 712 (Cal) If a woman is residing with her relatives who are aiding her in endeavouring to procure a divorce, such detention is not unlawful—2 Weir 724

Unlawful purpose—A Magistrate can act under this section when both the detention and the purpose are unlawful In 16 Cal 487 cited above the detention was held to be unlawful, but the purpose was not Unlawful purpose means immoral purpose This section applies to female children only and not to children generally this shows that the purpose has some special reference to the sex of the person against whom it is entertained In other words the section has reference to adultery, concubinage, prostitution, deflowering or other similar purposes But it certainly does not include the detention of a Hindu girl in a Christian Institution in order that she may be a Christian or the detention of a Christian child in a Muhammadan Institution in order that she may be a Mahomedan—16 Cal 487, see also 4 Bom L R 609

1426 Procedure—It is the District Magistrate who alone has jurisdiction to entertain a complaint and make an order under this section He has no power to transfer such a case to a Sub-Magistrate and that Magistrate would have no jurisdiction therein—Ratanlal 963

An application under this section does not necessarily allege the commission of an offence and is not a complaint consequently the provisions of Secs 200 and 203 do not apply to proceedings under this section—4 Bom L R 609

Where a Magistrate has reason to believe that a woman is unlawfully detained but cannot find who so detains her, the proper course is for the Magistrate to issue an order to have the woman brought before him and to examine her it would be illegal for the Magistrate in such a case to order the restoration of the woman to liberty without any finding that she was unlawfully detained by any one and without ordering any one to restore her to liberty—2 Weir 724

An application to get back a girl from her father's custody on the allegation that she is the wife of the applicant must be made to a Civil Court and not to the Magistrate under this section—10 C W N 1225

553 (1) Whenever any person causes a police-officer to arrest another person in a presidency-town, if it appears to the Magistrate by whom the case is heard that there was compensation to persons groundlessly given in charge in Presidency-town

no sufficient ground for causing such arrest, the Magistrate may award such compensation, not exceeding fifty rupees to be paid by the person so causing the arrest to the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit

(2) In such cases, if more persons than one are arrested, the Magistrate may, in like manner, award to each of them such compensation, not exceeding fifty rupees, as such Magistrate thinks fit

(3) All compensation awarded under this section may be recovered as if it were a fine, and if it cannot be so recovered, the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such sum is sooner paid

554 (1) With the previous sanction of the Governor General in Council, the High Court at Fort William and with the previous sanction of the Local Government, any other High Court established by Royal Charter may, from time to time, make rules for the inspection of the records of subordinate Courts

(2) Every High Court not established by Royal Charter may from time to time, and with the previous sanction of the Local Government,—

Power of other High Courts to make rules for other purposes

(a) make rules for keeping all books, entries and accounts to be kept in all Criminal Courts subordinate to it and for the preparation and transmission of any returns or statements to be prepared and submitted by such Courts

(b) frame forms for every proceeding in the said Courts for which it thinks that a form should be provided,

(c) makes rules for regulating its own practice and proceedings and the practice and proceedings of all Criminal Courts subordinate to it, and

(d) make rules for regulating the execution of warrants issued under this Code for the levy of fines,

Provided that the rules and forms made and framed under this section shall not be inconsistent with this Code or any other law in force for the time being

(2) All rules made under this section shall be published in the local official Gazette

555 Subject to the power conferred by S 554 and by S 107 of the Government of India Act, 1915 the forms set forth in the fifth schedule, with such variation as the circumstances of each case require may be used for the respective purposes therein mentioned and if used shall be sufficient

1427 With such variation --There being no prescribed form of warrant under section 100 a Magistrate who had to issue one under that section adapted a form under sec 96 to the provision of sec 100 by altering the figures and by drawing up the warrant in terms required by sec 100. It was held that the warrant was perfectly legal—45 Cal 203. See also Note 203 under sec 100

556 No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court try or commit for trial any case to or in which he is a party or personally interested, and no Judge or Magistrate shall hear in appeal from any judgment or order passed or made by himself

Case in which Judge or Magistrate is personally interested.

Explanation—A Judge or Magistrate shall not be deemed a party, or personally interested, within the meaning of this section, to or in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein a public servant or by reason only that he has viewed the place in which an offence is alleged to have been committed or any other place in which any other transaction material to the case is alleged to have occurred and made an inquiry in connection with the case

Illustration

A, as Collector upon consideration of information furnished to him, directs the prosecution of B for a breach of the Excise Laws. A is disqualified from trying this case as a Magistrate

1428 Principle and scope of section —It is one of the oldest and

plainest rules of justice and common sense that no man shall sit as a Judge in a case in which he has a distinct and substantial interest—2 Cal 23 The law in laying down the strict rule that if a Judge has any legal interest in the decision of the case he is disqualified from trying it, however small that interest may be had regard not so much to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. One important object at all events, is to clear away every thing which might engender suspicion and distrust in the tribunal and to promote the feelings of confidence in the administration of justice which is so essential to social order and security.—*Sergeant v Dale* 2 Q B D 558 20 Cal 857

A Magistrate who is disqualified under this section to try a case is not a Court of competent jurisdiction in respect to that case, and if he tries that case the defect is not cured by sec 537—23 Cal 328 Nor will the defect be cured by any consent or waiver on the part of the accused—2 Cal 23 32 All 635 9 A I R 81 7 A I J 740 1 S I R 98 4 Lah I J 452

Try or commit any case—The expression try any case is wide enough to include any stage of a judicial proceeding in which the guilt or innocence of the accused is finally adjudicated upon—5 S I R 137 Thus he cannot hear in appeal in the case. The word try is comprehensive enough to include the hearing of an appeal—23 Cal 44 17 C W N 111, 1899 A W N 4 4 Ilt I J 452 9 N I R 81 1 S I R 98 He is also debarred from interfering in revision in the case—1905 L B R (Cr P C) 57 He cannot direct further inquiry under sec 436—5 S I R 137 (*Contra*—27 All 25)

But a Magistrate can initiate proceedings even though he is personally interested in the case—2 Cal 23 Though a Magistrate is disqualified under this section from trying a case on account of personal interest, he is not, on that account debarred from granting a permission to another Magistrate to proceed with the case—20 All 181 The Magistrate is not debarred from taking cognizance of the case even though he has taken some part in the institution of the proceedings—Oullah v Beni Madhab 50 Cal 135

If a Magistrate considers that he is disqualified from trying a case, and the case is of a petty nature he ought not to commit it to the Sessions, but should move the District Magistrate to transfer it to some other Magistrate—*Fimp v Ram Jatau* 21 A I J 420 23 Cr I J 665 A I R 1924 All 185

In which he is a party—Where a Magistrate while travelling in a railway carriage requested the accused who were his fellow passengers to desist from smoking and on their contemptuously refusing to do so, arrested and subsequently tried and convicted them it was held that the Magistrate was legally and morally disqualified from exercising his judicial functions in relation to the offences imputed—*Ratanlal* 339 So also, a Magistrate, who was one of the persons obstructed by the accused driving on the wrong side of the road, could not himself try the accused for offences under secs 28 and 29 of the Bombay Act VII of 1867—*Ratanlal* 3

1429 Personally interested:—The words 'personally interested' do not imply mere *intellectual* interest but something of the nature of an expectation of advantage to be gained, or of a loss or some disadvantage to be avoided by the person who is said to be interested in the case—8 Bom 1 R 947 Thus a public officer whose duty it is to see that the law is obeyed cannot merely by reason of that duty, be said to be personally interested in the prosecution and trial of an offender—15 All 192 The words personally interested cannot refer to any *remote* interest in the matter but must refer to some particular and immediate personal interest in the case and its result—15 All 192 The law does not measure the amount of interest which a Judge possesses. If he has any legal interest in the decision of the question one way, he is disqualified no matter how small the interest may be—*Sergeant v Dale* 2 Q B D 558 14 N I R 14

Instances —(1) *Taking part in arrest of accused and Police proceedings* —Where the Magistrate took an active part in dispersing the unlawful assembly and pursuing the members and arresting them and subsequently he initiated proceedings against the accused and himself tried and convicted them it was held that the Magistrate should not have tried the case himself as he had initiated and directed the whole proceedings and could be said to have been personally interested in them—20 Cal 857 Where the investigation of the Police at the preliminary inquiry was directed by a Magistrate to a considerable degree and where the Magistrate himself traced some of the accused and ordered their arrest, he was disqualified from trying the case—23 Cal 328 A Magistrate who takes more than a formal part in a police investigation should not try the case—424 Po v Fmp 4 Bur 1 J 65 26 Cr I J 1317, 2 L B R 209

(2) *Magistrate being a witness* —A Magistrate cannot in a case in which he is the sole Judge of law and fact, be a competent witness. The trial and conviction by a Magistrate of an accused in a case wherein he (the Magistrate) is himself a witness is illegal—2 Cal 405, 20 Cr I J 45 (Pat) 1904 P I R 21 A Magistrate cannot import matters (of personal knowledge) into his judgment not stated on oath before the Court in the presence of the accused. If he does so, he makes himself a witness in the case and renders himself incompetent to try it—20 Cr I J 45 (Pat) 20 Cal 85—A Magistrate who becomes aware of some of the facts in connection with a case by his taking some part, or at any rate by being present at a search made by the police during the investigation, should not try the case but transfer it to some other Magistrate—5 C W N 804 An officer should not try an offence under sec 174 I P C, in his capacity as a Magistrate, when the offence has been committed before him in his capacity as a Settlement Officer—2 All 405 But if during the course of the trial the Magistrate himself made a statement on oath which he recorded and permitted himself to be cross-examined and re-examined it was held that he was not incompetent to try the case—27 All 13

(3) *Pecuniary interest* —A Magistrate who is a shareholder of the company which is the complainant in the case is disqualified from trying the case. In such cases it is not necessary to inquire whether there was any

real or substantial ground for suspecting bias on his part—20 Bom 502 See also 2 Cal 23 A Magistrate should not entertain a criminal case in which persons indebted to him are concerned either as complainant or as accused—C P Cr Cr Part II, No 54

(4) *Magistrate being servant of complainant*—A Magistrate who is a servant of the corporation is deemed to have such an interest in the result of a prosecution by the corporation as to disqualify him from trying the case—7 Cal 322 10 Cal 194

(5) *Magistrate being master of complainant*—The mere fact that the Magistrate is the master of the complainant who is complaining on his own account merely does not deprive the Magistrate of his jurisdiction, though in such a case it should generally be expedient for him to refer the complainant to some other Magistrate—9 Bom 172 But where the complainant was the servant of the Magistrate and it appeared that the Magistrate's wife was driving in the dog cart for passing which the accused was charged with rash and negligent driving the Magistrate was held to be personally interested and he ought not to try the case—14 Bom 572

(6) *Magistrate being Agent of Court of Wards*—The mere fact that the District Magistrate is, in his capacity as Collector concerned in the management of an estate under the Court of Wards does not disqualify him from trying a case of theft arising out of a dispute between the landlord and tenant in an estate under the management of the Court of Wards—46 Cal 834, 28 Cal 297 But where the manager of an estate under the Court of Wards, who was also appointed the Sub divisional Officer, drew up proceedings under sec 145 against one who disputed the possession of a piece of land, in which the estate claimed an interest and the Magistrate refused an application for transfer of the case it was held that the Magistrate showed a lack of appreciation of ordinary principles which should guide judicial officers in matters of this kind—9 C W N cxxxvi

1430 Sanctioning or directing prosecution:—See notes under sec 487 A Magistrate who takes a mere formal part in the prosecution cannot be said to direct the prosecution and is not therefore deprived of his jurisdiction in the case Thus a Magistrate who simply issued process as officer-in-charge of the Sudder sub division is not precluded from hearing an appeal in the case—36 Cal 869 in Bur I 1 150 Where a Magistrate under the Excise Act lays before the Inspector of Police certain information regarding the conduct of the accused in his dealings in opium and directs the said Inspector to make an inquiry on the basis of that information, and a prosecution is subsequently instituted in the ordinary course by the investigating Police Officer, held that the Magistrate cannot be said to have such connection with the proceedings antecedent to the prosecution as would debar him from trying the accused—11 A L J 652 Where a Deputy Tahsildar made a report to the Tahsildar about certain offences and the Tahsildar in his turn reported the matter to the Deputy Magistrate, who authorised the Tahsildar to prosecute the accused, and the Tahsildar then lodged a complaint before the Deputy Magistrate who tried the case, held that the Deputy Magistrate was not disqualified,

he merely authorised the prosecution and not directed it. A distinction should be drawn between authorisation and direction of prosecution—24 Mad 238. Where a prosecution is by a Town Committee, the mere fact that the Magistrate had as the President of the Town Committee sanctioned the prosecution cannot be said to give the Magistrate any personal interest in the proceedings, and the Magistrate is competent to try the case himself. But nevertheless it is not desirable that he should try the case when other Magistrates are available—*Gopi Chand v. K. F.*, 1 Rang, 517. A Sessions Judge is not prohibited in law from hearing an appeal from a conviction in a case in which as an Insolvency Judge, on the application of a creditor, he had allowed the prosecution to proceed—*Srikrishna v. Emp.*, 21 A. L. J. 90. But where a District Magistrate who as Inspector of factories ordered an inquiry to be made and in the same capacity directed the prosecution of the accused for an offence under the Factories Act, he was disqualified from trying the case—1 Lah 35. Where a Cantonment Magistrate in his capacity as secretary of the Cantonment Committee ordered the prosecution of the accused in respect of an alleged building in contravention of the cantonment rules and proceeded to try the case, held that the case ought to be transferred to another Magistrate—*Hira Lal v. Emp.* 20 A. L. J. 911. A Magistrate, who upon information furnished to him directs the issue of a warrant under sec. 6 of the Gambling Act, is disqualified from trying the case—13 Bur 1 T 154. Where after the close of a trial, the trying Magistrate orders the Police to send up a charge sheet in respect of a witness for the prosecution and upon the Police doing so, tries that person and convicts him, held that the Magistrate having directed the prosecution of the accused is not competent to hold the trial—23 Bom L. R. 842.

1431 Explanation.—Under the Explanation, a Magistrate is not deemed to be a party or personally interested in any case by reason of the fact that he is a Municipal Commissioner or otherwise concerned therein in a public capacity. But if in addition to a connection of that sort, he directs the prosecution of a person for an offence, he is disqualified from trying the case, not by reason of the fact that he is Municipal Commissioner or publicly connected with the case, but by reason of the further fact that he has constituted himself the prosecutor—5 S. F. R. 137, 1899. A. W. N. 74, 23 Bom L. R. 842. Thus, the mere fact that the Magistrate might happen to be a Municipal Commissioner does not necessarily disqualify him from holding a trial in which some Municipal matter was involved. But it is a very different matter when it is found that the Magistrate is practically one of the prosecutors and the Judge—10 Cal 1030. A Municipal Commissioner in his capacity as such Commissioner had invited the attention of the Executive Officer of the Municipality to the manner in which a certain By-law of the Municipality was being disregarded by the accused. The Executive Officer called the attention of the Health officer to the matter and the Health officer instituted the prosecution after satisfying himself that there were good *prima facie* grounds for believing that the By-law was being broken and that the interests of the public health required its enforcement. The case was tried by a Bench of Honorary Magistrates of which the Municipal Commissioner was a member, and ended in a conviction.

vicium Held that the trial and conviction were not illegal, because the Municipal Commissioner was not a party to the prosecution nor did he cause it to be instituted—*Nanoo v Emp* 24 Cr L J 135 (All) The mere fact that the Magistrate is the Vice President of the Municipality and Chairman of the Managing Committee does not disqualify him from trying an offence against the Municipality But if he has taken any part in promoting the prosecution as for instance, by concurring in sanctioning it at a meeting of the Managing Committee or otherwise he would be disqualified—18 Bom 422 1896 P R 5 So also, if the Magistrate is the Vice-President of a Municipal Committee and was present at the meeting in which the resolution was passed for the disobedience of which the accused is prosecuted the Magistrate is debarred from trying the case—23 Cr L J 704 (Lah) A Magistrate does not, by reason of his being a member of a sub-committee of a Municipal Board, become personally interested so as to be disentitled to try the accused for an offence against the Municipal Board—27 All 25 But if he presides at a meeting of the Municipal Board which directs the prosecution of the accused, he becomes disqualified—14 N L R 14 5 S L R 137 20 Cr L J 244 (Nag) It may be that he did not speak or vote at the meeting but the fact remains that he attended the meeting where the question was debated and the prosecution ordered, and he has therefore placed himself personally to some extent in the position of a prosecutor—5 S L R 137 Where the Municipal Committee resolved to institute criminal proceedings against the accused and directed the Secretary to take necessary steps, and the Secretary forwarded a copy of the resolution to the Joint Magistrate (who was no other than the Secretary himself) who took proceedings and tried the accused it was held that the trial was not only illegal but a mere show—1883 A W N 181 The District Magistrate is not disqualified from hearing the appeal merely because he happens to be the Chairman of the Municipal Board—1899 A W N 74 *Contra*—23 Cal 44 and 15 Mad 83 where it was held that the very fact that the Chairman of the Municipality was the Magistrate, disqualified him from trying the offence, and the Explanation did not apply to his case

In 10 Cal 194 a distinction has been drawn between a salaried officer of a Corporation and an Honorary Officer, and it has been held that the Explanation does not apply to a salaried officer A salaried officer of the Corporation is by reason of the very fact that he is a servant of the Corporation, precluded from trying any Municipal case as a Magistrate But a gentleman who without remuneration is merely discharging a public and honorary office, and who has no personal interest in the proceedings of the Municipality, may well be supposed to be free from that bias which the jealousy of the law presumes in other persons more immediately interested

Concerned therein in a public capacity—A Magistrate in charge of opium and excise administration of a district is not personally interested in the observation of the provisions of the Opium Act, merely because it is his duty to see the law relating to sale of opium enforced and maintained in his district he is therefore not precluded from exercising jurisdiction in respect of offences against the said Act—15 All 192, 5 A L J

he merely *authorised* the prosecution and not *directed* it. A distinction should be drawn between *authorisation* and *direction* of prosecution—24 Mad 238. Where a prosecution is by a Town Committee, the mere fact that the Magistrate had as the President of the Town Committee sanctioned the prosecution cannot be said to give the Magistrate any personal interest in the proceedings, and the Magistrate is competent to try the case himself. But nevertheless it is not desirable that he should try the case when other Magistrates are available—*Gopi Chand v K F*, 1 Rang, 517. A Sessions Judge is not prohibited in law from hearing an appeal from a conviction in a case in which he is an Insolvency Judge, on the application of a creditor, he had allowed the prosecution to proceed—*Srikrishna v Emp*, 21 A L J 90. But where a District Magistrate who is Inspector of factories ordered an inquiry to be made and in the same capacity *directed* the prosecution of the accused for an offence under the Factories Act, he was disqualified from trying the case—1 Lah 35. Where a Cantonment Magistrate in his capacity as secretary of the Cantonment Committee ordered the prosecution of the accused in respect of an alleged building in contravention of the cantonment rules, and proceeded to try the case, *held* that the case ought to be transferred to another Magistrate—*Hira Lal v Emp*, 20 A L J 911. A Magistrate, who upon information furnished to him directs the issue of a warrant under sec 6 of the Gambling Act, is disqualified from trying the case—13 Bur 1 T 154. Where after the close of a trial, the trying Magistrate orders the Police to send up a charge sheet in respect of a witness for the prosecution and upon the Police doing so, tries that person and convicts him *held* that the Magistrate having directed the prosecution of the accused is not competent to hold the trial—23 Bom L R 842.

1431 Explanation:—Under the Explanation, a Magistrate is not deemed to be a party or personally interested in any case by reason of the fact that he is a Municipal Commissioner or otherwise concerned therein in a public capacity. But if in addition to a connection of that sort, he *directs the prosecution* of a person for an offence, he is disqualified from trying the case, not by reason of the fact that he is Municipal Commissioner or publicly connected with the case, but by reason of the further fact that he has constituted himself the *prosecutor*—5 S L R 137, 1899 A W N 74, 23 Bom L R 842. Thus, the mere fact that the Magistrate might happen to be a Municipal Commissioner does not necessarily disqualify him from holding a trial in which some Municipal matter was involved. But it is a very different matter when it is found that the Magistrate is practically one of the prosecutors and the Judge—to Cr 1030. A Municipal Commissioner in his capacity as such Commissioner had invited the attention of the Executive Officer of the Municipality to the manner in which a certain Byelaw of the Municipality was being disregarded by the accused. The Executive Officer called the attention of the Health officer to the matter and the Health officer instituted the prosecution after satisfying himself that there were good *prima facie* grounds for believing that the Byelaw was being broken and that the interests of the public health required its enforcement. The case was tried by a Bench of Honorary Magistrates of which the Municipal Commissioner was a member, and ended in a conv

Viction Held that the trial and conviction were not illegal, because the Municipal Commissioner was not a party to the prosecution nor did he cause it to be instituted—*Vanoo v Fmp* 24 Cr L J 135 (All) The mere fact that the Magistrate is the Vice President of the Municipality and Chairman of the Managing Committee does not disqualify him from trying an offence against the Municipality But if he has taken any part in promoting the prosecution as for instance by concurring in sanctioning it at a meeting of the Managing Committee or otherwise, he would be disqualified—18 Bom 422 1896 P R 5 So also if the Magistrate is the Vice President of a Municipal Committee and was present at the meeting in which the resolution was passed for the disobedience of which the accused is prosecuted the Magistrate is debarred from trying the case—23 Cr L J 704 (Lah) A Magistrate does not, by reason of his being a member of a sub-committee of a Municipal Board become personally interested so as to be disentitled to try the accused for an offence against the Municipal Board—27 All 25 But if he presides at a meeting of the Municipal Board which directs the prosecution of the accused, he becomes disqualified—14 N L R 14 5 S L R 13—20 Cr L J 244 (Nag) It may be that he did not speak or vote at the meeting but the fact remains that he attended the meeting where the question was debated and the prosecution ordered and he has therefore placed himself personally to some extent in the position of a prosecutor—5 S L R 137 Where the Municipal Committee resolved to institute criminal proceedings against the accused and directed the Secretary to take necessary steps, and the Secretary forwarded a copy of the resolution to the Joint Magistrate (who was no other than the Secretary himself) who took proceedings and tried the accused, it was held that the trial was not only illegal but a mere show—1883 A W N 181 The District Magistrate is not disqualified from hearing the appeal merely because he happens to be the *Chairman* of the Municipal Board—1899 A W N 74 *Contra*—23 Cal 44 and 15 Mad 83 where it was held that the very fact that the Chairman of the Municipality was the Magistrate, disqualified him from trying the offence, and the Explanation did not apply to his case

In 10 Cal 194 a distinction has been drawn between a salaried officer of a Corporation and an Honorary Officer, and it has been held that the Explanation does not apply to a salaried officer A salaried officer of the Corporation is, by reason of the very fact that he is a servant of the Corporation, precluded from trying any Municipal case as a Magistrate But a gentleman who without remuneration is merely discharging a public and honorary office, and who has no personal interest in the proceedings of the Municipality, may well be supposed to be free from that bias which the jealousy of the law presumes in other persons more immediately interested

Concerned therein in a public capacity—A Magistrate in charge of opium and excise administration of a district is not personally interested in the observation of the provisions of the Opium Act, merely because it is his duty to see the law relating to sale of opium enforced and maintained in his district, he is therefore not precluded from exercising jurisdiction in respect of offences against the said Act—15 All 192, 5

357 A District Magistrate is not precluded under this section from trying an offence under the Police Act, merely because he is the head of the Police—22 All 140 The fact that a District Magistrate is also the District Superintendent of Police does not of itself disqualify him from trying or inquiring into cases investigated by the Police of his district—2 I B R 209 But if the Magistrate in his public capacity directs the prosecution he is disqualified Thus, where the Magistrate as president of the octroi sub-committee directed the prosecution of an accused for evading the payment of octroi, the Magistrate was debarred from trying the case even though the accused had consented to be so tried—32 All 635

1432 Local inspection:—Under the Code of 1882, it was held that a Magistrate making a personal inspection of the *locus in quo* where the offence was committed, made himself a witness in the case and thereby rendered himself incompetent to try the case—*Q E v Muckam*, 19 Mad 263, *Grish Chander v Q F*, 20 Cal 857, *Hari Kishore v Abdul* 21 Cal 920 But now the law has been changed by the addition of the latter part of the Explanation

A Magistrate is competent to inspect personally a locality in order to test the connection of the evidence and the plans of the locality submitted in the case Such an inspection would not disqualify him from trying the case—1901 P R 13 *Babbon v A F* 37 Cal 340 (355) Where the Magistrate inspected the *locus in quo* and stated in his judgment what he saw when he inspected, he was not disqualified—2 Weir 728 Where a Magistrate made a local inspection in the presence of both the parties and the pleaders, and stated in his judgment some facts which he then observed, it was held that the Magistrate was competent to convict the accused persons—2 Weir 727 Where the Judge personally visited the scene of offence with the prosecution witnesses and the vakil for the accused, and acting under the powers vested in him under section 540 recalled some of the prosecution witnesses and examined them in such a way as to put on record the most important points observed at the inspection, and the accused were given full opportunity of cross-examining those witnesses with reference to the facts relating to the personal inspection held that it was open to the Judge to make the inspection, and that he did not act illegally or with material irregularity in using the results of his inspection in his disposal of the case—*In re Thachroth Hydross* 45 M L J 279 It is not only not objectionable but in many cases highly advisable that a Magistrate trying a criminal case should view the place in order to understand fully the bearing of the evidence given in Court But if he does so, he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or the other—*Hari Rai v Emperor* 39 Cal 476 A local inspection should only be made for the purpose of enabling the Magistrate to understand better the evidence adduced before him (see sec 539B) and it must be strictly confined to that—*Q F v Manickam* 19 Mad 263 (266), *Krishnappa v Sengoda* 2 Weir 727 When the law allows a view of the locality, every possible precaution should be taken that such a view should be nothing but a view of the local features Where the Magistrate did much more than viewing the

plate for the purpose of understanding and testing the evidence, and imported into his judgment matters of opinion and inference based upon circumstances not on the record, held that there was an error of procedure necessitating a retrial before another Magistrate—*Babbon Sheik v Emperor* 37 Cal 340 (357) Where a Magistrate in visiting the scene of occurrence not merely noted the various features of importance but imported into his judgment what he could not have possibly noted from the locality or from anything connected therewith (e g the position of the accused and of other men at the time of the alleged occurrence) he exceeded the proper limits of his discretion in making the inspection and thus disqualified himself from trying the case—3 C W N 607 See also Note 1374 under sec 526

As to whether the holding of an inquiry under sec 202 disqualifies the Magistrate from trying the case, see Note 670 under sec 202

557 No pleader who practises in the Court of any Magistrate in a presidency-town or district shall sit as a Magistrate in such Court or in any Court within the jurisdiction of such Court

Practising pleader not to sit as Magistrate in certain Courts

1433 The appointment of a pleader to act as Presidency Magistrate is not forbidden by any provision of the Code The only thing required of him is to give up practice on appointment—23 Bom 490

This section does not forbid a pleader to practise in any Court but forbids him to sit as a Magistrate in certain Court If a pleader practises in the Honorary Magistrate's Court or in the Township Magistrates Court within whose jurisdiction the Court is, he is debarred from sitting as a Magistrate in the Honorary Magistrate's Court—*King Emp v Nga Tha Sheum* 25 Cr I J 311 (Bur)

558 The Local Government may determine what, for the purpose of this Code, shall be deemed to be the language of each Court within the territories administered by such Government, other than the High Courts established by Royal Charter.

Power to decide language of Courts

"With the permission of the presiding Judge or Magistrate, any Advocate or Pleader may address the Court in English, when any one of the pleaders on the opposite side is acquainted with that language, or whenever the senior of such pleaders or his client consents to that being done"—Cal G R & C O, p 58

559 (1) Subject to the other provisions of this Code, the powers and duties of a Judge or Magistrate may be exercised or performed by his successor in office.

Provisions for powers of Judges and Magistrates being exercised by their successors in office.

(2) *When there is any doubt as to who is the successor in office of any Magistrate the Chief Presidency Magistrate in a Presidency town, and the District Magistrate outside such town shall determine by order in writing the Magistrate who shall for the purposes of this Code or of any proceedings or order thereunder be deemed to be the successor in office of such Magistrate*

(3) *When there is any doubt as to who is the successor in office of any Additional or Assistant Sessions Judge, the Sessions Judge shall determine by order in writing the Judge who shall for the purposes of this Code or of any proceedings or order thereunder be deemed to be the successor in office of such Additional or Assistant Sessions Judge*

This section has been redrafted by section 155 of the Cr P C Amendment Act XVIII of 1923. The old section stood as follows —

559 All powers conferred by this Code on the Governor General in Council or on the Local Government may be exercised from time to time as occasion requires

But this section was unnecessary, because its provisions are covered by section 14 of the General Clauses Act. The old section has therefore been omitted and an entirely different section has been framed in its place.

A new section is intended to be inserted providing for the powers of Judges and Magistrates being exercised by their successors-in-office and the determination by the Chief Presidency or District Magistrate of the person to be deemed the successor-in-office of a Subordinate Magistrate in cases of doubt. —*Statement of Objects and Reasons (1914)*

560 A public servant having any duty to perform in connection with the sale of any property under this Code shall not purchase or bid for the property

Officers concerned in sales not to purchase or bid for property

561 (1) Notwithstanding anything in this Code, no Magistrate except a Chief Presidency Magistrate or District Magistrate shall—

Special provisions with respect to offence of rape by a husband

(a) take cognizance of the offence of rape where the sexual intercourse was by a man with his wife, or

(b) commit the man for trial for the offence

(2) And, notwithstanding anything in this Code, if a Chief Presidency Magistrate or District Magistrate deems it necessary to direct an investigation by a police officer, with respect to such an offence as is referred to in sub section (1), no police-officer of

a rank below that of police inspector shall be employed either to make, or to take part in, the investigation

Clause (a)—Where the offence referred to in this clause was taken cognizance of by the District Magistrate, the fact that the investigation into the offence had been conducted by a subordinate Police officer was not a material irregularity which would vitiate the proceedings—1895 A W N 9

561A Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice

1433A This section has been added by section 156 of the Cr P C Amendment Act, XVIII of 1923 'By this section it is proposed to give statutory recognition to the inherent powers of the High Court—a principle which is already well recognized—*Statement of Objects and Reasons* (1914)

Or otherwise to secure the ends of justice—We have slightly elaborated the provisions of this clause. We understand that a High Court has recently held [44 All 401] that it had no power to direct the expunging of objectionable matter from a record. We think it desirable that it should be made clear that this clause is intended to meet such a case—*Report of the Joint Committee* (1922) See Note 1214 under sec 439

In the exercise of its inherent powers under this section, the High Court cannot pass any order which would conflict with the provisions of the Code. Thus the High Court has no jurisdiction to make an order for the restoration of attached property, where the application is made beyond the period prescribed in sec 89—*In re Gurunath* 26 Bom L R 719 25 Cr L J 1293

The powers conferred on the High Court under this section are powers which must be found within the Crim Pro Code. This section confers no new powers on the High Court, because the Court cannot, by invoking its inherent powers, extend the powers given to it by statute. Thus, the High Court has no power to appoint a receiver pending the disposal of a revision petition against an order passed under section 143—*Varudayya v Shanmuga Sundara* 49 M L J 593 See this case cited in Note 421 under sec 145

This section does not confer on a High Court the power to review its own judgment—*Va ar Mohd v Hara Singh* 26 P L R 616 27 Cr L J 23 *Id Sadiq v Emp* 7 Lah L J 108 26 Cr L J 1169

But the inherent power of the High Court under this section can be exercised to stay a criminal proceeding till the disposal of a civil pending in a Civil Court relating to the same dispute—*Kanhayalal Bhagwan Das*, 23 A L J 956 26 Cr L J 1483

562 In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any other offence under the Indian Penal Code punishable with not more than two years' imprisonment before any Court, and, no previous conviction is proved against him, if it appears to the Court before whom he is so convicted, that regard being had to the youth, character and antecedents of the offender, to the trivial nature of the offence and to any extenuating circumstances under which the offence was committed, it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, and during such period (not exceeding one year) as the Court may direct, to appear and receive sentence when called upon, and in the meantime to keep the peace and be of good behaviour

562 (1) When any person not under twenty-one years of age is convicted of an offence punishable with imprisonment for not more than seven years, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or transportation for life and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, * * * and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behaviour

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not specially empowered by the Local Government in this behalf,

and the Magistrate is of opinion that the power conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class or Subdivisional Magistrate, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in manner provided by section 380

(1) In any case in which a person is convicted of theft, theft in a building dishonest misappropriation cheating, or any other offence under the Indian Penal Code, punishable with not more than two years imprisonment, and no previous conviction is proved against him the Court before whom he is so convicted may, if it thinks fit having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed instead of sentencing him to any punishment release him after due admonition

(2) An order under this section may be made by any Appellate Court or by the High Court when exercising its power of revision

(3) When an order has been made under this section in respect of any offender, the High Court may on appeal when there is a right of appeal to such Court or when exercising its powers of revision, set aside such order and in lieu thereof pass sentence on such offender according to law

Provided that the High Court shall not under this subsection inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted

(4) The provisions of Sections 122 126A and 4061 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section

Change—Subsection (1) has been substantially amended and Subsections (2) to (4) have been newly added, by section 15 of the Cr P C Amendment Act, VIII of 1923. The main changes are the following—

First this section extends the list of offences on conviction for which a person may be released upon probation secondly it is made clear that section 562 does not apply merely to the case of youthful offenders but applies to a wider class of persons, thirdly the word 'trivial' has been

omitted, *fourthly*, the period for which an offender may be released under this section has been extended from one to three years, *fifthly* power has been conferred on an Appellate Court or upon a High Court in the exercise of its revisional jurisdiction to make an order under section 562, and *finally* the High Court has been empowered, either on appeal or in revision, to inflict sentence of imprisonment in lieu of an order under this section.—*Statement of Objects and Reasons (1914)* Subsection (1A) has been added by the Cr P C Second Amendment Act XXVII of 1923. This amendment has been made on the recommendation of the Jail Committee.

1434 Scope and application of section:—Under this section the first offender need not necessarily be a youth, its operations are not limited to juvenile offenders. It applies to persons of advanced age—2 Bom L R 817, 1916 P R 11, 18 Cr L J 469 (Mad), 2 L B R 314. The intention of the law is not to make it essential that the offender must be young or that the offence must be trivial in its nature etc., but merely to indicate the lines on which the discretion of the Court should be exercised—2 L B R 65, 6 C W N cch.

To enable a Magistrate to apply this section the first essential is that the accused is a first offender, and if he is one, the extenuating circumstances which entitle him to the indulgence of the Court are his age, character and antecedents—2 Bom L R 817. In order to give a Court jurisdiction to release an offender under this section there must co-exist two conditions, viz there should be no previous convictions proved and the offence must be one of those specified in the section. If the two conditions are fulfilled, the Court has jurisdiction in the exercise of its discretion to act under the section. But in exercising the discretion the Court may have regard to the points specified in the section, namely the age, character and antecedents of the offender, and to the circumstances under which the offence was committed—2 L B R 65. This section is intended to apply to offenders (especially youthful offenders) who without being persons of depraved character may on occasions succumb to sudden temptation and the legislature very humanely and very properly allows the Magistrate in such cases to give the young man a chance and to deal with him leniently under this section. But where an offence implies a good deal of preparation (e.g. the offence of illicit manufacture of liquor) it cannot be said that it is done in consequence of succumbing to a sudden temptation, and the section should not be applied to such a case—*Crown v Suran Singh* 1916 P R 19, *Emp v Piara Singh* 7 Lah 32 27 P L R 211.

This section may be a very valuable section if properly applied, and it may very often happen that a juvenile offender who is sentenced to jail for a short period of imprisonment for a trivial offence may be practically ruined for life, whereas he would be saved by the due application of sec 562. But in passing a sentence at least two things are necessary to guard against viz danger to the public, and danger to the accused himself. The public must not be led to suppose that all juvenile offenders may commit any crimes that they like without any fear of punishment because that would be an incentive to criminal parents to initiate their children into a life of crime. And even children themselves being immune

from the fear of punishment might be tempted to go astray from the unpleasant paths of virtue into paths of crime. It is obvious therefore that before applying this section one must consider whether there is a good cause for its application or not. If the offence is by no means a simple crime such as is committed by children out of mere thoughtlessness rather than of criminality, but it shows a singular combination of design and ingratitude and a general character of craft and deceit, it would call for a severe punishment indeed, and resort should not be had to the provisions of this section—*Daryalal v Emp* 18 S 1 R 61 25 Cr L J 1224. Magistrates should be very careful in applying this section and should not allow themselves to be misled into the use of this section by misplaced leniency and sympathy—*Emp v Matho* 27 Cr L J 309 (Sind).

Petty squabbles of young persons should be dealt with under this section—12 Cr L J 242 (Bur). Where the offender is a person of good position in life, he should rather be dealt with under this section than sentenced to whipping—1907 P W R 9. Where the accused was a widow of over 45, and it appeared that in committing the offence (forgery false personation) she was a puppet in the hands of the other accused held that this was a case in which the Court instead of sentencing her to imprisonment should release her on her entering into a bond—*K E v Kiran Bala* 43 C L J 79 30 C W N 373 27 Cr L J 409.

This section applies when no previous conviction is proved against the offender. A previous conviction is a technical bar to an order under this section but if no such conviction is proved at the trial and an order under this section is passed a subsequent discovery of a previous conviction is no ground for interference in revision—*Esip v Partab Narain*, 2 O W N 593 26 Cr L J 1248.

Section does not apply when sentence has been passed—This section cannot be applied to a case in which the Magistrate has not only convicted the accused person but sentenced him as well to imprisonment and fine—17 A L J 426. The words in the section are instead of sentencing him.

1435 Subsection(1)—Under the old law this sub-section applied only where the offender was convicted of one of certain offences under the Penal Code and not of an offence under any other law e.g. an offence under the Indian Railways Act—1 N L R 139 or an offence under the Excise Act—1916 P R 19. This restriction has now been removed.

The old sub-sec (1) could not apply where the offender was punishable with more than 2 years imprisonment. Thus it could not apply where the accused was convicted of criminal breach of trust—7 Bur L R 14 or of receiving stolen property—2 Bom L R 343 or of lurking house trespass—15 C P L R 11 or of using a genuine or a forged document—17 Bom L R 921 or of house breaking—18 Cr L J 469 (Mad) or of voluntarily causing grievous hurt—4 L B R 150 or of aggravated form of cheating under sec 420 I P C—3 L B R 95 1 Lah 612 41 Mad 533 or to an offence under sec 381 I P C—4 N L R 18. All these cases will now fall under the present subsection (1).

No order can be made under this section where the accused has,

convicted in the trial of an offence not falling under this section as well as of an offence falling under this section—2 Weir 731

Who can pass order—An order under this section can be passed not only by the Court which convicted the accused but also by the Appellate Court, as well as by the High Court in revision—24 All 306, 29 Mad 567, 25 C W N 720 This is now expressly provided in the new sub-section (2)

1436 Bond:—The bond to be taken should be not only to keep the peace and to be of good behaviour, but to appear and receive sentence when called upon and in the meantime to keep the peace and be of good behaviour—2 Bom L R 112 But it is not competent to a Magistrate to direct the accused to appear in Court on a fixed day to receive sentence all he can do is to release the accused on probation of good conduct for a certain period and to direct him to appear and receive sentence when called upon during such period, if he does not observe the conditions of the bond—2 Bom L R 702

Bond by minor—It was held that the third proviso to section 118, providing for bond of minors to be executed by their sureties, applied only to bonds under that section and did not apply to bonds of first offenders released under this section. A bond under this section had to be executed by the minor himself and not by his sureties (Cf the words 'on his entering into a bond')—4 L B R 12 (overruling 2 L B R 137) But this is no longer good law in view of the new section 514B

Inability to furnish security—If an accused person is ordered to give security under this section and he fails to do so, he should not be detained in prison till the expiration of the period for which security is to be furnished but the proper course is for the Magistrate, before passing an order under this section, to ascertain whether the accused is likely to be able to give security immediately or within a reasonable time. If he fails to give security within a reasonable time, the Magistrate should pass a sentence which should be only nominal—3 L B R 2, *Nasu Mea v A E* 2 Rang 360 (361) 26 Cr L J 285 The Magistrate should not imprison the accused under sec 123 on failure to give security under sec 562. Sec 123 specifically applies only to sections 106 and 118 and not to sec 562—*Nasu Mea v A E* 2 Rang 360 (361)

1437 Proviso:—*Power of 2nd or 3rd Class Magistrate*—It is not open to a Second Class Magistrate, who has not been specially empowered to exercise jurisdiction under sub-section (1) of the section, to take proceedings under that sub-section, although he was invested by a notification issued under the 1882 Code with all the powers specified in the fourth schedule of that Code—2 Weir 731 If a Second Class Magistrate not empowered under this section is of opinion that the case is a fit one for the exercise of the powers conferred by sub-section (1) of section 562, he should record his opinion to that effect and submit the case to a First Class Magistrate or Subdivisional Magistrate for orders—*Crown v Jawah* 5 Lah 36 (37) 25 Cr L J 1124 The same remarks apply to third class Magistrates

Power of the Magistrate to whom proceedings are submitted—See notes under sec 380

Joint trial of young and aged offenders—Where the first accused aged nearly 50 and the second accused a boy of 11, were charged of theft before a Second Class Magistrate, and the Magistrate sent the case of both the accused to a First Class Magistrate so that the second accused might be dealt with under sec 562, it was held that the Second Class Magistrate should have disposed of the case of the first accused according to law without submitting the case to the First Class Magistrate, and that he should have submitted the case of the second accused only—2 Bom L R 112 Under the present law, the case of the aged offender also falls under this section

1438 Subsection (1A):—The offences enumerated in this subsection are the same as those mentioned in the old section. It is restricted to offences under the Indian Penal Code, and does not apply to an offence under any other law, e g an offence under the Indian Railways Act—1 N L R 139, or an offence under the Excise Act—1916 P R 19

Again, the benefit of this subsection is not extended to the aggravated forms of the offences mentioned herein. Thus when this subsection speaks of theft, dishonest misappropriation or cheating, it must be construed to mean theft etc in its simple form, punishable respectively under secs 379, 403 and 417 I P C, and does not include the aggravated forms of those offences. The offence of cheating means simple cheating and not the aggravated form of it under sec 420 I P C—3 L B R 95, 41 Mad 533, 1 Lah 612. The word theft can only mean simple theft otherwise it would not have been followed by the words theft in a building as well. A servant found guilty of theft and convicted under sec 381 I P C is not entitled to the benefit of this clause, as theft by servant is not one of the offences specified herein. It is an evasion of law to treat an aggravated form of offence as an ordinary offence and thus introduce a different jurisdiction or a lower scale of punishment—4 N L R 18. But the Allahabad High Court holds that the words dishonest misappropriation and 'cheating' apply to and cover those offences in all their forms, thus 'cheating' covers secs 418, 419 and 420 I P C and 'criminal misappropriation' includes offences under sections 404 and 405 I P C otherwise the words are a mere surplusage, because these offences are not punishable with more than two years imprisonment. The words of a Statute should be given an extended meaning of which they are reasonably susceptible, when a restricted meaning would reduce those words to a mere surplusage—12 A L J 465. The Nagpur Court holds the same view in Emp v Jan Lal 8 N I J 97, 24 Cr I J 251.

This subsection also speaks of any other offence punishable with not more than two years' imprisonment. In applying this subsection to those offences, the term of imprisonment and not the nature of the offences is the test. If the offence is punishable with not more than two years' imprisonment, the clause may be applied even though the offence be a serious one. Thus a boy of 18 years who attempted to cause hurt with a weapon may be dealt with under this subsection, because the attempt

cause hurt is punishable with 18 months though the offence of causing hurt itself is punishable with 3 years—3 L B R 30

The words 'the Court before whom he is so convicted' occurring in subsection (1A) should not be read as controlled by the proviso to subsection (1) so that it is not necessary that the Magistrate passing an order under subsection (1A) should be a first class Magistrate or a second class Magistrate specially empowered. Therefore an ordinary Magistrate of the second class who has convicted an accused under section 279 I P Code can order his release after due admonition—*Murlidhar v Mahboob Khan* 47 All 353 26 Cr L J 624 A I R 1925 All 644 But the Bombay High Court holds that the proviso to subsection (1) governs the whole section and is therefore applicable to subsection (1A), so that a 3rd cla Magistrate is not competent to release an offender after due admonition under subsection (1A)—*Emp v Rauchhod* 27 Bom L R 1019 26 Cr L J 1461 A I R 1925 Bom 479

Distinct conviction must be recorded—Where the charge is in the alternative either of theft or of retaining stolen property, and the Magistrate while convicting the accused does not say of which of those offences he convicts the accused, held that in the absence of a conviction for theft the Magistrate is not competent to pass an order under this subsection—1 Bom L R 857

Subsection (2).—Under subsection (2) an appellate Court can pass an order releasing the accused on probation of good conduct. Where the High Court on an appeal from a conviction and sentence by the Presidency Magistrate ordered that the accused be released on entering into a bond but the accused failed to execute the bond, the punishment originally awarded by the Presidency Magistrate would not stand, (because that sentence had been already cancelled by the High Court) but the Presidency Magistrate should treat the accused as a person who was convicted but not sentenced to punishment and is again produced before the Court for the purpose of suitable punishment being awarded—*In re Budsha* 21 L W 40 26 Cr L J 683 A I R 1925 Mad 496

1439 Appeal and revision—An appeal lies from an order under this section releasing a convict on his entering into a bond—*Emp v Maishar*, 1904 P R 24 *Bahadur v Ismail* 29 C W N 151 57 Cal 463 26 Cr L J 435 A I R 1925 Cal 329 And the appeal may be preferred even after the expiry of the period of the bond—*Hayata v Frip* 1917 P R 20 18 Cr L J 401 An appeal will lie to the Sessions Judge from an order of a Magistrate of the first class passed under this section in a summary trial—*Emp v Hira Lal* 46 All 828 (see this case cited under sec 414) So also the High Court in revision can set aside the conviction and the order demanding security, even though the convicts have not moved the High Court to exercise that power—1912 P W R 7 1914 P W R 12

But unless the order passed by the Magistrate under this section is clearly mistaken or injudicious or amounts to a failure of justice, the High Court will not interfere in revision—*Murlidhar v Mahboob*, 47 All 353 26 Cr L J 624

It was held under the old law that in setting aside in revision the order under this section the High Court could not substitute in its place a sentence of imprisonment because no sentence had been passed by the Lower Court (the order under sec 562 not being a sentence) and the provisions of sec 439 as to enhancement of sentence did not apply—*Fimp v Ghasite* 37 All 31 12 A I J 1244 16 Cr L J 43 If the Appellate or Revisional Court considered that any sentence should be passed upon the accused it could order a retrial—1911 P R 16 37 All 31 But the new subsection (3) now empowers the High Court in appeal or in revision, to pass sentence on the accused after setting aside the order as to security—*Fimp v Aesar* 24 A I J 228 27 Cr L J 303

563 (1) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension

(2) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence Such Court may, after hearing the case pass sentence

564 (1) The Court before directing the release of an offender under Section 562, subsection (1) shall be satisfied that the offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions

(2) Nothing in this section or in sections 562 and 563 shall affect the provisions of Section 31 of the Reformatory Schools Act 1897

The words sub-section (1) have been added by the Repealing and Amending Act VII of 1914 This is intended to make it clear that section 564 (1) does not relate to the release of an offender under sub-section (1A) of section 562 —*Ga ette of India* 1924 Part V page 59

Previously convicted offenders

565 (1) When any person having been convicted—

Order for notifying address of previously convicted offender

(a) by a Court in British India of an offence punishable under Section 215, Section 489A, Section 489B, Section 489C or Section 489D, of the Indian Penal Code or of any offence punishable under Chapter VII or Chapter XVII of that Code, with imprisonment of either description for a term of three years or upwards, or

(1) by a Court or Tribunal in the territories of any Prince or State in India acting under the general or special authority of the Governor General in Council or of any Local Government of any offence which could if committed in British India have been punishable under any of the aforesaid sections or Chapters of the Indian Penal Code with like imprisonment for a like term,

is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by a High Court, Court of Session, Presidency Magistrate, District Magistrate, Subdivisional Magistrate or Magistrate of the first class, * * * such Court or Magistrate may, if it or he thinks fit, at the time of passing sentence of transportation or imprisonment on such person also order that his residence and any change of or absence from such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence.

(2) If such conviction is set aside on appeal or otherwise such order shall become void.

(3) The Local Government may make rules to carry out the provisions of this section relating to the notification of residence or change of or absence from residence by released convicts.

(4) An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision.

(5) Any person against whom an order has been made under this section and who refuses or neglects to comply with any rule so made shall be deemed within the meaning of section 176 of the Indian Penal Code to have omitted to give a

notice required for the purpose of preventing the commission of an offence

(6) Any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated

Change:—This section has been almost redrafted by section 151 of the Cr P C Amendment Act XVIII of 1923. The main changes introduced are the following—*Firstly*, it extends the list of offences after a conviction for which a person may be required to notify his residence and subsequent changes of residence, *secondly* on the analogy of section 75 of the Penal Code, as amended in 1910, provision has been made for previous convictions before tribunals of Native States which exercise their jurisdiction under the general or special authority of the Government of India or the Local Government, *thirdly* all first class Magistrates, in place of those specially empowered, have been authorised to pass orders under this section, *fourthly* the rule-making power has been extended to cover the provision of this section relating to the notification of residence, or change of residence or absence from residence of released convicts, *fifthly* the punishment of a breach of the rules made under this section has been enhanced and lastly Courts of Appeal or revision have been empowered to pass orders under this section—*Statement of Objects and Reasons* (1914)

1440 Application of section:—This section applies when the accused has been previously convicted the passing of an order under this section on a first offender is illegal—8 M I T 35

This section does not apply where either the previous or the subsequent conviction is for an attempt to commit the offences under Chap XII or XVII of the I P C—1907 P R 17

This section does not apply where the accused upon the subsequent conviction, is sentenced to whipping—35 Bom 13. An order under this section can be passed only when the accused is sentenced to transportation or imprisonment

This section does not apply where the subsequent conviction is a technical one. Where a person is found only technically guilty of theft, it is absurd to make his conviction for such a trifling offence the occasion for a long period of Police supervision under this section—1914 P W R 3

Where the previous conviction of the accused is set aside on appeal, though on technical grounds the accused cannot be called an old offender and an order of restriction cannot be passed under this section on a subsequent conviction—Nga Po v K F 3 Rang 156 26 Cr L J 1344

Under the old law, this section did not apply where the previous conviction had been in a Native State, even though the law of that State was identical in terms with the Indian Penal Code—1 N L R 13. But now this section does apply in such a case. See clause (b) which has been newly added

(a) by a Court in British India of an offence punishable under Section 21, Section 489A, Section 489B, Section 489C or Section 489D of the Indian Penal Code or of any offence punishable under Chapter VII or Chapter XVII of that Code, with imprisonment of either description for a term of three years or upwards, or

(1) by a Court or Tribunal in the territories of any Prince or State in India acting under the general or special authority of the Governor General in Council or of any Local Government, of any offence which could if committed in British India have been punishable under any of the aforesaid sections or Chapters of the Indian Penal Code with like imprisonment for a like term

is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by a High Court, Court of Session, Presidency Magistrate, District Magistrate, Subdivisional Magistrate or Magistrate of the first class, * * * such Court or Magistrate may if it or he thinks fit, at the time of passing sentence of transportation or imprisonment on such person also order that his residence and any change of or absence from such residence after release be notified as herein after provided for a term not exceeding five years from the date of the expiration of such sentence

(2) If such conviction is set aside on appeal or otherwise such order shall become void

(3) The Local Government may make rules to carry out the provisions of this section relating to the notification of residence or change of or absence from residence by released convicts

(4) An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision

(5) Any person against whom an order has been made under this section and who refuses or neglects to comply with any rule so made shall be deemed within the meaning of section 176 of the Indian Penal Code to have omitted to give a

SCHEDULES.

SCHEDULE I

ENACTMENTS REPEALED

(Repealed by the Amending and Repealing Act X of 191)

Offences under the following Secs of the I P O may be tried by any Magistrate —140 143 144 145 14 151 156 160 170 171 177 174 177 278 79 85 86 89 90 291 94 A 323 334 336 341 35 356 357 358 374 379 380 403 426 447 448 451 504 510

Offences under the following Secs I P C may be tried by First or Second class Magistrates —135 136 137 138 154 155 156 157 158 165 166 173 175 176 177 178 179 180 182 183 184 185 186 187 188 189 190 20 203 206 207 217 218 A 241 54 59 60 261 262 64 265 266 267 269 270 71 72 273 274 275 276 280 281 283 284 287 288 91 95 96 97 298 309 318 324 335 337 338 342 343 353 354 355 381 384 385 404 405 406 408 411 414 417 418 419 421 422 43 44 47 428 49 450 431 437 434 451 452 453 454 456 457 461 46 482 483 486 487 488 489 490 491 49 498 508

Offences under the following Secs of the I P C to be tried by First class Magistrate only —14 A 9 133 148 15 153 A 161 16 163 164 167 168 169 7 E 17 F 171 C 171 H 171 I 181 193 196 197 198 199 200 204 205 208 219 210 211 212 13 A 214 A 15 16 1 A 23 4 25 229 233 235 237 239 240 42 43 46 247 248 249 50 51 5 53 63 292 293 304 A 317 316 33 344 45 346 347 348 363 36 368 369 372 373 377 382 39 393 394 401 407 409 40 435 440 455 458 465 468 469 477 A 484 485 494 497 500 50 50 505 506 507 509

Offences under the following Secs of the I P C to be tried as warrant cases —115—136 144—148 5 155 153 A 159 161—170 177 181 189—201 203— 7 9 67 70 281 95—333 335 338 342—348 353 357 363—44 47—440 448—489 493 —509 511

Offences under the following Secs I P C to be tried as summons cases —137—143 151 153—158 60 171—180 18 —188 202 25 B 28 263 A 69 71—80 8 —94 34 336 337 341 352 358 426 447 490—49 510

Offences under the following Secs I P C are to be tried as warrant cases sometimes as summons cases —153 177 25

Offences under the following Secs I P C are punishable with fine only —137 154 155 156 171 G 171 H 171 I 63 1 278 83 290 294 A partly

SCHEDULE II.

TABULAR STATEMENT OF OFFENCES.

EXPLANATORY NOTE.—The entries in the second and seventh columns of the schedule, headed respectively "Offences" and "Punishment under the Indian Penal Code," are not intended as definitions of the offences and punishments described in the several corresponding sections of the Indian Penal Code, or even as abstracts of those sections, but merely as *references to the subject of the section, the number of which is given in the first column.*

The third column of this schedule applies also to the Police in the towns of Calcutta and Bombay

(**ABBREVIATIONS**—Cog = cognizable (may arrest without warrant), Not Cog = not cognizable (shall not arrest without warrant), Not B = not bailable, Com = compoundable, Not Com = not compoundable, Imp = imprisonment; C. d. = of either description, S I = simple imprisonment, Ses = Session, P Mag = Presidency Magistrate, Mag = Magistrate, Ct. = Court; C P M = Chief Presidency Magistrate)

CHAPTER V—ABETMENT

1	2	3	4	5	6	7	8
Section.	Offence	Cog or not	Warrant or summons	Bailable or not	Com or not	Punishment under the I P C	By what Ct triable
109	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment.	Cog if the offence is committed in consequence, and where no express provision is made for its punishment.	As in the offence abetted.	As in the offence abetted.	As in the offence abetted.	Same punishment as for the offence abetted	The Ct by which the offence abetted is triable

Section.	Offence	Cog or not.	Warrant or summons	Bailable or not	Com. or not	Punishment under the I P C	By what Ct. triable.
	If the abettor or the person abetted be a public servant whose duty it is to prevent the offence	Cog, if the offence is cog	As in the offence abetted	As in the offence abetted	As in the offence abetted	$\frac{1}{2}$ Imp of the longest term provided for the offence, or fine, or both.	The Ct by which the offence abetted is triable.
117	Abetting the commission of an offence by the public, or by more than ten persons	Do .	Do ...	Do ...	Do ..	Imp e d for 3 years, or fine, or both	Do
118	Concealing a design to commit an offence punishable with death or transportation for life, if the offence be committed	Do ...	Do ...	Not B ..	Do ...	Imp e d for 7 years and fine	Do
	If the offence be not committed,	Do ..	Do ...	Bailable	Do ..	Imp e d. for 3 years and fine.	Do
119	A public servant concealing a design to commit an offence which it is his duty to prevent, if the offence be committed.	Do ...	Do ...	As in the offence abetted	Do ...	$\frac{1}{2}$ Imp of the longest term provided for the offence, or fine, or both	Do.
	If the offence be punishable with death or transportation for life.	Do ...	Do ..	Not B ...	Do ..	Imp e d for 10 years	Do

If the offence be not committed	Do ...	Do ... <i>Bailable</i>	Do ... $\frac{1}{2}$ Imp of the longest term provided for the offence, or fine, or both	Do.
120 Concealing a design to commit an offence punishable with imprisonment, if the offence be committed	Cog if the offence can be sealed is cog	As in the offence can be sealed	As in the offence concealed.	Do
If the offence be not committed	Do ...	Do ... <i>Bailable</i>	Do ... $\frac{1}{2}$ Imp of the longest term provided for the offence or fine, or both	Do

CHAPTER V.A—OF CRIMINAL CONSPIRACY.

120-B Criminal conspiracy to commit an offence punishable with death, transportation, or rigorous imprisonment for a term of two years or upwards	Cog if the offence which is the object of the conspiracy is cog.	As in the offence which is the object of the conspiracy	Not com	Same punishment as for the abetment of the offence which is the object of the conspiracy	Ct of Ses, when the offence is the object of the conspiracy is triable exclusively by such Ct, in all other cases, Ct of Ses, P Mag, or Mag. 1st class
Any other criminal conspiracy.	Not Cog	Summons	Bailable	Do ... Imp e d for six months or fine or both.	P Mag, or Mag 1st class

CHAPTER VI.—OFFENCES AGAINST THE STATE.

1	2	3	4	5	6	7	8
Section	Offences	Cog. or not	Warrant or summons	Bailable or not.	Com. or not	Punishment under the I P C	By what Ct triable
121	Waging or attempting to wage war, or abetting the waging of war against the Queen	Not Cog	Warrant	Not B	... Not Com	Death, or transportation* for life, and <i>fine</i> .	Ct. or Ses.
121 A	Conspiring to commit certain offences against the State.	Do ...	Do ..	Do. ...	Do. ...	Trans for life or any shorter term, or Imp. e. d for 10 years, and <i>fine</i> .	Do
122	Collecting arms, etc, with the intention of waging war against the Queen	Do ...	Do. ...	Do ...	Do ...	Trans. for life, or imp e. d. for 10 years and <i>fine</i> .	Do.
123	Concealing with intent to facilitate a design to wage war.	Do ..	Do ..	Do. ...	Do ...	Imp e d. for 10 years and <i>fine</i> ,	Do.
124	Assaulting Governor General, Governor, etc, with intent to compel or restrain the exercise of any lawful power	Do. ...	Do. ...	Do. ...	Do. ...	Imp e. d. for 7 years and <i>fine</i> .	Do.
124 A	Sedition ...	Do ...	Do ...	Do. —	Do ...	Trans. for life or for any term and <i>fine</i> , or Imp. e. d. for 3 years and <i>fine</i> , or <i>fine</i>	Ct. of Ses. C. P. M. or D. M. Mag 1st class specially empowered.

125 Waging war against any Asiatic Power in alliance or at peace with the Queen, or abetting the waging of such war	Do ...	Do ...	Do ...	Do ...	Trans for life and fine, or imp. e. d for 7 years and fine, or fine.	Ct. of Ses.
126 Committing depredation on the territories of any Power in alliance or at peace with the Queen	Do ...	Do ...	Do ...	Do ...	Imp e. d for 7 years and fine, and forfeiture or certain property.	Do.
127 Receiving property taken by war or depredation mentioned in Sections 125 and 126	Do ...	Do ...	Do ...	Do ...	Do do. ...	Do.
128 Public servant voluntarily allowing prisoner of State or war in his custody to escape	Do ...	Do ...	Do ...	Do ...	Trans. for life, or imp e d for 10 years, and fine.	Do
129 Public servant negligently suffering prisoner of State or war in his custody to escape	Do ...	Do ...	Do ...	Do ...	S 1 for 3 years and fine	Ct of Ses, P. Mag. or Mag 1st class
130 Aiding escape of, rescuing or harbouring, such prisoner, or offering any resistance to the recapture of such prisoner	Do ..	Do ...	Not B ..	Do .	Trans for life, or imp e d. for 10 years, and fine	Ct of Ses.

CHAPTER VII.—OFFENCES RELATING TO THE ARMY AND NAVY.

131 Abetting mutiny, or attempting to seduce an officer, soldier or sailor from his allegiance or duty	Cog	Warrant	Not B....	Not Com	Trans. for life, or imp e d for 10 years, and fine.	Ct. of Ses.
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CHAPTER VI.—OFFENCES AGAINST THE STATE.

1	2	3	4	5	6	7	8
Section	Offences	Cog. or not	Warrant or summons	Bailable or not.	Com. or not	Punishment under the 1 P. C	By what Ct triable
121	Waging or attempting to wage war, or abetting the waging of war against the Queen	Not Cog.	Warrant	Not B ..	Not Com	Death, or transportation ^a for life, and <i>fine</i> .	Ct. or Ses.
121	A Conspiring to commit certain offences against the State.	Do ..	Do. ...	Do. ...	Do ...	Trans for life or any shorter term, or Imp e. d. for 10 years, and <i>fine</i> .	Do
122	Collecting arms, etc, with the intention of waging war against the Queen.	Do ...	Do ...	Do ...	Do ...	Trans. for life, or imp e. d. for 10 years and <i>fine</i> .	Do
123	Concealing with intent to facilitate a design to wage war.	Do ...	Do ...	Do. ...	Do ...	Imp. e. d. for 10 years and <i>fine</i> .	Do
124	Assaulting Governor General, Governor, etc., with intent to compel or restrain the exercise of any lawful power	Do. ...	Do. ...	Do. ...	Do. ...	Imp. e. d. for 7 years and <i>fine</i>	Do.
124	A Sedition ...	Do ...	Do ...	Do. —	Do ...	Trans for life or for any term and <i>fine</i> , or Imp. e. d for 3 years and <i>fine</i> , or <i>fine</i>	Ct of Ses, C. P. M. or, Dt. M., or Mag 1st class specially empowered

	Do ..	Do ..	Do ..	Do ..	Do ..	Trans for life and fine, or imp e d for 7 years and fine, or fine	Ct of Ses
125 Waging war against any Asiatic Power in alliance or at peace with the Queen, or abetting the waging of such war	Do	Do	Do	Do	Do	Imp e d for 7 years and fine, and forfeiture or certain property	Do
126 Committing depredation on the territories of any Power in alliance or at peace with the Queen	Do	Do	Do	Do	Do	Do	Do
127 Receiving property taken by war or depredation mentioned in Sections 125 and 126	Do	Do	Do	Do	Do	Trans for life, or imp e d for 10 years, and fine	Do
128 Public servant voluntarily allowing prisoner of State or war in his custody to escape	Do	Do	Do	Do	Do	Sl for 3 years and fine	Ct of Ses, P Mag or 1st class
129 Public servant negligently suffering prisoner of State or war in his custody to escape	Do	Do	Do	Do	Do	Trans for life, or imp e d for 10 years, and fine	Ct of Ses.
130 Aiding escape of, rescuing or harbouring, such prisoner, or offering any resistance to the recapture of such prisoner	Do	Do	Do	Do	Do	Trans for life, or imp e d for 10 years, and fine	Ct of Ses.

CHAPTER VII—OFFENCES RELATING TO THE ARMY AND NAVY.

	Cog	Warrant	Not B	Not Com	Trans for life, or imp e d for 10 years, and fine.	Ct of Ses
131 Abetting mutiny, or at tempting to seduce an officer, soldier or sailor from his allegiance or duty						

Section	Offences	3 Cog or not	4 Warrant or summons	5 Bailable or not	6 Com or not	7 Punishment under the I P C	8 By what Ct triable
132	Abetment of mutiny, if mutiny is committed in consequence thereof	Cog	Warrant	Not B	Not Com	Death, or trans for life, or imp e d for 10 years, and fine	Ct of Ses
133	Abetment of an assault by an officer, soldier or sai lor on his superior officer, when in the execution of his office	Do	Do ...	Do .	Do ...	Imp e d for 3 years, and fine	Ct of Ses, P. Mag, or Mag. 1st class
134	Abetment of such assault, if the assault is com mitted	Do ...	Do ...	Do	Do ..	Imp e d for 7 years, and fine	Ct of Ses
135	Abetment of the desertion of an officer, soldier or sailor	Do*	Do ..	Bailable	Do	Imp e d for 2 years, or fine, or both	P Mag, or Mag. 1st or 2nd class
136	Harbouring such an officer, soldier or sailor who has deserted.	Do ..	Do ...	Do ...	Do ...	Do	Do
137	Deserter concealed on board merchant vessel, through negligence of master or person in charge thereof	Not Cog	Summons	Do ...	Do ...	Fine of 500 rupees	Do

CHAPTER VIII —OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

138	Abetment of act of insubordination by an officer, soldier or sailor if the offence be committed in consequence	Cog ...	Warrant	Do ...	Do ...	Imp e d for 6 months, or fine, or both	Do
140	Wearing the dress or carrying any token used by a soldier, with intent that it may be believed that he is such a soldier	Do	Summons	Do ..	Do,	Imp e d for 3 months, or fine of 500 rupees, or both.	Any Mag.
143	Being member of an unlawful assembly.	Cog ..	Summons	Bailable	Not com	Imp e d for 6 months, or fine, or both	Any Mag
144	Joining an unlawful assembly armed with any deadly weapon	Do ...	Warrant	Do ...	Do	Imp e d for 2 years, or fine, or both	Do
145	Joining or continuing in an unlawful assembly, knowing that it has been commanded to disperse	Do ..	Do	Do .	Do	do .	Do,
147	Rioting	Do .	Do .	Do ...	Do	do	Do
148	Rioting armed with a deadly weapon	Do ...	Do	Do ..	Do	Imp e, d for 3 years, or fine, or both	Ct of Ses, P Mag or Mag. 1st class
149	If an offence be committed by any member of an unlawful assembly, every other member of such assembly shall be guilty of the offence.	Cog if the of fence is cog	As in the offence	As in the offence	Do	Same as for the offence	Ct by which the offence is triable.

1	2	3	4	5	6	7	8
Section.	Offences	Cog or not	Warrant or summons	Usable or not	Com or not	Punishment under the I P C	By what Ct triable
150	Hiring, engaging or employing persons to take part in an unlawful assembly	Cog	According to the offence committed by the persons hired etc.	As in the offence	Not Com	The same as for being a member of such assembly, and for any offence committed by any member of such assembly	Ct by which the offence is triable
151	Knowingly joining or continuing in any assembly of five or more persons after it has been committed to disperse	Do	Summons	Usable	Do	Imprisoned for 6 months, or fine, or both	Any Mag
152	Assaulting or obstructing public servant when suppressing riot etc.	Do	Warrant	Do	Do	Imprisoned for 3 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st class
153	Wantonly giving provocation with intent to cause riot, if rioting be committed	Do	Do	Do	Do	Imprisoned for 1 year, or fine, or both	Any Mag
153A	Promoting enmity between classes.	Do	Summons	Do	Do	Imprisoned for 6 months, or fine, or both	Do
		Not cog	Warrant	Not B	Do	Imprisoned for 2 years or fine or both	P Mag, or Mag 1st class

	Do	Summons	Bailable	Do	Fine of 1 000 rupees	P	Mag, or Mag 1st or 2nd class
154 Owner or occupier of land not giving information of riot, etc	Do	Do	Do	Do	Fine	.	Do
155 Person for whose benefit or on whose behalf a riot takes place not using all lawful means to prevent it	Do	Do	Do	Do	Do	.	Do
156 Agent of owner or occupier for whose benefit a riot is committed not using all lawful means to prevent it	Cog	Do	Do	Do	Imp e d for 6 months, or fine, or both		Do
157 Harbours persons hired for an unlawful assembly	Do	Do	Do	Do	Do		Do
158 Being hired to take part in an unlawful assembly or riot	Do	Warrant	Do	Do	Imp e d for 2 years, or fine, or both		Do
Or to go armed	Not Cog	Summons	Do	Do	Imp e d for 1 month, or fine of 100 rupees, or both		Any Mag
160 Committing affray							

CHAPTER IX—OFFENCES BY OR RELATING TO PUBLIC SERVANTS

	Not Cog	Summons	Bailable	Not Com	Imp e d for 3 years, or fine, or both	Ct of Ses, P Mag, or Mag of the 1st class
161 Being or expecting to be a public servant, and taking a gratification other than legal remuneration in respect of an official act						

Section	Offence	Cog or not	Warrant or summons	Bailable or not	Com. or not	Punishment under the 1 P C	By what Ct triable
162	Taking a gratification in order by corrupt or illegal means to influence a public servant	Not Co	Summons	Bailable	Not Com	Imp e d for 3 years, or fine, or both	Ct of Ses, P, Mag, or Mag 1st class
163	Taking a gratification for the exercise of personal influence with a public servant	Do ...	Do .	Do ...	Do ...	Simple imp for 1 year, or fine, or both	P Mag, or Mag 1st class
164	Abetment by public servant of the offences defined in the last two preceding clauses with reference to himself	Do ...	Do .	Do ...	Do ...	Imp e. d. for 3 years, or fine, or both	Ct of Ses, P, Mag, or Mag 1st class
165	Public servant obtaining any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by such public servant	Do ...	Do ...	Do. ...	Do .	Simple imp. for 2 years, or fine, or both	P Mag, or Mag. 1st or 2nd class
166	Public servant disobeying a direction of the law with intent to cause injury to any person	Do ...	Do ...	Do ...	Do ..	Simple imp for 1 year, or fine, or both.	Do.
167	Public servant framing an incorrect document with intent to cause injury	Do ...	Do ...	Do. ...	Do ...	Imp e d for 3 years, or fine, or both	Ct of Ses. P Mag, or Mag 1st class

168	Public servant unlawfully engaging in trade	Do	..	Do	Do	Simple imp for 1 year, or fine, or both	P Mag, or Mag, 1st class
169	Public servant unlawfully buying or bidding for property	Do	...	Do	Do	Simple imp for 2 years, or fine, or both, and confiscation of property purchased	Do.
170	Personating a public servant	Cog		Warrant	Do	Imp e d for 2 years, or fine, or both	Any Mag
171	Wearing garb or carrying token used by public servant with fraudulent intent	Do		Summons	Do	Imp e d for 3 months, or fine of 200 rupees, or both	Do

CHAPTER IX A—OFFENCES RELATING TO ELECTIONS

171 E	Bribery	...	..	Not Cog	Summons	Returnable	Not Com	Imp e d for one year, or fine, or both	P Mag, or Mag of the 1st class
171 F	Undue influence and persuasion at an election	Do		Do	Do	Do	Do	Do	Do
171 G	False statement in connection with an election	Do		Do	..	Do	..	Fine	Do
171 H	Illegal payments in connection with elections	Do		Do	..	Do	Do	Fine of 500 rupees	Do
171 I	Failure to keep election accounts	Do	..	Do	Do	Do	Do	Do	Do

CHAPTER X—CONTENTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

172	Abstending to avoid service of summons or other proceedings from a public servant	Not Cog.	Summons	Returnable	Not Com	S I for 1 month, or fine of 500 rupees, or both	Any Mag
173	Summons or notice require attendance in person, etc., in a Court of Justice	Do	.	Do	..	Do	S I. for 6 months, or fine of 1,000 rupees, or both

Section	Offence	3	4	5	6	7	8
		Cog or not	Warrant or summons	Bailable or not	Com or not	Punishment under the I P. C.	By what Ct. triable
173	Preventing the service of the affixing of any summons or notice, or the removal of it when it has been affixed, or preventing a proclamation. If summons is, etc., require attendance in person, etc., in a Ct of Justice	Not Cog	Summons	Bailable	Not Com	S 1 for 1 month, or fine of 500 rupees, or both.	P Mag. or Mag. 1st or 2nd class
174	Not obeying a legal order to attend at a certain place in person or by agent, or departing therefrom without authority. If the order require personal attendance, etc., in a Ct. of Justice.	Do .	Do	Do ..	Do, ...	S. 1 for 6 months, or fine of 1,000 rupees, or both	Do
175	Intentionally omitting to produce a document to a public servant by a person legally bound to produce or deliver such document	Do ..	Do, ...	Do .	Do ...	S 1 for 1 month, or fine of 500 rupees, or both.	Any Mag.
		Do ...	Do, ..	Do ...	Do ...	S 1 for 6 months, or fine of 1,000 rupees, or both.	Do.
		Do ..	Do, ...	Do .	Do ...	S 1 for 1 month, or fine of 500 rupees, or both.	The Ct. in which the offence is committed, subject to the provisions of Ch. XXXV; or, if not committed in a Ct., a P. Mag., or Mag of the 1st or 2nd class.

Section.	1	2	3	4	5	6	7	8
		Offence	Cog. or not	Warrant or summons	Bailable or not	Com or not	Punishment under the I P C	By what Ct tribunal
181		Knowingly stating to a public servant on oath as true that which is false	Not Cog	Warrant	Bailable	Not Com	Imp e d for 3 years, and fine.	Ct of Ses, P Mag, or Mag 1st class
182		Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person	Do	Summons	Do	Do	Imp e d for 6 months, or fine of 3,000 rupees, or both	P Mag, or Mag, 1st or 2nd class
183		Resistance to the taking of property by the lawful authority of a public servant.	Do	Do	Do	Do	Do	Do
184		Obstructing sale of property offered for sale by authority of a public servant.	Do	Do	Do	Do	Imp e d for 1 month, or fine of 500 rupees, or both	Do
185		Bidding, by a person under a legal incapacity to purchase it, for property at a lawfully authorized sale, or bidding without intending to perform the obligations incurred thereby	Do	Do	Do	Do	Imp e d for 1 month, or fine of 200 rupees, or both	P. Mag, or Mag 1st or 2nd class

186 Obstructing public servant in the discharge of his public functions	Do ...	Do	Do ...	Do ...	Imp e d for 3 months, or fine of 500 rupees, or both	Do
187 Omission to assist public servant when bound by law to give such assistance.	Do ..	Do	Do ...	Do ...	S l for 1 month, or fine of 200 rupees, or both.	Do.
188 Disobedience to an order lawfully promulgated by a public servant if such disobedience causes obstruction, annoyance or injury to persons lawfully employed	Do ...	Do ...	Do ...	Do ...	S l. for 6 months, or fine of 500 rupees, or both	Do.
189 Threatening a public servant with injury to him or one in whom he is interested, to induce him to do or forbear to do any official act.	Do ..	Do	Do ..	Do ..	Imp e d for 2 years, or fine, or both	Do.
190 Threatening any person to induce him to refrain from making a legal application for protection from injury.	Do	Do	Do ..	Do ...	Imp e d for 1 year, or fine, or both	Do

1	2	3	4	5	6	7	8
Section	Offence	Cog or not	Warrant or summons	Returnable or not	Com or not	Punishment under the F P C	By what Ct triable

CHAPTER XI—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE

193	Giving or fabricating false evidence in a judicial proceeding	Not Cog	Warrant	Returnable	Not Com	Imprisoned for 7 years and fine	Ct of Ses, P Mag or 1st class
	Giving or fabricating false evidence in any other case.	Do	Do	Do	Do	Imprisoned for 3 years and fine	Do
194	Causing or fabricating false evidence with intent to cause any person to be convicted of a capital offence.	Do	Do	Not R	Do	Transportation for life or rigorous imprisonment for 10 years and fine	Ct of Ses
195	If innocent person be there by convicted and executed evidence with intent to procure conviction of an offence punishable with transportation for life or with imprisonment for seven years or upwards	Do	Do	Do	Do	Death or as above	Do
	Using in a judicial proceeding evidence known to be false or fabricated.	Do	Do	Do	Do	The same as for the offence	Do
196	Using in a judicial proceeding evidence known to be false or fabricated.	Do	Do	Ann the offence of giving such evidence	Do	Same as for giving or fabricating false evidence	Ct of Ses, P Mag or 1st class

	Do. ...	Do. ...	Bailable.	Do. ...	Same as for giving false evidence.	Ct. of Mag. 1st class.	P. Mag. or Mag. 1st class.
197 Knowingly issuing or signing a false certificate relating to any fact of which such certificate is by law admissible in evidence.	Do. ...	Do. ...	Do. ...	Do. ...	Do.	Do.	Do.
198 Using as a true certificate one known to be false in a material point	Do. ...	Do. ...	Do. ...	Do. ...	Do.	Do.	Do.
199 False statement made in any declaration which is by law receivable as evidence.	Do. ...	Do. ...	Do. ...	Do. ...	Do.	Do.	Do.
200 Using as true any such declaration known to be false.	Do. ...	Do. ...	Do. ...	Do. ...	Do.	Do.	Do.
201 Causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender, if a capital offence.	Do. ...	Do. ...	Do. ...	Do. ...	Imp. e. d. for 7 years, and fine.	Ct. of Ses.	
If punishable with transportation for life or imprisonment for 10 years	Do. ...	Do. ...	Do. ...	Do. ...	Imp. e. d. for 3 years, and fine.	Ct. of Ses, P. Mag., or Mag. 1st class.	
If punishable with less than 10 years' imprisonment	Do. ..	Do. ...	Do. .	Do. ...	‡ Imp. of the longest term, provided for the offence, or fine, or both.	P. Mag. or Mag. 1st class, or Ct. by which the offence is triable.	
202 Intentional omission to give information of an offence by a person legally bound to inform.	Do. ...	Summons	Do. ..	Do. ...	Imp. e. d. for 6 months or fine, or both.	P. Mag., or Mag. 1st or 2nd class.	

CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

Section.	Offence	3	4	5	6	7	8
193	Giving or fabricating false evidence in a judicial proceeding.	Not Cog.	Warrant	Bulable	Not Com.	Imp. e. d. for 7 years and fine.	Ct. of Ses, P. Mag. or 1st class.
194	Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence.	Do	Do	Do	Do	Imp e d. for 3 years and fine.	Do.
195	Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation for life or with imprisonment for seven years or upwards.	Do	Do	Do	Do	Transportation for life or rigorous imp. for 10 years and fine	Ct. of Ses.
196	Using in a judicial proceeding evidence known to be false or fabricated.	Do	Do	Do	Do	Death or as above	Do.
		Do	Do	Do	Do	The same as for the offence.	Do.
		Do	Do	Do	Do	Same as for giving or fabricating false evidence.	Ct. of Ses, P. Mag. or 1st class.

197	Knowingly issuing or signing a false certificate relating to any fact of which such certificate is by law admissible in evidence	Do	Do	•	Available	Do	•	Do	•	Same as for giving false evidence	for giving Ct of Mag 1st class	Ses, P or Mag
198	Using as a true certificate one known to be false in a material point	Do	Do	Do	Do	Do	Do	Do	•	Do	Do	Do
199	False statement made in any declaration which is by law receivable as evidence	Do	Do	Do	Do	Do	Do	Do	•	Do	Do	Do
200	Using as true any such declaration known to be false	Do	Do	Do	Do	Do	Do	Do	•	Do	Do	Do
201	Causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender if a capital offence	Do	Do	Do	Do	Do	Do	Do	•	Imp e d for 7 years, and fine	Ct of Ses	Ses
	If punishable with transportation for life or imprisonment for 10 years	Do	Do	Do	Do	Do	Do	Do	•	Imp e d for 3 years, and fine	Ct of Ses, P Mag, or Mag 1st class	Ses, P or Mag
	If punishable with less than 10 years' imprisonment	Do	Do	Do	Do	Do	Do	Do	•	Imp of the longest term, provided for the offence, or fine, or both	P Mag or Mag 1st class, or Ct by which the offence is triable	Ses, P or Mag
202	Intentional omission to give information of an offence by a person legally bound to inform	Do	Do	Do	Do	Do	Do	Do	•	Imp e d for 6 months or fine, or both	P Mag, or Mag 1st or 2nd class	Ses, P or Mag

Section	1	2	3	4	5	6	7	8
	Offence.	Cog. or not.	Warrant or summons	Bailable or not.	Com or not	Punishment under the 1 P. C.	By what Ct. triable	
203	Giving false information respecting an offence committed.	No	Cog.	Warrant	Bailable	Not Com.	Imp. e. d. for 2 years, or fine, or both.	P. Mag, or Mag. 1st or 2nd class.
204	Secreting or destroying any document to prevent its production as evidence.	Do.	...	Do	...	Do	do	... P. Mag, or Mag. 1st class,
205	False personation for the purpose of any act or proceeding in a suit or criminal prosecution, or for becoming bail or security.	Do.	...	Do.	...	Do	Imp e. d. for 3 years, or fine, or both	Ct. of Ses, n. Mag, or Mag 1st class.
206	Fraudulent removal or concealment, etc., of property to prevent its seizure as a forfeiture, or to satisfaction of a fine under sentence, or to execution of a decree.	Do	...	Do.	..	Do	Imp e d. for 2 years, or fine, or both.	P Mag, or Mag. 1st or 2nd class.
207	Claiming property without right, or practising deception touching any right to it, to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence, or to execution of a decree.	Do.	...	Do.	...	Do.	do.	... Do.

208	<i>Fraudulently suffering a decree to pass for sum not due, or suffering decree to be executed after it has been satisfied.</i>	Do	...	Do	...	Do	...	Do	...	Do	...	Do	...	Do	...	P. Mag. or Mag of the 1st class
209	<i>False claim in a Court of Justice.</i>	Do	...	Do	...	Do	...	Do	...	Do	...	Do	...	Do	...	P. Mag. or Mag. 1st Class.
210	<i>Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied</i>	Do	.	Do	...	Do	...	Do	...	Do	...	Do	...	Do	...	Do
211	<i>False charge of offence made with intent to injure</i>	Do	...	Do	...	Do	...	Do	...	Do	...	Do	...	Do	...	Do
	<i>If offence charged be punishable with imprisonment for 7 years or upwards</i>	Do	Do	Do	...	Do	...	Do	...	Do	...	Do	...	Do	...	Ct. of Ses. P Mag, or Mag 1st class.
	<i>If offence charged be capital or punishable with transportation for life</i>	Do	...	Do	...	Do	...	Do	...	Do	...	Do	...	Do	...	Ct. of Ses
212	<i>Harbouring an offender, if the offence be capital</i>	Cog	Do	Do	...	Do	...	Do	...	Do	...	Do	...	Do	...	Ct. of Ses. P Mag or Mag. 1st class
	<i>If punishable with transportation for life, or with imprisonment for 10 years</i>	Do	.	Do	...	Do	...	Do	...	Do	...	Do	...	Do	...	Do
	<i>If punishable with imprisonment for 1 year and not for 10 years</i>	Do	Do	Do	...	Do	...	Do	...	Do	...	Do	...	Do	...	P Mag, or Mag 1st class, or Ct by which the offence, or fine, or both

Section.

	3	4	5	6	7	8
Offence.	Cog or not	Warrant or summons	Bailable or not.	Com or not.	Punishment under the I P. C	By what Ct. triable.
213 Taking gift, etc., to screen an offender from punishment, if the offence be capital	Cog	...	Warrant	Bailable	Not Com	Imp e d for 7 years, Ct of Ses and fine
If punishable with transportation for life, or with imprisonment for 10 years.	Do	...	Do	...	Do	Imp e. d for 3 years, Ct of Ses, P. Mag. or Mag. 1st class
If with imprisonment for less than 10 years.	Do	...	Do	...	Do	Imp. of the longest term provided for the offence, or fine or both.
214 Offering gift or restoration of property in consideration of secreting offender if the offence be capital.	Not Cog	Do	...	Do	...	Imp e. d. for 7 years, Ct of Ses.
If punishable with transportation for life, or with imprisonment for 10 years.	Do	...	Do	...	Do	Imp e. d. for 3 years, Ct. of Ses., P. Mag., or Mag. 1st class
If with imprisonment for less than 10 years.	Do	...	Do	...	Do	Imp of the longest term, provided for the offence, or fine or both
						P. Mag. or Mag 1st class, or Ct by which the offence is triable.

215	Taking gift to help to re- cover moveable property of which a person has been deprived by an offence, without causing apprehension of offender	Cog	Do	Do	Do	Do	Imp e d for 2 years, or fine, or both	1 st Mag, or Mag 1st class
216	Harbours an offender who has escaped from custody, or whose appre- hension has been ordered, if the offence be capital If punishable with trans- portation for life, or with imprisonment for 10 years	Cog	Do	Do	Do	Do	Imp e d for 7 years and fine	Ct of Ses, P Mag, or Mag 1st class
	If punishable with trans- portation for life, or with imprisonment for 10 years	Do	Do	Do	Do	Do	Imp e d for 3 years, with or without fine	Do
	If with imprisonment for 1 year, and not for 10 years	Do	Do	Do	Do	Do	Imp of the longest term provided for the offence, or fine, or both	P Mag, or Mag 1st class, or Ct by which the of- fence is triable
216A	Harbours robbers or dacons	Do	Do	Do	Do	Do	R l for 7 years and fine	Ct of Ses, P Mag, or Mag 1st class
217	Public servant disobeying a direction of law with intent to save person from punishment, or pro- perty from forfeiture	Not Cog	Summons	Do	Do	Do	Imp e d for 2 years, or fine, or both	P Mag, or Mag 1st or 2nd class
218	Public servant framing an incorrect record or writing with intent to save person from punishment, or pro- perty from forfeiture	Do	Warrant	Do	Do	Do	Imp e d for 3 years, or fine, or both	Ct of Ses.

Section	Offence	Cog or not.	Warrant or summons	Bailable or not	Com or not	Punishment under the I P. C	By what Court.
219	Public servant in a judicial proceeding corruptly making and pronouncing an order, report, verdict or decision which he knows to be contrary to law.	Not Cog.	Warrant	Bailable	Not Com	Imp e. d. for 7 years, or fine, or both.	Ct. of Ses
220	Commitment for trial or confinement by a person having authority, who knows that he is acting contrary to law	Do	Do	Do	Do	Do	Do
221	Intentional omission to apprehend on the part of a public servant bound by law to apprehend an offender, if the offence be capital	Do	Do	Do	Do	Imp e d. for 7 years, with or without fine	Do
	If punishable with transportation for life, or imprisonment for 10 years	Do	Do	Do	Do	Imp e. d for 3 years, with or without fine	Ct of Ses. P. Mag, or Mag. 1st class.
	If with imprisonment for less than 10 years.	Do.	Do.	Do.	Do	Imp e. d for 2 years, with or without fine	P. Mag, or Mag. 1st or 2nd class.

	Do	Do	Not B ...	Do ...	Trans for life, or imp e d for 14 years, with or without fine	Ct. of Ses
122 Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of Justice, if under sentence of death If under sentence of trans portation or penal ser- vitude for life, or trans portation, imprisonment or penal servitude for 10 years or upwards If under sentence of im prisonment for less than 10 years or lawfully com mitted to custody	Do	Do	Do	Do	Imp e d for 7 years, with or without fine	Do
223 Escape from confinement negligently suffered by a public servant	Do	Do	Bailable	Do.	Imp e d for 3 years, or fine, or both	Ct of Ses, P Mag or Mag 1st class.
224 Resistance or obstruction by a person to his lawful apprehension	Do	Summons	Do	Do	S I for 2 years, or fine, or both	P Mag, or Mag 1st or 2nd class.
225 Resistance or obstruction to the lawful apprehen sion of another person, or rescuing him from lawful custody If charged with an offence punishable with trans portation for life or im prisonment for 10 years If charged with a capital offence	Cog	Warrant	Do	Do	Imp e d for 3 years, or fine, or both	Do
	Do	Do	Do	Do	Do	Do
	Do	Do	Not B	Do	Imp e d for 3 years, and fine	Ct of Ses, P Mag or Mag 1st class.
	Do	Do	Do	Do	Imp e d for 7 years, and fine	Ct of Ses

1	2	3	4	5	6	7	8
Section.	Offence	Cog or not.	Warrant or summons	Bailable or not	Com or not	Punishment under the I P. C	By what Ct triable.
219	Public servant in a judicial proceeding corruptly making and pronouncing an order, report, verdict or decision which he knows to be contrary to law.	Not Cog.	Warrant	Bailable	Not Com	Imp e. d. for 7 years, or fine, or both	Ct. of Ses
220	Commitment for trial or confinement by a person having authority, who knows that he is acting contrary to law	Do	...	Do	...	Do	do
221	Intentional omission to apprehend on the part of a public servant bound by law to apprehend an offender, if the offence be capital	Do	...	Do	...	Imp e d for 7 years, with or without fine	Do
	If punishable with transportation for life, or imprisonment for 10 years	Do	...	Do.	...	Imp e. d for 3 years, with or without fine,	Ct of Ses, P. Mag, or Mag. 1st class
	If with imprisonment for less than 10 years,	Do.	...	Do.	...	Imp e. d for 2 years, with or without fine	P. Mag, or Mag. 1st or 2nd class

2	Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of Justice, if under sentence of death or under sentence of imprisonment or under sentence of transportation or penal servitude for life, or transportation, imprisonment or penal servitude for 10 years or upwards	Do	Do	..	Not B	...	Do	...	Trans for life, or imp e d for 14 years, with or without fine	Ct of Ses
	If under sentence of imprisonment or less than 10 years or lawfully committed to custody	Do	Do	...	Do	...	Do	...	Imp e d for 7 years, with or without fine	Do
223	Escape from confinement negligently suffered by a public servant	Do	Do	Bailable	Do	...	Do	...	Imp e d for 3 years, or fine, or both	Ct. of Ses, P Mag, or 1st class
224	Resistance or obstruction by a person to his lawful apprehension	Do	Summons	Do	.	Do	...	S 1 for 2 years, or fine, or both	P Mag, or Mag 1st or 2nd class.	Do
225	Resistance or obstruction to the lawful apprehension of another person, or rescuing him from lawful custody	Cog	Warrant	Do	...	Do	...	Imp e d for 3 years, or fine, or both	Do	Do
	If charged with an offence punishable with transportation for life or imprisonment for 10 years	Do	Do	Do	...	Do	...	Dn do ..	Do	Do
	If charged with a capital offence	Do	Do	..	Not B	.	Do	...	Imp e d for 3 years, and fine	Ct of Ses, P. Mag or 1st class
		Do	...	Do	...	Do	...	Imp e d for 7 years, and fine.	Ct of Ses	

1	2	3	4	5	6	7	8
	Offence	Cog or not	Warrant or summons	liable or not	Com or not	Punishment under the I P C	By what Ct or table
	If the person is sentenced to transportation for life, or to transportation, penal servitude or imprisonment for 10 years or upwards	Cog	Warrant	Not li	Not Com	Imp e d for 7 years, and fine	Ct of Ses
	If under sentence of death	Do	Do	Do	Do	Trans for life, or imp e d. for 10 years, and fine	Do
225A	Omission to apprehend, or sufferance of escape, on part of publ c servant, in cases not otherwise provided for— (a) in case of intentional omission or sufferance,	Not cog	Do	liable	Do	Imp e d for 3 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st class
	(b) in case of negligent omission or sufferance	Do	Summons	Do.	Do	S I for 2 years, or fine, or both	P Mag, or Mag 1st or 2nd class
225B	Resistance or obstruction to lawful apprehensions on or escape or rescue in case not otherwise provided for	Cog	Warrant	Do	Do	Imp e d for 6 months, or fine, or both	Do
226	Unlawful return from transportation	Do	Do	Not li	Do	Trans for life, and fine and P I for 3 years before transportation	Ct of Ses

	27	Violation of condition of Not Cog Summons	Do	Do	Punishment of original sentence, or if part of the punishment has been undergone, the residue	Do	SI for 6 months, or fine of 1,000 rupees, or both	Do	Imp. e d for 2 years, or fine, or both	Do	Imp. e d for 7 years, and fine	Do	Trans for life, or imp e. d for 10 years, and fine	Do	Ct of Ses, P Mag, or Mag 1st class	Ct of Ses
27	Violation of condition of Not Cog Summons	Do	Do	Do	...Punishment of original sentence, or if part of the punishment has been undergone, the residue	Do	SI for 6 months, or fine of 1,000 rupees, or both	Do	Imp. e d for 2 years, or fine, or both	Do	Imp. e d for 7 years, and fine	Do	Trans for life, or imp e. d for 10 years, and fine	Do	Ct of Ses, P Mag, or Mag 1st class	Ct of Ses
218	Intentional insult or interruption to a public servant sitting in any stage of judicial proceeding	Do	Do	Do	Do	Do	Bailable	Do	Do	Do	Do	Do	Do	Do	Do	Do
229	Personation of a juror or assessor	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do
CHAPTER XII—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS																
231	Counterfeiting, or performing any part of the process of counterfeiting coin	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do
232	Counterfeiting or performing any part of the process of counterfeiting the Queen's coin	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do
233	Making, buying or selling instrument for the purpose of counterfeiting coin	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do
234	Making, buying or selling instrument for the purpose of counterfeiting Queen's coin	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do
235	Possession of instrument or material for the purpose of using the same for counterfeiting coin	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do
	If Queen's coin	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do	Do

The Ct by which the original offence was triable

...Punishment of original sentence, or if part of the punishment has been undergone, the residue

SI for 6 months, or fine of 1,000 rupees, or both

Imp. e d for 2 years, or fine, or both

Imp. e d for 7 years, and fine

Ct. in which offence is committed, subject to provisions of Ch XXXV

P Mag or Mag 1st class,

Ct of Ses, P Mag, or Mag 1st class

Ct of Ses

Ct of Ses

Section	1	2	3	4	5	6	7	8
		Offence	Cog. or out.	Warrant or summons	Returnable or not.	Com. or not.	Punishment under the I. P. C	By what Ct. triable.
236		Abetting in British India the counterfeiting out of British India of coin.	Cog ...	Warrant	Not B ...	Not Com.	The punishment pro- vided for abetting the counterfeiting of such coin within British India. Imp. c. d. for 3 years and fine	Ct. of Ses.
237		Import or export of coun- terfeit coin, knowing the same to be counterfeit.	Do ...	Do ...	Do ...	Do ...	Imp. c. d. for 3 years and fine	Ct. of Ses., P. Mag. or 1st class.
238		Import or export of coun- terfeits of the Queen's coin, knowing the same to be counterfeit.	Do. ...	Do ..	Do ...	Do ...	Trans, for life, or imp c. d for 10 years and fine	Ct. of Ses.
239		Having any counterfeit coin known to be such when it came into pos- session and delivering, etc the same to any person.	Do ...	Do ...	Do. ...	Do ...	Imp e d for 5 years, and fine.	Ct. of Ses., P. Mag. or 1st class
240		The same with respect to the Queen's coin.	Do ...	Do. ...	Do ...	Do. ...	Imp e. d. for 10 years, and fine.	Do
241		Knowingly delivering to another any counterfeit coin as genuine which, when first possessed, the deliverer did not know to be counterfeit.	Do. ...	Do. ..	Do ...	Do. ...	Imp e. d for 2 years, or fine of 10 times the value of the coin counterfeited, or both	P. Mag, or Mag. 1st or 2nd class.

	Do	Do	Do	Do	Do	Imp e d for 3 years and fine	Ct of Ses, P Mag, or Mag 1st class
242	in of counterfeit y a person who t to be counterfeit ie became posses	Do	Do	Do	Do	Imp e d for 3 years and fine	Ct of Ses, P Mag, or Mag 1st class
243	-reof in of Queen's coin -rson who knew it -nterfeit when he -possessed thereof -mployed in a Mint -coin to be of a -t weight or com -t from that fixed	Do	Do	Do	Do	Imp e d for 7 years, and fine	Do
244	Do	Do	Do	Do	Do	do	Ct or Ses
245	lly taking from a ny coining instru	Do	Do	Do	Do	do	Do
246	-ntly diminishing ght or altering the ition of any coin	Do	Do	Do	Do	Imp e d for 3 years, and fine	Ct of Ses, P Mag, or Mag 1st class
247	Fraudulently diminishing the weight or altering the composition of the Queen's coin	Do	Do	Do	Do	Imp e d for 7 years, and fine	Do
248	Altering appearance of any coin with intent that it shall pass as a coin of a different description	Do	Do	Do	Do	Imp e d for 3 years, and fine	Do
249	Altering appearance of the Queen's coin with intent that it shall pass as a coin of a different description	Do	Do	Do	Do	Imp e d for 7 years, and fine,	Do

Section	1	2	3	4	5	6	7	8
		Offence.	Cog or not	Warrant or summons	Bailable or not	Com or not	Punishment under the 1 P C	By what Ct triable
230		Delivery to another of coin possessed with the know- ledge that it is altered.	Cog	.. Warrant	Not B	Not Com	Imp e d for 5 years, and fine	Ct of Ses, P. Mag, or Mag 1st class
231		Delivery of Queen's coin possessed with the know- ledge that it is altered	Do	Do	Do	Do	Imp e d. for 10 years, and fine	Do
232		Possession of altered coin by a person who knew it to be altered when he be- came possessed thereof	Do	Do	Do	Do	Imp e d for 3 years, and fine	Do
233		Possession of Queen's coin by a person who knew it to be altered when he be- came possessed thereof	Do	Do	Do	Do	Imp e d for 5 years, and fine	Do
234		Delivery to another of coin as genuine which, when first possessed, the deli- verer did not know to be altered	Do	Do	Do	Do	Imp e d for 2 years, or fine of ten times the value of the coin	P. Mag, or Mag 1st or 2nd class
235		Counterfeiting a Govern- ment stamp	Do	.. Do	Do	Do	Trans. for life, or imp e d for 10 years, and fine	Ct of Ses
236		Having possession of an in- strument or material for the purpose of counterfeit- ing a Government stamp	Do	.. Do	Do	Do	Imp e d. for 7 years, and fine	Do

257	Making, buying or selling instrument for the purpose of counterfeiting a Government stamp.	Do.	...	Do	...	Do.	...	Do.	...	Do.
258	Sale of counterfeit Government stamp	Do	...	Do	...	Do.	...	Do.	...	Do
259	Having possession of a counterfeit Government stamp	Do	...	Do	...	Do	...	Do	...	Ct of Ses. P. Mag. or 1st class.
260	Using as genuine a Government stamp known to be counterfeit.	Do	..	Do	.	Do	...	Imp e d for 7 years, or fine, or both.	...	Do.
261	Effacing any writing from a substance bearing a Government stamp, or removing from a document a stamp used for it with intent to cause loss to Government	Do	.	Do.	.	Do	...	Imp e. d. for 3 years, or fine or both	...	Do
262	Using a Government stamp known to have been before used	Do	..	Do	...	Do	...	Imp. e d for 2 years, or fine, or both	...	P. Mag, or Mag 1st or 2nd class
263	Erasure of mark denoting that stamp has been used	Do	...	Do	...	Do	...	Imp e d. for 3 years, or fine, or both	...	Ct. of Ses, P. Mag or 1st class
263A	Fictitious stamps	Do	...	Do	..	Do	...	Fine of 200 rupees	...	P. Mag or Mag first class.

CHAPTER XIII.—OFFENCES RELATING TO WEIGHTS AND MEASURES.

264	Fraudulent use of false instrument for weighing	Not Cog	Summons	Bailable	Not Com.	Imp e d for 1 year, or fine, or both.	P. Mag, or Mag. first or second class.
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Section	Offence.	Cog. or not.	Warrant or summons	Bailable or not	Com. or not.	Punishment under the P. C.	By what Ct. triable	
282	Conveying for hire any person by water, in a vessel in such a state, or so loaded, as to endanger his life,	Cog	...	Summons	Bailable	Not Com	Imp e. d. for 6 months, or fine of 1,000 rupees, or both	P. Mag, or Mag. 1st or 2nd class.
283	Causing danger, obstruction or injury in any public way or line of navigation.	Do.	...	Do	...	Do.	Fine of 200 rupees	Do.
284	Dealing with any poisonous substance so as to endanger human life, etc.	Not Cog.	Do	..	Do.	...	Imp e. d. for 6 months, or fine of 1,000 rupees or both.	Do.
285	Dealing with fire or any combustible matter so as to endanger human life, etc.	Cog	...	Do	...	Do	do	Any Mag.
286	So dealing with any explosive substance.	Do.	...	Do	...	Do	do.	Do.
287	So dealing with any machinery.	Not Cog.	Do	...	Do	...	Do.	P. Mag, or Mag. 1st or 2nd class.
288	A person omitting to guard against probable danger to human life by the fall of any building over which he has a right entitling him to pull it down or repair it.	Do	...	Do	...	Do.	do	Do

289	A person omitting to take order with any animal in his possession, so as to guard against danger to human life, or of grievous hurt, from such animal	Cog ...	Do ..	Do ...	Do ...	Imp e d for 6 months, or fine of 1,000 rupees, or both	Any Mag
290	Committing a public nuisance	Not Cog	Do ...	Do .	Do ..	Fine of 200 rupees	Do
291	Continuance of nuisance after injunction to discontinue	Cog ..	Do .	Do ...	Do .	S l for 6 months, or fine, or both	P. Mag, or Mag 1st or 2nd class
292	Salé, etc., of obscene books	Do ...	Warrant	Do ...	Do. ...	Imp e d for 3 months or fine, or both	P Mag. or Mag 1st Class.
293	Salé, etc., of obscene objects to young persons,	Do ..	Do	Do ..	Do ..	Imp e d for 6 months or fine or both	Do.
294	Obscene Songs	Do	Do ..	Do	Do ...	Do. do	Any Mag
294A	Keeping a lottery office	Not Cog	Summons	Do	Do .	Imp e d for 6 months or fine, or both	Do
	Publishing proposals relating to lotteries	Do .	Do ...	Do ..	Do	Fine of 1,000 rupees	Do

CHAPTER XV --OFFENCES RELATING TO RELIGION.

295	Destroying, damaging or defiling a place of worship or sacred object with intent to insult the religion of any class of persons	Cog ...	Summons	Balance	Not Com	Imp e d for 2 years, or fine, or both	P Mag, or Mag 1st or 2nd class
296	Causing a disturbance to an assembly engaged in religious worship	Do .	Do ...	Do ...	Do ...	Imp e d for 1 year, or fine, or both	Do.

1	2	3	4	5	6	7	8
Section	Offence	Cog. or not.	Warrant or summons	Bailable or not.	Com or not.	Punishment under the 1 P C.	By what Ct triable
297	Trespassing in place of worship or sepulchre, disturbing funeral, with intention to wound the feelings or to insult the religion of any person, or offering indignity to a human corpse.	Cog ...	Summons	Bailable.	Not Com.	Imprisoned for 1 year, or fine, or both	P Mag., or Mag 1st or 2nd class
298	Uttering any word or making any sound in the hearing, or making any gesture or placing any object in the sight, of any person, with intention to wound his religious feelings.	Not Cog.	Do	Do	Com ...	Do do	Do
302	Murder	Cog	Warrant.	Not B	Not Com	Death, or life and fine	Ses
303	Murder by a person under sentence of transportation for life	Do	Do ...	Do	Do ...	Death	Do

CHAPTER XVI—OFFENCES AFFECTING THE HUMAN BODY.

Of Offences Affecting Life.

		D	Do	Do ..	Trans for life, or imp e d for 10 years, and fine	Ct or Ses
304	Culpable homicide not amounting to murder, if act by which the death is caused is done with intention of causing death, &c	Do	Do	Do	Imp e d for 10 years, or fine, or both	Do
	If act is done with knowledge that it is likely to cause death, but without any intention to cause death, &c	Do	Do	Do	Imp e d for 2 years, or fine, or both	Ct of Ses, P Mag or 1st class.
304A	Causing death by rash or negligent act	Do	Bailable	Do ..	Death, or trans for life, or imp e d for 10 years, and fine	Ct of Ses
305	Abetment of suicide committed by a child, or in sane, or delirious person, or an idiot or a person intoxicated	Do	Not B	Do		
306	Abetting the commission of suicide	Do	Do	Do ..	Imp e d for 10 years and fine	Do
307	Attempt to murder	Do	Do	Do	Do	Do
	If such act cause hurt to any person	Do	Do	Do	Trans for life, or as above	Do
	Attempt by life convict to murder, if hurt is caused	Do	Do	Do	Death or as above	Do
308	Attempt to commit culpable homicide	Do	Bailable	Do	Imp e d for 3 years, or fine, or both	Do
	If such act cause hurt to person	Do	Do	Do	Imp e d for 7 years, or fine, or both	Do
	Attempt to commit suicide	Do	Do	Do ..	S. I for 1 year, or fine, or both	P Mag, or Mag 1st or 2nd class
	g a thug	Do	Not B.	Do ..	Trans for life, and fine	Ct. of Ses

1	2	3	4	5	6	7	8
Section.	Offence.	Cog. or not.	Warrant or summons	Bailable or not	Com. or not	Punishment under the L. P. C.	By what Ct. triable.
<i>Of the Causing of Miscarriage; of Injuries to Unborn Children; of the Exposure of Infants; and of the Concealment of Births.</i>							
312	Causing miscarriage.	Not Cog	Warrant	Bailable	Not Com	Imp e d for 3 years, or fine, or both	Ct. of Ses
	If the woman be quick with child.	Do ...	Do ..	Do ...	Do. ..	Imp e. d. for 7 years, and fine.	Do
313	Causing miscarriage with- out woman's consent.	Do. ..	Do ...	Not B...	Do ...	Trans. for life, or imp e. d. for 10 years, and fine.	Do.
314	Death caused by an act done with intent to cause miscarriage.	Do ...	Do ...	Do. ...	Do. ...	Imp e. d. for 10 years and fine.	Do.
	If act done without woman's consent.	Do ...	Do. ...	Do ...	Do ...	Trans. for life, or as above.	Do.
315	Act done with intent to prevent a child being born alive, or to cause it to die after its birth.	Do. ...	Do. ...	Do ...	Do. ...	Imp e d. for 10 years, or fine, or both	Do
316	Causing death of a quick unborn child by an act amounting to culpable homicide.	Do. ...	Do ...	Do. ...	Do ...	Imp e d. for 10 years, or fine, or both	Do

317	Exposure of a child under 12 years of age by parent or person having care of it with intention of wholly abandoning it	Cog	Do	Ilalable	Do	Imp e d for 7 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st class
318	Concealment of birth by secret disposal of dead body	Do	Do	Do	Do ..	Imp e d for 2 years, or fine or both	Ct. of Ses, P Mag, or Mag 1st class
<i>Of Hurt</i>							
323	Voluntarily causing hurt	Not Cog	Summons	Do ..	Com	Imp e d for 1 year, or fine, or both	Any Mag
324	Voluntarily causing hurt by dangerous weapons or means.	Cog }	Do	Do	Com with permits sion of Court	Imp e d for 3 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st or 2nd class
325	Voluntarily causing grievous hurt	Do	Do	Do	Do	Imp e d for 7 years, and fine	Do
326	Voluntarily causing grievous hurt by dangerous weapons or means	Do	Do	Not B	Not Com	Trans for life, or imp e d for 10 years, and fine	Ct of Ses, P Mag, or Mag 1st class
327	Voluntarily causing hurt to extort property or a valuable security, or to constrain to do anything which is illegal or which may facilitate the commission of an offence	Do	Warrant	Do	Do	Imp e d for 10 years, and fine	Ct of Ses, P Mag, or Mag 1st class
	Administering stupefying drug with intent to cause hurt, etc	Do ...	Do ...	Do	Do	Do.	Ct of Ses

Section.	3	4	5	6	7	8
Offence.	Cog or not.	Warrant or summons	Bailable or not	Com. or not.	Punishment under the I P. C	By what Ct. triable.
329 Voluntarily causing grievous hurt to extort property or a valuable security, or to constrain to do anything which is illegal, or which may facilitate the commission of an offence.	Cog. ...	Warrant	Not B	Not Com.	Trans for life, or imp e d. for 10 years, and fine.	Ct. of Ses.
330 Voluntarily causing hurt to extort confession or information, or to compel restoration of property, etc.	Do ...	Do ...	Bailable	Do ...	Imp e d. for 7 years, and fine	Do
331 Voluntarily causing grievous hurt to extort confession or information, or to compel restoration of property, etc.	Do ...	Do ...	Not B.	Do ...	Imp. e. d. for 10 years, and fine.	Do.
332 Voluntarily causing hurt to deter public servant from his duty,	Do. ...	Do. ...	Bailable	Do. ...	Imp e. d. for 3 years, or fine, or both.	Ct. of Ses, P. Mag or 1st class.
333 Voluntarily causing grievous hurt to deter public servant from his duty.	Do ...	Do ...	Not B...	Do. ...	Imp. e d. for 10 years, and fine.	Ct of Ses.

	Not Cog	Summons	Bailable	Com	Imp e d for 1 month or fine of 500 rupees, or both	Any Mag
334 Voluntarily causing hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation	Cog ...	Do	Do	... Com with permission of Court	Imp e d for 4 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st or 2nd class
335 Causing grievous hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	Do	Do	Do	... Not Com	Imp e d for 3 months, or fine, or both	Any Mag
336 Doing any act which endangers human life or the personal safety of others	Do ...	Do ...	Do ...	... Com with permission of Court	Imp e d for 6 months, or fine, or both	P Mag, or Mag, 1st or 2nd class
337 Causing hurt by an act which endangers human life, etc	Do	Do ..	Do	Do	Imp e d for 2 years, or fine, or both	Do
338 Causing grievous hurt by an act which endangers human life, etc,	Do	Do	Do	Do	Imp e d for 2 years, or fine, or both	Do
<i>Of Wrongful Restraint and Wrongful Confinement.</i>						
341 Wrongfully restraining any person	Cog ...	Summons	Bailable	Com ..	S 1 for 1 month, or fine or both.	Any Mag
342 Wrongfully confining any person	Do	Do ..	Do ...	Do ..	Imp e d. for 1 year, or fine, or both	P. Mag, or Mag 1st or 2nd class
343 Wrongfully confining for three or more days	Do .	Do ...	Do	... Com with Court's permission	Imp e d for 2 years, or fine, or both	Do
344 Wrongfully confining for 10 or more days	Do ...	Do ...	Do	... Not Com	Imp e d for 3 years, and fine	Ct of Ses, P Mag, or Mag 1st or 2nd class.

1	2	3	4	5	6	7	8
Section	Offence	Cog or not.	Warrant or summons.	Bailable or not	Com or not	Punishment under the I P. C	By what Ct triable
345	Keeping any person in wrongful confinement, knowing that a writ has been issued for his liberation.	Not Cog	Summons	Bailable	Not Com	Imprisoned for 2 years in addition to imprisonment under any other section	Ct of Ses, P. Mag, or Mag. 1st or 2nd class.
346	Wrongful confinement in secret.	Cog ...	Do	Do	Com. with permission Courts	Do do ...	Do
347	Wrongful confinement for the purpose of extorting property, or constraining to do an illegal act, etc.	Do. ...	Do ...	Do ...	Not Com	Imprisoned for 3 years and fine	Do
348	Wrongful confinement for the purpose of extorting confession or information or of compelling restoration of property, etc.	Do. ...	Do ...	Do ...	Do. ...	Do do ...	Ct of Ses, P. Mag, or Mag. 1st class
§							
<i>Of Criminal Force and Assault.</i>							
352	Assault or use of criminal force otherwise than on grave provocation	Not Cog...	Summons	Bailable	Com ...	Imprisoned for 3 months, or fine, or both	Any Mag.
352	Assault or use of criminal force to deter a public servant from discharge of his duty	Do ...	Warrant	Do ...	Not Com	Imprisoned for 2 years, or fine, or both	P Mag, or Mag 1st or 2nd class

354 Assault or use of criminal force to a woman with intent to outrage her modesty.	Do. . .	Do . . .	Do . . .	Do . . .	Do . . .	Do . . .
355 Assault or criminal force with intent to dishonour a person, otherwise than on grave and sudden provocation	Not Cog	Summons	Do . . .	Com . . .	Do . . .	Do . . .
356 Assault or criminal force in attempt to commit theft of property worn or carried by a person	Cog . . .	Warrant	Not B . . .	Not Com	Do . . .	Any Mag
357 Assault or use of criminal force in attempt wrongfully to confine a person	Do . . .	Do . . .	Bailable	Com with Court's permission	Imp e d for 1 year, or fine or both	Do . . .
358 Assault or use of criminal force on grave and sudden provocation	Not Cog	Summons	Do . . .	Com . . .	S 1 for 1 month, or fine of 200 rupees, or both	Do . . .

Of Kidnapping, Abduction, Slavery and Forced Labour.

363 Kidnapping	Cog . . .	Warrant	Bailable	Not Com	Imp e d for 7 years, and fine	Ct of Ses, P. Mag or Mag 1st class.
364 Kidnapping or abducting in order to murder	Do . . .	Do . . .	Not B. . .	Do . . .	Transportation for life, or rigorous imp for 10 years and fine	Ct of Ses.
365 Kidnapping or abducting with intent secretly and wrongfully to confine a person	Do . . .	Do . . .	Do . . .	Do . . .	Imp e d for 7 years, and fine	Ct of Ses, P. Mag, or Mag 1st class

Offence	Cog or not	warrant or summons	Bailable or not	Com. or not	Punishment under the 1 P. C	By what Ct triable.
366 Kidnapping or abducting a woman to compel her marriage or to cause her defilement, etc.	Cog	...	Warrant	Not Com	Imp e d for 10 years, Ct of Ses and fine	
366 A Procurement of minor girl ..	Do .	Do	...	Do	...	
366-B Importation of girl from foreign country.	Do	D, D,	Do	...	Do	Do
367 Kidnapping or abducting In order to subject a person to grievous hurt, slavery, etc.	Do	...	Do	...	Do	Do
368 Concealing or keeping in confinement a kidnapped person.	Do	...	Do	...	Do	Do
369 Kidnapping or abducting a child with intent to take property from the person of such child	Do	...	Do	...	Punishment for kidnapping or abduction	Ct of Ses, P Mag, or Mag 1st class.
370 Buying or disposing of any person as a slave	Not Cog.	Do	Bailable	Do	Imp e d for 7 years, and fine	Ct of Ses, P. Mag, or Mag 1st class
371 Habitual dealing in slaves	Cog. ..	Do	...	Not B	Do	Ct. of Ses
372 Selling or letting to hire a minor for purposes of prostitution, etc.	Do	...	Do	...	Trans, for life, or imp. e. d for 10 years and fine.	Do
	Do	...	Do	...	Imp e d for 10 years, and fine	Ct. of Ses, P. Mag, or Mag. 1st class

373	Buying or obtaining possession of a motor for the same purposes	Do	Do	Do	Do	Do
374	Unlawful compulsory labour	Not Cog	Do	Not Com	Imp e d for 1 year, or fine, or both	Any Mag
Of Rape						
376	Rape— <i>Sexual intercourse by a Not Cog man with his own wife not being under 12 years of age</i>	Not Cog	Summons	Not Com	Imp e d for 2 years or fine or both	Court of Ses P Mag or Dist Mag
	Sexual intercourse by a Not Cog man with his own wife being under 12 years of age	Not Cog	Summons	Not Com	Trans for 1 le, or imp e d for 10 years and fine	Ct of Ses
	In any other case	Cog	Warrant	Not B	Do	Do
377	Unnatural offences	Do	Do	Do	Trans for 1 le, or imp e d for 10 years, and fine	Ct of Ses P Mag or Mag, 1st class

CHAPTER XVII—OFFENCES AGAINST PROPERTY

Of Theft

379	Theft	Cog	Warrant	Not B	Not Com	Imp e d for 3 years, or fine, or both	Any Mag
380	Theft in a building, tent or vessel	Do	Do	Do	Do	Imp e d for 7 years, and fine	Do
381	Theft by clerk or servant of property in possession of master or employer.	Do	Do	Do	Do	do	Ct of Ses, P Mag or Mag 1st or 2nd class

Section.	Offence.	3	4	5	6	7	8
		Cog. or not	Warrant or summons	Bailable or not	Com or not	Punishment under the I P C	By what Ct. triable
382	Theft, preparation having been made for causing death, or hurt, or restraint or fear of death, or of hurt, or of restraint, in order to the committing of such theft or to retiring after committing it, or to retaining property taken by it.	Cog. ...	Warrant	Not B	Not Com	R I for 10 years, and Ct of fine	Ct of Ses, P. Mag or 1st class
384	Extortion	Not Cog	Warrant	Bailable	Not Com.	Imp e. d for 3 years, or fine, or both	Ct of Ses, P. Mag or 1st or 2nd class.
385	Putting or attempting to put in fear of injury, in order to commit extortion	Do. ...	Do ..	Do ..	Do ...	Imp e. d for 2 years, or fine, or both.	Do
386	Extortion by putting a person in fear of death or grievous hurt.	Do. ...	Do ..	Not B ...	Do	Imp e d for 10 years, Ct of Ses and fine.	Do
387	Putting or attempting to put a person in fear of death or grievous hurt, in order to commit extortion.	Do ...	Do ...	Do ...	Do. ...	Imp e d. for 7 years, and fine	Do
388	Extortion by threat of accusation of an offence punishable with death, transportation for life, or imprisonment for 10 years	Do. ...	Do. ...	Bailable ...	Do	Imp e d for 10 years, and fine	Do

If the offence threatened be an unnatural offence.	Do ...	Do ..	Do ...	Do ...	Trans for life	Do
389 Putting a person in fear of accusation of offence punishable with death, trans. for life, or with imp for 10 years, in order to commit extortion	Do ..	Do ..	Do ...	Do ...	Imp e d for 10 years, and fine.	Ct of Ses
If the offence be an unnatural offence	Do .	Do ..	Do ...	Do ...	Trans for life	Do
<i>Of Robbery and Dacoity.</i>						
392 Robbery ..	Cog	Warrant	Not B ...	Not com	R I for 10 years and fine	Ct of Ses, P Mag or Mag 1st class
If committed on the high way between sunset and sunrise	Do	Do	Do .	Do ...	R I for 14 years, and fine.	Do
393 Attempt to commit robbery	Do ...	Do ...	Do ..	Do ...	R I for 7 years and fine	Do
394 Person voluntarily causing hurt in committing or attempting to commit robbery, or any other person jointly concerned in such robbery.	Do ...	Do .	Do .	Do ..	Trans for life, or R I for 10 years and fine	Do
395 Dacoity ..	Do ...	Do	Do ...	Do ..	Do do ...	Ct of Ses
396 Murder in dacoity ..	Do	Do ..	Do ...	Do ..	Death, trans for life, or R I for 10 years, and fine	Do
397 Robbery or dacoity with attempt to cause death or grievous hurt,	Do ...	Do ...	Do ...	Do ...	R I for not less than 7 years	Do
98 Attempt to commit robbery or dacoity when armed with deadly weapon.	Do ...	Do .	Do ...	Do ...	Do do ..	Do

Section	1	2	3	4	5	6	7	8
		Offence	Cog or not	Warrant or summons	Not B or not	Com or not	Punishment under the I P C	By what Ct triable
399		Making preparation to commit dacoity	Cog	Warrant	Not B	Not Com	R I for 10 years and fine	Ct of Ses
400		Belonging to a gang of persons associated for habitually committing dacoity	Do	Do	Do	Do	Trans for life, or imp for 10 years, and fine	Do
401		Belonging to a wandering gang of persons associated for the purpose of habitually committing thefts	Do	Do	Do	Do	R I for 7 years, and fine	Ct of Ses, P Mag, or 1st class
402		Being one of five or more persons assembled for committing dacoity	Do	Do	Do	Do	Do	Ct. of Ses

Of Criminal Misappropriation of Property

		Not Cog	Warrant	Bailable	Comp with Ct's permission	Imp e d for 3 years, or fine, or both	Any Mag
403	Dishonest misappropriation of moveable property, or converting it to one's own use.	Do	Do	Do	Do	Do	Ct of Ses, P Mag or 1st or 2nd class
404	Dishonest misappropriation of property, knowing that it was in possession of a deceased person at his death and that it has not since been in the possession of any person legally entitled to it	Do	Do	Do	Do	Do	Ct of Ses, P Mag or 1st or 2nd class

If by clerk or person employed by deceased Do Do . Do Imp e d for 7 years and fine Do

Of Criminal Breach of Trust

406 Criminal breach of trust	Cog	Warrant	Not B .	Not Com	Imp e d for 3 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st or 2nd class
407 Criminal breach of trust by a carrier, wharfinger, &c	Do	Do	Do	Do	Imp e d for 7 years and fine	Ct of Ses, P Mag or Mag 1st class
408 Criminal breach of trust by a clerk or servant	Do	Do	Do	Do	Do	Ct of Ses, P Mag, or Mag 1st or 2nd class
409 Criminal breach of trust by public servant or by banker, merchant or agent &c	Do	Do	Do	Do	Trans for life, or imp e d for 10 years and fine	Ct of Ses P Mag, or Mag 1st class

Of the Receiving of Stolen Property

411 Dishonestly receiving stolen property, knowing it to be stolen	Cog	Warrant	Not B	Not Com	Imp e d for 3 years, or fine, or both	Ct of Ses, P Mag or Mag 1st or 2nd class
412 Dishonestly receiving stolen property, knowing that it was obtained by dacoity	Do	Do	Do	Do	Trans for life, or imp for 10 years and fine	Ct of Ses
413 Habitually dealing in stolen property	Do	Do	Do	Do	Trans for life, or imp e d for 10 years and fine	Do
414 Assisting in concealment or disposal of stolen property knowing it to be stolen	Do	Do	Do	Do	Imp e d for 3 years, or fine or both	Ct of Ses, P Mag, or Mag 1st or 2nd class,

1	2	3	4	5	6	7	8
Section.	Offence	Cog or not	Warrant summons	Bailable or not	Com or not	Punishment under the I P. C	By what Ct triable

Of Cheating.

417	Cheating ...	...	Not Cog	Warrant	Bailable	Com with Cts permission	Imp e d for 1 year, or fine or both	P Mag, or Mag 1st or 2nd class.
418	Cheating a person whose interest the offender was bound, either by law or by legal contract, to protect.	Do ...	Do ...	Do	Do	Do ...	Imp e d. for 3 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st or 2nd class
319	Cheating by personation	Cog	Do	Do	Do	Do	Do	Do
420	Cheating and thereby dishonestly inducing delivery of property, or the making, alteration or destruction, of a valuable security.	Do ...	Do	Do	Do	Do	Imp e d for 7 years, and fine	Ct of Ses, P Mag, or Mag 1st class

Of Fraudulent Deeds and Disposition of Property

421	Fraudulent removal or concealment of property, &c, to prevent distribution among creditors.	Not Cog	Cog	Warrant	Bailable	Not Com	Imp e d for 2 years or fine or both	P Mag or Mag 1st or 2nd class
422	Fraudulently preventing from being made available for his creditor a debt or demand due to the offender.	Do ...	Do	Do	Do	Do	Imp e. d for 2 years, or fine, or both	Do.

Section	1	2	3	4	5	6	7	8
		Offence.	Cog. or not.	Warrant summons	Bailable or not.	Com or not	Punishment under the P. C.	By what Ct triable
430		Mischief by causing diminution of supply of water for agricultural purposes, &c.	Cog.	Warrant	Bailable	Com with Ct's per mission	Imp e d for 5 years, or fine, or both	Ct. of Ses, P Mag, or Mag. 1st or 2nd class
431		Mischief by injury to public road, bridge, navigable river, or navigable channel and rendering it impassable or less safe for travelling or conveying property.	Do	Do	Do	Not Com	do.	Do
432		Mischief by causing inundation or obstruction to public drainage, attended with damage.	Do	Do	Do	Do	do	Do
433		Mischief by destroying, or moving, or rendering less useful a light house, or sea mark or by exhibiting false lights	Do	Do	Do	Do	Imp e d. for 7 years or fine, or both.	Ct of Ses.
434		Mischief by destroying or moving, etc. a land-mark fixed by public authority.	Not Cog.	Do	Do	Do	Imp e d for 1 year, or fine, or both	P Mag, or Mag 1st or 2nd class

	Cog	Do ..	Do	Do	Imp e d for 7 years, and fine	Ct of Ses, 1 st Mag, or 1 st class
435 Mischief by fire, or explosive substance with intent to cause damage to amount of 100 rupees or upwards, or in case of agricultural produce, 10 rupees or upwards	Do	Do ..	Not B	Do	Trans for life, or imp e d for 10 years, and fine	Ct of Ses
436 Mischief by fire, or explosive substance with intent to destroy a house, etc	Do	Do	Do ..	Do	Imp e d for 10 years, and fine	Do
437 Mischief with intent to destroy or make unsafe a decked vessel, or a vessel of 20 tons burden	Do	Do ..	Do	Do	Trans for life, or imp e d for 10 years, and fine	Do
438 The mischief described in the last section when committed by fire or any explosive substance	Do	Do ..	Do	Do	Imp e d for 10 years, and fine	Do
439 Running vessel ashore with intent to commit theft, etc	Do	Do	Do	Do	Imp e d for 5 years, and fine	Ct of Ses, 1 st Mag, or 1 st class
440 Mischief committed after preparation made for causing death, or hurt, etc.	Do	Do	Do	Do		

Of Criminal Trespass.

447 Criminal trespass	Cog	Summons	Bailable	Com	Imp e d for 3 months, or fine or, both	Any Mag
448 House trespass	Do ..	Warrant	Do	Do ..	Imp e d for 1 year, or fine, or both	Do
House trespass in order to the commission of an offence punishable with death,	Do ..	Do ..	Not B	Not Com	Trans for life or imp for 10 years, and fine	Ct of Ses

Offence	3	4	5	6	7	8
	Cog or not	Warrant or summons	Bailable or not	Com or not	Punishment under the I P.C	By what Ct triable.
450 House trespass in order to the commission of an offence punishable with trans for life	Cog ...	Warrant	Not B ...	Not Com	Imp e d for 10 years, and fine	Ct of Ses
451 House trespass in order to the commission of an off- ence punishable with imp If the offence is theft.	Do ...	Do ...	Bailable	Com with Ct's permission	Imp e d for 2 years, and fine.	Any Mag.
452 House trespass, having made preparation for causing hurt, assault, etc.	Do ..	Do. ..	Do ...	Do ..	Imp e d for 7 years, and fine	Ct of Ses, P. Mag, or Mag 1st or 2nd class Do.
453 Linking house trespass or house breaking	Do ..	Do. ...	Do ..	Do ..	Do do ...	Do.
454 Linking house trespass or house breaking in order to the commission of an off- ence punishable with imp If the offence is theft ..	Do ...	Do ..	Do. ..	Do ..	Imp. e d for 2 years, and fine	P Mag, or Mag 1st or 2nd class.
455 Linking house trespass or house breaking after pre- paration may be for causing hurt, assault, etc	Do ..	Do ...	Do. ...	Do ...	Imp. e d for 3 years, and fine	Ct of Ses, P Mag, or Mag 1st or 2nd class Do.
	Do ...	Do. ...	Do ...	Do ..	Do do ...	Ct of Ses, P Mag, or Mag 1st class

456 Lurking house trespass or house breaking by night	Do .	Do	Do	Imp e d for 3 years, and fine	Ct of Ses, P Mag, or Mag 1st or 2nd class
457 Lurking house trespass or house breaking by night in order to the commission of an offence punishable with imp	Do.	Do	Do .	Imp e d for 5 years, and fine	Do
If the offence is theft . .	Do	Do	Do	Imp e d, for 14 years, and fine	Do
458 Lurking house trespass or house breaking by night, after preparation made for causing hurt, etc	Do .	Do	Do	Do	Ct of Ses, P Mag, or Mag first class
459 Grievous hurt caused whilst committing lurking house trespass or house breaking.	Do	Do	Do	Transportation for life, or imp e d for 10 years, and fine	Ct of Ses
460 Death or grievous hurt caused by one of several persons jointly concerned in house breaking by night etc.	Do	Do	Do	Do	Do
461 Dishonestly breaking open or unfastening any closed receptacle containing or supposed to contain property	Do .	Do	Bailable	Imp e d for 3 years, or fine, or both	P Mag, or Mag 1st or 2nd class
462 Being entrusted with any closed receptacle containing or supposed to contain any property, and fraudulently opening the same.	Do	Do	Do .	Imp e d for 3 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st or 2nd class

Offence

Cog or
notWarrant or
summonsBailable
or notCom or
not.Punishment under the
I P CBy what Ct
triable.

CHAPTER XVIII.—OFFENCES RELATING TO DOCUMENT AND TO TRADE OR PROPERTY MARKS

THE CODE OF CRIMINAL PROCEDURE

[Sch.

465 Forgery	"	Not Cog	Warrant	Bailable	Not Com	Imp e d for 2 years, or fine, or both	Ct of Ses, P Mag, or Mag, 1st class, Ct of Ses
466 Forgery of a record of a Ct of Justice or of a Register of Births, &c., kept by a public servant	Do	...	Do	...	Not B	Do	...
467 Forgery of a valuable secu- rity, will, or authority to make or transfer any valu- able security, or to receive any money, &c. When the valuable secu- rity is a promissory note of the Govt of India.	Do	...	Do	...	Do	...	Trans for life, or imp e d for 10 years, and fine
468 Forgery for the purpose of cheating	Cog	...	Do	...	Do	...	Do
469 Forgery for the purpose of harming the reputation of any person, or knowing that it is likely to be used for that purpose.	Not Cog	Do	...	Do	...	Do	...
	Do	...	Do	...	Do	...	Imp e d for 7 years, and fine
	Do	...	Bailable	Do	...	Imp e d for 3 years, and fine	Ct of Ses, P Mag, or, Mag 1st class. Do

	Do	Do	Do	Do	Do	Punishment for forgery of such document.	Same Ct as that by which the forgery is triable
471 Using as genuine a forged document which is known to be forged	Do	Do	Do	Do	Do	Do	Ct. of Ses
When the forged document is a promissory note of the Govt of India	Cog	Do	Do	Do	Do	Do	Do
472 Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable under Sec 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit	Not Cog	Do	Do	Do	Do	Trans for life, or imp e d for 7 years, and fine	Do,
473 Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable otherwise than under Section 467 of the Indian Penal Code or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit.	Do.	Do	Do	Do	Do	Imp e d for 7 years, and fine	Do
474 Having possession of a document, knowing it to be forged, with intent to use it as genuine, if the document is one of the description mentioned in section 466 of the Indian Penal Code.	Do	Do	Do	Do	Do	Do	Do

Section	Offence	3 Cog. or not	4 Warrant or summons	5 Bailable or not.	6 Com. or not.	7 Punishment under the P. C.	8 By what Ct triable
	If the document is one of the description mentioned in Section 467 of the Indian Penal Code.						Ct. of Ses
475	Counterfeiting a device or mark used for authenticating documents described in Section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Do ...	Do ...	Do ...	Do ...	Trans for life or imp e. d for 7 years, and fine.	Do.
476	Counterfeiting a device or mark used for authenticating documents other than those described in Section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Do ...	Do ...	Not B ...	Do ...	Imp e. d for 7 years, and fine	Do
477	Fraudulently destroying, or defacing, or attempting to destroy or deface, or securing a will, etc.	Do ...	Do ...	Do ...	Do ...	Trans for life, or imp. e. d for 7 years, and fine	Do
477-A	Falsification of accounts ...	Do ...	Do ...	Bailable	Do ...	Imp. e. d. for 7 years, or fine, or both	Ct. of Ses, P. Mag. or 1st class.

Of Trade and Property Marks

482. Using a false trade or property mark with intent to deceive, or injure any person.	Not Cog	Warrant	Releasable	Comm with Cts permission	Imprisoned for 1 year, or fine or both.	1 st Mag, or Mag 1st or 2nd class
483. Counterfeiting a trade or property mark used by an other, with intent to cause damage, or injury	Do	Do	Do	Do	Imprisoned for 2 years, or fine, or both	Do
484. Counterfeiting a property mark used by a public servant, or any mark used by him to denote the manufacture, quality, etc., of any property	Do	Summons	Do	Not Comm	Imprisoned for 3 years, and fine	Ct of Ses, 1 st Mag, or Mag 1st class
485. Fraudulently making or having possession of any die, plate or other instrument for counterfeiting any public or private property or trade mark	Do	Do	Do	Do	Imprisoned for 3 years, or fine, or both	Do
486. Knowingly selling goods marked with a counterfeit property or trade mark	Do	Do	Do	Comm with Cts permission	Imprisoned for 1 year, or fine, or both	P Mag, or Mag 1st or 2nd class
487. Fraudulently making a false mark upon any package or receptacle containing goods, with intent to cause it to be believed that it contains goods which it does not contain, etc	Do	Do	Do	Not Comm	Imprisoned for 3 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st or 2nd class
Making use of any such false mark.	Do	Do	Do	Do	Do	Do

8

7

6

5

4

3

2

1

Section

Offence

Cog or
notWarrant or
summons.Bailable
or notCom or
notPunishment under the
I P. CBy what Ct
triable

459 Removing, destroying, or defacing any property mark with intent to cause injury

Not Cog. Summons Bailable Not com Imp e d for 1 year, or fine, or both. P Mag, or Mag 1st or 2nd class

Of Currency Notes and Bank Notes

459-A Counterfeiting currency or bank notes

Cog ... Warrant Not B ... Not Com Trans. for life, or imp e d. for 10 years, and fine. Ct. of Scs.

459-B Using as genuine forged or counterfeit currency notes or bank notes.

Do. ... Do. ... Do. ... Do. do Do. Do.

459-C Possession of forged or counterfeit currency notes or bank notes

Do ... Do ... Bailable Do. ... Imp e. d for 7 years, or fine, or both. Do

459-D Making or possessing instruments or materials for forging or counterfeiting currency notes or bank notes.

Do ... Do. ... Not B. ... Do. ... Trans for life, or imp e d. for 10 years, and fine Do

CHAPTER XIX.—CRIMINAL BREACH OF CONTRACTS OF SERVICE.

460 Being bound by contract to render personal service during a voyage or journey or to convey or guard any property or person and voluntarily omitting to do so

Not Cog Summons Bailable Com. ... Imp e d. for 1 month, P. Mag, or Mag. 1st or 2nd class or fine of 100 rupees, or both

Do

Do.

Ct of Ses

Ct of Ses, p

Mag or 1st class

Ct of Ses.

and fine

491 Being bound to attend on, or supply the wants of, a person who is helpless from youth, unsoundness of mind or disease, and voluntarily omitting to do so

492 Being bound by contract to render personal service for a certain period at a distant place to which the employee is conveyed at the expense of the employer and voluntarily deserting the service or refusing to perform the duty.

CHAPTER XX—OFFENCES RELATING TO MARRIAGE.

493 A man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief

494 Marrying again during the lifetime of a husband or wife.

495 Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted

Imp e d for 3 months, or fine, or both

Do

Do

Do

Do

Imp e d for 1 month, or fine of double the expense incurred, or both.

Do

Do

Do

Do

Imp e d for 10 months and fine

Not Com

Not B.

Warrant

Not Cog

Imp e d for 7 years, and fine

Com with Ct's per mission

Bailable

Do

Do

Do

Imp e d for 10 years, and fine

Not Com

Do

Do

Do

Section	Offence	3	4	5	6	7	8
		Cog. or not.	Warrant or summons	Bailable or not	Com or not	Punishment under the 1 P C	By what Ct triable
46	A person with fraudulent intention going through ceremony of being married knowing that he is not thereby lawfully married	Not Cog.	Warrant	Not B	.. Not Com	Imp e d for 7 years, and fine	Ct of Ses
47	Adultery	..	Do	.. Bailable	Com	Imp e d for 5 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st class
48	Enticing or taking away or detaining with a criminal intent a married woman	Do	Do	Do	Do	Imp e d for 2 years, or fine, or both.	P Mag, or Mag, 1st or 2nd class

CHAPTER XXI—DEFAMATION.

500	Defamation ..	.. Not Cog	Warrant	Bailable	Com	.. S 1. for 2 years, or fine or both	Ct of Ses, P Mag, or Mag 1st class
501	Printing or engraving matter knowing it to be defamatory.	Do	Do	Do	Do	Do	Do
502	Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter	Do	Do	Do	Do	Do	Do

Section.	1	2	3	4	5	6	7	8
		Offence	Cog. or not	Warrant or summons	Bailable or not.	Com or not.	Punishment under the I P C	By what Ct triable
496	A person with fraudulent intention going through ceremony of being married knowing that he is not thereby lawfully married	Not Cog.	Warrant	Not B	..	Not Com	Imp e d for 7 years, and fine	Ct of Ses
497	Adultery	..	Do, ...	Do	..	Bailable	Com	Imp e d for 5 years, or fine, or both
498	Enticing or taking away or detaining with a criminal intent a married woman	Do ...	Do	Do	Do	Do ...	Imp e d for 2 years, or fine, or both.	Ct of Ses, p Mag, or Mag 1st class
500	Defamation ..	... Not Cog	Warrant	Bailable	Com	..	S l. for 2 years, or fine or both	Ct of Ses, p Mag, or Mag 1st class
501	Printing or engraving matter knowing it to be defamatory.	Do ...	Do	Do	Do	Do ...	Do	Do
502	Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.	Do ...	Do	Do	Do	Do ...	Do	Do

CHAPTER XXI--DEFAMATION.

CHAPTER XVII.—CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE

504	Insult intended to provoke a breach of the peace	Not Cog	Warrant	Bailable	Com	Imp e d for 2 years, or fine, or both	Any Mag
505	False statement, rumour, &c. circulated with intent to cause mutiny or offence against the public peace	Do	Do	Not B	Not Com	Do	P Mag, or Mag 1st class
506	Criminal intimidation	Do	Do	Bailable	Com	Do	P Mag, or Mag 1st or 2nd class
	If threat be to cause death or grievous hurt, &c	Do	Do	Do	Not Com	Imp e d for 7 years, or fine, or both	Ct of Ses, P Mag, or Mag 1st class
507	Criminal intimidation by anonymous communication or having taken precaution to conceal whence the threat comes	Do	Do	Do	Do	Imp e d for 2 years, in addition to the punishment under above section	Do
508	Act caused by inducing a person to believe that he will be rendered an object of Divine displeasure	Do	Do	Do	Com	Imp e d for 1 year or fine, or both	P Mag, or Mag 1st or 2nd class
509	Uttering any word or making any gesture intended to insult the modesty of a woman, &c	Do	Do	Do	Com with Ct s permission	S I for 1 year, or fine or both	P Mag or Mag, 1st class
510	Appearing in a public place &c, in a state of intoxication, and causing annoyance to any person	Do	Do	Do	Not Com	S I for 24 hours or fine of 10 rupees, or both	Any Mag

1	2	3	4	5	6	7	8
Section.	Offence.	Cog or not	Warrant or summons	Bailable or not	Com or not	Punishment under the I P. C	By what Ct. triable.

CHAPTER XXIII.—ATTEMPTS TO COMMIT OFFENCES.

331 Attempting to commit offence.	As in the offence attempted	As in the offence attempted	As in the offence attempted	Trans or Imp not exceeding half of the longest term provided for the offence, or fine, or both.	The Ct by which the offence attempted is triable.
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OFFENCES AGAINST OTHER LAWS.

If punishable with death, trans or imp for 7 years or upwards.	Cog.	Warrant	Not B...	Not Com	Ct of Ses.
If punishable with imprisonment for 3 years and upwards, but less than 7 years.	Do	Do	Do	Do	Ct. of Ses, P Mag. or Mag 1st class.
If punishable with imp for one year and upwards, but less than 3 years.	Do	Do	Do	Do	Ct of Ses, P. Mag, or Mag 1st or 2nd class.
If punishable with imprisonment for less than one year, or with fine only	Do	Do	Do	Do	Any Mag.

SCHEDULE III

(See section 36)

ORDINARY POWERS OF PROVINCIAL MAGISTRATES

I — Ordinary Powers of a Magistrate of the Third Class

- (1) Power to arrest or direct the arrest of, and to commit to custody, a person committing an offence in his presence, S. 64
- (2) Power to arrest, or direct the arrest in his presence of, an offender, S. 65
- (3) Power to endorse a warrant, or to order the removal of an accused person arrested under a warrant, Ss. 83, 84 and 86
- (4) Power to issue proclamation in cases judicially before him, S. 87
- (5) Power to attach and sell property *and to dispose of claims to attached property* in cases judicially before him, S. 88
- (6) Power to restore attached property, S. 89
- (7) Power to require search to be made for letters and telegrams, S. 95
- (8) Power to issue search warrant, S. 96
- (9) Power to endorse a search warrant and order delivery of thing found, S. 99
- (10) Power to command unlawful assembly to disperse, S. 127
- (11) Power to use civil force to disperse unlawful assembly, S. 128
- (12) Power to require military force to be used to disperse unlawful assembly, S. 130
- (13) [* * * *]
- (14) Power to authorise detention, *not being detention in the custody of the Police* of a person during a police investigation, S. 167
- (14A) *Power to postpone issue of process and inquire into case himself*, S. 202
- (15) Power to detain an offender found in Court, S. 351
- (16) * * * *
- (17) Power to apply to District Magistrate to issue commission for examination of witness, S. 506 (2)
- (18) Power to recover forfeited bond for appearance before Magistrate's Court, S. 514, *and to require fresh security*, S. 514A
- (18A) *Power to make orders as to custody and disposal of property pending inquiry or trial*, S. 516A
- (19) Power to make orders as to disposal of property, S. 517
- (20) Power to sell * * * property of a suspected character, S. 525
- (21) *Power to require affidavit in support of application*, S. 539A.
- (22) *Power to make local inspection*, S. 539B

II — *Ordinary Powers of a Magistrate of the Second Class*

- (1) The ordinary powers of a Magistrate of a third class
- (2) Power to order the police to investigate an offence in cases in which the Magistrate has jurisdiction to try or commit for trial, S 155
- (3) Power to postpone issue of process and to inquire into a case or direct investigation, S 202
- (4) [* * * * *]

III — *Ordinary Powers of a Magistrate of the First Class*

- (1) The ordinary powers of a Magistrate of the second class
- (2) Power to issue search warrant otherwise than in course of an inquiry, S 98
- (3) Power to issue search warrant for discovery of persons wrongfully confined, S 100
- (4) Power to require security to keep the peace, S 107
- (5) Power to require security for good behaviour, S 109
- (6) Power to discharge sureties, S 126A
- (6A) Power to make orders as to local nuisances, S 133
- (7) Power to make orders, etc., in possession cases, Ss 145, 146 and 147
- (7A) Power to record statements and confessions during a police investigation, S 164
- (7AA) Power to authorise detention of a person in the custody of the Police during a police investigation, S 167
- (7B) Power to hold inquests, S 174
- (8) Power to commit for trial, S 206
- (9) Power to stop proceedings when no complaint, S 24
- (9A) Power to tender pardon to accomplice during inquiry into case by himself, S 337
- (10) Power to make orders of maintenance, Ss 488 and 489
- (11) Power to take evidence on commission, S 503
- (12) Power to recover penalty on forfeited bond, S 514
- (12A) Power to require fresh security, S 514A
- (12B) Power to recall case made over by him to another Magistrate, S 528 (4)
- (13) Power to make order as to first offenders, S 562
- (14) Power to order released convicts to notify residence, S 565

IV — *Ordinary Powers of a Sub-divisional Magistrate appointed under S 13*

- (1) The ordinary powers of a Magistrate of the first class
- (2) Power to direct warrants to landholders, S 78
- (3) Power to require security for good behaviour, S 110
- (4) [* * * * *]
- (5) Power to make orders prohibiting repetitions of nuisances, S 143
- (6) Power to make orders under S 144
- (7) Power to depute Subordinate Magistrate to make local inquiry S 145

- (8) Power to order police investigation into cognizable cases, S 156
- (9) Power to receive report of police officer and pass order, S 173
- (10) [* * *]
- (11) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, S 186
- (12) Power to entertain complaints, S 190
- (13) Power to receive police reports, S 190
- (14) Power to entertain cases without complaint, S 190
- (15) Power to transfer cases to a Subordinate Magistrate, S 192
- (16) Power to pass sentence on proceedings recorded by a subordinate Magistrate, S 349
- (17) Power to forward record of inferior Court to District Magistrate, S 435 (2)
- (18) Power to sell property alleged or suspected to have been stolen, etc, S 524
- (19) Power to withdraw cases other than appeals and to try or refer them for trial, S 528
- (20) [* * *]

V—Ordinary Powers of a District Magistrate

- (1) The ordinary powers of a Sub Divisional Magistrate
- (1A) Power to try juvenile offenders, S 29A
- (2) Power to require delivery of letters, telegrams, etc, S 95
- (3) Power to issue search warrants for documents in custody of postal or telegraph authority, S 96
- (4) Power to require security for good behaviour in case of sedition, S 108
- (5) Power to discharge persons bound to keep the peace or to be
- (6) " " " "
- (6A) " " " " ce officer not
- (7)
- (7A) Power to tender pardon to accomplice at any stage of a case, S 337
- (8) Power to quash convictions in certain cases, S 350
- (9) Power to hear appeals from orders requiring security for keeping the peace or good behaviour, S 406
- (9A) Power to hear appeals from orders of Magistrates refusing to accept or rejecting sureties, S 406A
- (10) Power to hear or refer appeals from convictions by Magistrates of the second and third classes, S 407
- (11) Power to call for records, S 435
- (12) Power to order inquiry into complaint dismissed or case of accused discharged, S 436
- (13) Power to order commitment, S 437
- (14) Power to report case to High Court, S 438
- (15) * * * *
- (16) *

- (17) Power to appoint person to be public prosecutor in particular case, S 492 (2)
 (18) Power to issue commission for examination of witness, Ss 503, 506
 (19) Power to hear appeals from or revise orders passed under Ss 514, 515
 (20) Power to compel restoration of abducted female, S 552

SCHEDULE IV.

(See sections 37 and 38)

ADDITIONAL POWERS WITH WHICH PROVINCIAL MAGISTRATES MAY BE INVESTED

POWERS WITH WHICH A MAGISTRATE OF THE FIRST CLASS MAY BE INVESTED	{	BY THE LOCAL GOVERN- MENT.	(1)	Power to require security for good behaviour in case of sedition, S. 108
			(2)	Power to require security for good behaviour, S. 110
			(3)	[. . .]
			(4)	Power to make orders prohibiting repetitions of nuisances, S. 143
			(5)	Power to make orders under S. 144
			(6)	[. . .]
			(7)	Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, S. 186
			(8)	Power to take cognizance of offences upon complaints, S. 190
			(9)	Power to take cognizance of offences upon Police reports, S. 190
			(10)	Power to take cognizance of offences without complaint, S. 190
			(11)	Power to try summarily, S. 26a
			(12)	Power to hear appeals from convictions by Magistrates of the second and third classes, S. 407
			(13)	Power to sell property alleged or suspected to have been stolen, etc., S. 524
			(14)	[. . .]
			(15)	Power to try cases under S. 224A of the Indian Penal Code
	{	BY THE DIS- TRICT MAGISTRATE.	(1)	Power to make orders prohibiting repetitions of nuisances, S. 143.
			(2)	Power to make orders under S. 144

POWERS
WITH WHICH
A MAGIS-
TRATE OF
THE FIRST
CLASS MAY
BE IN-
VESTED

BY THE DIS-
TRICT MA-
GISTRATE

- (3) [* * *]
(4) Power to take cognizance of offences upon complaint, S 190.
(5) Power to take cognizance of offences upon police reports, S 190
(6) Power to transfer cases, S 192

POWERS
WITH WHICH
A MAGIS-
TRATE OF
THE SECOND
CLASS MAY
BE IN-
VESTED

BY THE LO-
CAL GOVERN-
MENT

- (1) [* * *]
(2) Power to make orders prohibiting repetitions of nuisances, S 143
(3) Power to make orders under S 144
(3a) *Power to record statements and confessions during a police investigation, S 164*
(3b) *Power to authorise detention of a person in the custody of the Police during a police investigation, S 167*
(4) Power to hold inquests, S 174
(5) Power to take cognizance of offences upon complaint, S 190
(6) Power to take cognizance of offences upon police reports, S 190
(7) Power to take cognizance of offences without complaint, S 190
(8) Power to commit for trial, S 206
(9) Power to make orders as to first offenders, S 562
(1) Power to make orders prohibiting repetitions of nuisances, S 143
(2) Power to make orders under S 144
(3) Power to hold inquests S 174
(4) Power to take cognizance of offences upon complaint, S 190
(5) Power to take cognizance of offences upon police reports, S 190

BY THE DIS-
TRICT MA-
GISTRATE

- (1) Power to make orders prohibiting repetitions of nuisances, S 143
(2) [* * *]
(3) Power to hold inquests, S 174
(4) Power to take cognizance of offences upon complaint, S 190
(5) Power to take cognizance of offences upon
S 190

POWERS
WITH WHICH
A MAGIS-
TRATE OF
THE THIRD
CLASS MAY BE
INVESTED

BY THE LO-
CAL GOV-
ERNMENT

POWERS
WITH WHICH
A SUB DIVI
SIONAL
MAGISTRATE
MAY BE IN
VESTED

BY THE DIS
TRICT MAGIS
TRATE

- (1) Power to make orders prohibiting repetition of nuisances, S 143
- (2) {
- (3) Power to hold inquests, S 174
- (4) Power to take cognizance of offences upon complaint
- (5)

BY THE LO
CAL GOVERN
MENT

POWER TO CALL FOR RECORDS, S 435

SCHEDULE V.

(See section 555)

FORMS

I—SUMMONS TO AN ACCUSED PERSON

(See section 68)

To _____ of _____
(state shortly the offence charged) you are hereby required to appear
in person (or by pleader as the case may be) before the (Magistrate)
_____ of _____, on
_____ day of _____ Herein fail not
Dated this _____ 19____
(Seal) _____ day of _____ (Signature)

II—WARRANT OF ARREST

(See section 75)

To (name and designation of the person or persons to whom or are
to execute the warrant)
WHEREAS _____ of _____ stands charged
with the offence of (state the offence), you are hereby directed to arrest
the said _____ and to produce him before me Herein fail not.
Dated this _____ 19____
(Seal) _____ day of _____ (Signature)

(See section 76)

This warrant may be endorsed as follows —
If the said _____ shall give bail himself in the sum
of _____ with one surety in the sum of _____
(or two sureties each in the sum of _____) to attend
before me on the _____ day of _____ and to

continue so to attend until otherwise directed by me, he may be released

Dated this _____ day of _____ 19____ (Signature)

III — BOND AND BAIL BOND AFTER ARREST UNDER A WARRANT

(See section 86)

I (name), of _____ being brought before the District Magistrate of _____ (or as the case may be) under a warrant issued to compel my appearance to answer to the charge of _____ do hereby bind myself to attend in the Court of _____ on the _____ day of _____ next, to answer to the said charge and to continue so to attend until otherwise directed by the Court, and, in case of my making default herein, I bind myself to forfeit, to Her Majesty the Queen, Empress of India, the sum of rupees _____

Dated this _____ day _____ 19____ (Signature)

I do hereby declare myself surety for the above named _____ of _____ that he shall attend before _____ in the Court of _____ on the _____ day of _____ next to answer to the charge on which he has been arrested, and shall continue so to attend until otherwise directed by the Court and in case of his making default therein, I bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees _____

Dated this _____ day of _____ 19____ (Signature)

IV — PROCLAMATION REQUIRING THE APPEARANCE OF A PERSON ACCUSED

(See section 87)

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of _____ punishable under section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (name) cannot be found, and whereas it has been shown to my satisfaction that the said (name) has absconded (or is concealing himself to avoid the service of the said warrant)

Proclamation is hereby made that the said _____ of _____ is required to appear at (place) before this Court (or before me) to answer the said complaint on the _____ day of _____

Dated this _____ day of _____ 19____ (Seal) (Signature)

V — PROCLAMATION REQUIRING THE ATTENDANCE OF A W

(See section 87)

WHEREAS complaint has been made _____ that (name, description and address) has committed (or is

ted) the offence of (*mention the offence concisely*) and a warrant has been issued to compel the attendance of (*name, description and address of the witness*) before this Court to be examined touching the matter of the said complaint, and whereas it has been returned to the said warrant that the said (*name of witness*) cannot be served, and it has been shown to my satisfaction that he has absconded (*or is concealing himself to avoid the service of the said warrant*);

Proclamation is hereby made that the said (*name*) is required to appear at (*place*) before the Court of
on the _____ day of _____ next
at _____ o'clock to be examined touching the offence complained of

Dated this _____

day of _____

19 _____

(Seal.)

(Signature)

VI—ORDER OF ATTACHMENT TO COMPEL THE ATTENDANCE OF A WITNESS

(See section 88).

To the Police officer in charge of the Police station at _____

WHEREAS a warrant has been duly issued to compel the attendance of (*name, description and address*) to testify concerning a complaint pending before this Court, and it has been returned to the said warrant that it cannot be served; and whereas it has been shown to my satisfaction that he has absconded (*or is concealing himself to avoid the service of the said warrant*); and thereupon a Proclamation *has been or is being* duly issued and published requiring the said _____ to appear and give evidence at the time and place mentioned therein [_____]

This is to authorize and require you to attach by seizure the moveable property belonging to the said _____ to the value of _____

(Seal.)

day of _____

(Signature)

ORDER OF ATTACHMENT TO COMPEL THE APPEARANCE OF A PERSON ACCUSED.

(See section 88)

To (*name and designation of the person or persons who is or are to execute the warrant*) _____

WHEREAS complaint has been made before me that (*name, description and address*) has committed (*or is suspected to have committed*) the offence of _____ punishable under section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found, and whereas it has been shown to my satisfaction that the said (*name*) has absconded (*or is concealing himself to avoid the service of the said warrant*) and thereupon a Proclamation *has been or is being* duly issued and published requiring the said _____ to appear to answer

the said charge within _____ days; and whereas the said _____ is possessed of the following property other than land paying revenue to Government in the village (or town) of _____ in the District of _____ viz, _____ and an order has been made for the attachment thereof:

You are hereby required to attach the said property by seizure, and to hold the same under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution

Dated this _____ day of _____ 19____
(Seal) (Signature)

ORDER AUTHORISING AN ATTACHMENT BY THE DEPUTY COMMISSIONER AS COLLECTOR

(See section 88)

To the Deputy Commissioner of the District of _____

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of _____ punishable under section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (name) cannot be found; and whereas it has been shown to my satisfaction that the said (name) has absconded (or is concealing himself to avoid the service of the said

_____ has been or is being duly to appear to _____ days, [* * *] and _____ certain land paying revenue to Government in the village (or town) of _____ in the district of _____

You are hereby authorized and requested to cause the said land to be attached, and to be held under attachment pending the further order of this Court, and to certify without delay what you may have done in pursuance of this order

Dated this _____ day of _____ 19____
(Seal) (Signature)

VII —WARRANT IN THE FIRST INSTANCE TO BRING UP A WITNESS

(See section 90)

To (name and designation of the Police officer or other person or persons who is or are to execute the warrant)

_____ to do so;

This is to authorize and require you to arrest the said *(name)* and on the _____ day of _____ to bring him before this Court, to be examined touching the offence complained of
 Given under my hand and the seal of the Court, this _____ day of _____ 19____
(Seal) *(Signature)*

VIII—WARRANT TO SEARCH AFTER INFORMATION OF A PARTICULAR OFFENCE

(See section 96)

To *(name and designation of the Police officer or other person or persons who is or are to execute the warrant)*

WHEREAS information has been laid *(or complaint has been made)* before me of the commission *(or suspected commission)* of the offence of *(mention the offence concisely)*, and it has been made to appear to me that the production of *(specify the thing clearly)* is essential to the inquiry now being made *or about to be made* into the said offence *or suspected offence*,

This is to authorize and require you to search for the said *(the thing specified)* in the *(describe the house or place or part thereof to which the search is to be confined)* and, if found, to produce the same forthwith before this Court, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution

Given under my hand and the seal of the Court, this _____ day of _____ 19____
(Seal) *(Signature)*

IX—WARRANT TO SEARCH SUSPECTED PLACE OF DEPOSIT

(See section 98)

To *(name and designation of a Police officer above the rank of a constable)*

WHEREAS information has been laid before me, and on due inquiry thereupon had I have been led to believe that the *(describe the house or other place)* is used as a place for the deposit *(or sale)* of stolen property *(or if for either of the other purposes expressed in the section, state the purpose in the words of the section)*,

This is to authorize and require you to enter the said house *(or other place)* with such assistance as shall be required and to use, if necessary, reasonable force for that purpose, and to search every part of the said house *(or other place, or if the search is to be confined to a part, specify the part clearly)* and to seize and take possession of any property *(or documents, or stamps, or seals, or coins or obscene objects as the case may be)*—*[Add (when the case requires it) and also of any instruments and materials which you may reasonably believe to be kept for the*
 _____ *or false seals or*
 _____ *to bring before this*
 _____ *n of, returning this*
 _____ *ive done under it,*

immediately upon its execution

Given under my hand and the seal of the Court, this
day of _____ 19 ____

(Seal)

(Signature)

X—BOND TO KEEP THE PEACE.

(See section 107)

WHEREAS I (name), inhabitant of (place), have been called upon to enter into a bond to keep the peace, for the term of or until the completion of the inquiry in the matter of _____ now pending in the Court of _____

I hereby bind myself not to commit a breach of the peace, or do any act that may probably occasion a breach of the peace, during the said term or until the completion of the said inquiry and in case of my making default therein, I hereby bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees _____

Dated this _____

day of _____

19 ____

(Signature)

XI—BOND FOR GOOD BEHAVIOUR.

(See sections 108, 109 and 110)

WHEREAS I (name), inhabitant of (place), have been called upon to enter into a bond to be of good behaviour to Her Majesty, the Queen Empress of India, and to all Her subjects for the term of (state the period) _____ now pen-

_____ of good behaviour
term or until the
ing default therein,

19 ____

(Signature.)

(Where a bond with sureties is to be executed, add)—We do hereby
_____ that he will

_____ India and
_____ of the
_____ ourselves

Dated this _____

§
(Signature.)

XII—SUMMONS ON INFORMATION OF A PROBABLE BREACH OF THE PEACE

(See section 114)

To _____ of _____
_____ by credible information
_____ that you are likely to
breach of the peace
_____ are to attend in _____

by a duly authorized agent) at the Office of the Magistrate of _____ on the _____ day of _____ 19____, at ten o'clock in the forenoon to show cause why you should not be required to enter into a bond for rupees _____ [when sureties are required, add—and also to give security by the bond of one (or two, *as the case may be*) surety (or sureties) in the sum of rupees _____ each if more than one] that you will keep the peace for the term of _____

Given under my hand and the seal of the Court, this _____ day of _____ 19____.

(Seal)

(Signature)

XIII.—WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY TO KEEP THE PEACE

(See section 123)

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS (*name and address*) appeared before me in person (or by his authorised agent) on the _____ day of _____ in obedience to a summons calling upon him to show cause why he should not enter into a bond for rupees _____ with one surety (or a bond with two sureties each in rupees _____) that he, the said (*name*) would keep the peace for the period of _____ months, and whereas an order was then made requiring the said (*name*) to enter into and find such security (*state the security ordered when it differs from that mentioned in the* _____ *and he has failed to comply* with said order;

_____ e you, the said Superintendent (or _____ o your custody, together with this _____ the said Jail for the said period of _____ (*term of imprisonment*) unless he shall in the meantime be lawfully ordered to be released, and to return this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this _____ day of _____ 19____

(Seal)

(Signature)

XIV.—WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY FOR GOOD BEHAVIOUR

(See section 123)

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS it has been made to appear to me that (*name and description*) has been and is lurking within the district of _____ having no ostensible means of subsistence (or, that he is unable to give any satisfactory account of himself);

or

WHEREAS evidence of the general character of (*name and description*) has been adduced before me and recorded, from which it appears that he is a habitual robber (or housebreaker, etc., *as the case may be*);

And whereas an order has been recorded stating the same and requiring the said (name) to furnish security for his good behaviour for the term of (state the period) by entering into a bond with one surety (or two or more as the case may be) to the effect that he shall keep the peace and be of good behaviour during the term of years therein expressed, and

der and
he term)

This is to authorize and require you, the said Superintendent (or Keeper) to receive the said (name) into your custody, together with this warrant and him safely to keep in the said Jail for the said period of (term of imprisonment) unless he shall in the meantime be lawfully ordered to be released, and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this
day of _____ to

(Seal)

19

(Signature)

AV—WARRANT TO DISCHARGE A PERSON IMPRISONED ON FAILURE TO GIVE SECURITY.

(See sections 123 and 124)

To the Superintendent (or Keeper) of the Jail at _____

prisoner) was committed to your
the day of
under section of the

or

and there has appeared to me sufficient ground for the opinion that he can be released without hazard to the community.

This is to authorize and require you forthwith to discharge the said (name) from your custody unless he is liable to be detained for some other cause.

Given under my hand and the seal of the Court, this
day of 19

(Seal)

19

(Signature)

XVI --ORDER FOR THE REMOVAL OF NUISANCES

(See section 133)

have caused an
roadway for other
s, by etc (state
at such obstruct-

er

WHEREAS it has been made to appear to me that you are carrying on as owner, or manager, the trade or occupation of (state the trade or occupation and the place where it is carried on) and that

same is injurious to the public health (or comfort) by reason (*state briefly in what manner the injurious effects are caused*), and should be suppressed or removed to a different place,

or

WHEREAS it has been made to appear to me that you are owner (*or are in possession of or have the control over*) a certain tank (*or well or excavation*) adjacent to the public way (*describe the thoroughfare*) and that the safety of the public is endangered by reason of the said tank (*or well or excavation*) being without a fence (*or insecurely fenced*),

or

WHEREAS etc etc (*as the case may be*),

I do hereby direct and require you within (*state the time allowed*) to (*state what is required to be done to abate the nuisance*) or to appear at in the Court of on the day of next, and to show cause why this should not be enforced

or

I do hereby direct and require you within (*state the time allowed*) to cease carrying on the said trade or occupation at the said place, and not again to carry on the same, or to remove the said trade from the place where it is now carried on, or to appear, etc.

or

I do hereby direct and require you within (*state the time allowed*) to put up a sufficient fence (*state the kind of fence and the part to be fenced*), or to appear, etc.

or

I do hereby direct and require you etc, (*as the case may be*).

Given under my hand and the seal of the Court, this

day of 19

(Seal)

(Signature)

XVII—MAGISTRATE'S ORDER CONSTITUTING A JURY

(See section 138)

WHEREAS on the day of 19 an order was issued to (*name*) requiring him (*state the effect of the order*), and whereas the said (*name*) has applied to me, by a petition bearing date the day of for an order appointing a jury to try whether the said recited order is reasonable and proper, I do hereby appoint (*the names, etc of the five or more Jurors*) to be the jury to try and decide the said question, and do require the said Jury to report their decision within days from the date of this order at my office at

Given under my hand and the seal of the Court, this

day of 19

(Seal)

(Signature.)

XXIII—MAGISTRATE'S NOTICE AND PREEMPTORY ORDER AFTER THE FINDING BY JURY

(See section 140.)

To (name, description and address)

I HEREBY give you notice that the Jury duly appointed on the petition presented by you on the day of have found that the order issued on the day of requiring you (state substantially the requisition in the order) is reasonable and proper. Such order has been made absolute, and I hereby direct and require you to obey the said order within (state the time allowed), on peril of the penalty provided by the Indian Penal Code for disobedience thereto.

Given under my hand and the seal of the Court, this
day of 19

(Seal)

(Signature)

XXIV—INJUNCTION TO PROVIDE AGAINST IMMINENT DANGER PENDING INQUIRY BY JURY

(See section 142.)

To (name, description and address)

WHEREAS the inquiry by Jury appointed to try whether my order issued on the day of 19 , is reasonable and proper is still pending and it has been made to appear to me that the nuisance mentioned in the said order is attended with so imminent serious danger to the public as to render necessary immediate measures to prevent such danger, I do hereby under the provisions of S. 142 of the Code of Criminal Procedure, direct and enjoin you forthwith to (state plainly what is required to be done as a temporary safeguard), pending the result of the local inquiry by the Jury.

Given under my hand and the seal of the Court, this
(Seal)

(Signature).

XX—MAGISTRATE'S ORDER PROHIBITING THE REPETITION, ETC., OF A NUISANCE

(See section 143.)

To (name, description and address)

WHEREAS it has been made to appear to me that, etc., (state the proper recital, guided by Form No XVI or Form No XXI, as the case may be);

I do hereby strictly order and enjoin you not to repeat the said nuisance by again placing or causing or permitting to be placed, etc., (as the case may be).

Given under my hand and the seal of the Court, this
day of 19

(Seal)

(Signature)

XXI.—MAGISTRATE'S ORDER TO PREVENT OBSTRUCTION, RIOT, ETC.

(See section 144)

That I have seen and heard that certain persons have dug up a portion of the earth and stones dug up upon the adjoining public road, so as to occasion risk of obstruction to persons using the road ;

or

WHEREAS it has been made to appear to me that you and a number of other persons (*mention the class of persons*) are about to meet and proceed in a religious procession along the public street, etc., (*as the case may be*), and that such procession is likely to lead to a riot or an affray .

or

WHEREAS etc., etc., (*as the case may be*) ;

I do hereby order you not to place or permit to be placed any of the earth, or stones dug from land on any part of the said road ;

or

I do hereby prohibit the procession passing along the said street, and strictly warn and enjoin you not to take any part in such procession (*or as the case related may require*)

Given under my hand and the seal of the Court, this

day of 19

(Seal)

(Signature)

XXII.—MAGISTRATE'S ORDER DECLARING PARTY ENTITLED TO RETAIN POSSESSION OF LAND, ETC., IN DISPUTE.

(See section 145)

It appearing to me, on the ground duly recorded, that a dispute, likely to induce a breach of the peace, existed between (*describe the parties by name and residence, or residence only if the dispute be between bodies of villagers*) concerning certain (*state concisely the subject of dispute*) situate within the local limits of my jurisdiction, all the said parties were called upon to give in a written statement of their respective claims as to the fact of actual possession of the said (*the subject of dispute*), and being satisfied by due inquiry had thereupon without reference to the merits of the claim of either of the said parties to the legal right of possession, that the claim of actual possession by the said (*name or names or description*) is true ;

I do decide and declare that he is (*or they are*) in possession of the said (*the subject of dispute*), and entitled to retain such possession until ousted by due course of law, and do strictly forbid any disturbance of his (*or their*) possession in the meantime

Given under my hand and the seal of the Court, this

day of 19

(Seal)

(Signature)

XXIII—WARRANT OF ATTACHMENT IN THE CASE OF A DISPUTE AS TO POSSESSION OF LAND, ETC

(See Section 146)

To the Police officer in charge of the Police station at
[or, To the Collector of]

WHEREAS it has been made to appear to me that a dispute likely to induce a breach of the peace existed between (*describe the parties concerned by name and residence, or residence only if the dispute be between bodies of villagers*) concerning certain (*state concisely the subject of dispute*) situate within the limits of my jurisdiction and the said parties were thereupon duly called upon to state in writing their respective claims as to the fact of actual possession of the said (*the subject of dispute*) and whereas, upon do- inquiry into the said claims, I have decided that neither of the said parties was in possession of the said (*the subject of dispute*) [or, I am unable to satisfy myself as to which of the said parties was in possession as aforesaid],

This is to authorise and require you to attach the said (*the subject of dispute*) by taking and keeping possession thereof and to hold the same under attachment until the decree or order of a competent Court determining the rights of the parties or the claim to possession shall have been obtained, and to return this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this
day of 19

(Seal)

(Signature)

XXIV—MAGISTRATE'S ORDER PROHIBITING THE DOING OF ANYTHING ON LAND OR WATER

(See section 147)

A DISPUTE having arisen concerning the right of use of (*state concisely the subject of dispute*) situate within the limits of my jurisdiction, the possession of which land (*or water*) is claimed exclusively by (*describe the person or persons*), and it appearing to me on due inquiry into the same, that the said land (*or water*) has been open to the enjoyment of such use by the public (*or if by an individual or a class of persons describe him or them*) and (*if the use can be enjoyed throughout the year*), that the said use has been enjoyed within three months of the institution of the said inquiry (*or if the use is enjoyable only at particular seasons, say 'during the last of the seasons at which the same is capable of being enjoyed'*),

I do order that the said (*the claimant or claimants of possession*), or anyone in their interest, shall not take (*or retain*) possession of the said land (*or water*) to the exclusion of the enjoyment of the right of use aforesaid, until he (*or they*) shall obtain the decree or order of a competent Court adjudging him (*or them*) to be entitled to exclusive possession

Given under my hand and the seal of the Court, this
day of 19

(Seal)

(Signature)

XXV.—BOND AND BAIL BOND ON A PRELIMINARY INQUIRY BEFORE A POLICE OFFICER

(See section 169)

I (name) of , being charged with the offence of ,
and after inquiry required to appear before the Magistrate of
or

and after inquiry called upon to enter into my own recognizance to appear when required, do hereby bind myself to appear at in the Court of , on the day of next (or on such day as I may hereafter be required to attend) to answer further to the said charge, and, in case of my making default therein, I bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees

Dated this day of 19 .
(Signature)

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the above said that he shall attend at , in the Court of , on the day of next (or on such day as he may hereafter be required to attend), further to answer to the charge pending against him, and in case of his making default therein, I hereby bind myself (or we hereby bind ourselves) to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees .

Dated this day of 19
(Signature)

XXVI.—BOND TO PROSECUTE OR TO GIVE EVIDENCE.

(See section 170)

I (name), of (place), do hereby bind myself to attend at in the Court of at o'clock on the day of next and then and there to prosecute (or to prosecute and give evidence) (or to give evidence) in the matter of a charge of against one A B, and, in case of making default herein, I bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees

Dated this day of 19 .
(Signature)

XXVII.—NOTICE OF COMMITMENT BY MAGISTRATE TO GOVERNMENT PLEADER

(See section 218)

The Magistrate of hereby gives notice that he has committed one for trial at the next Sessions, and the Magistrate hereby instructs the Government Pleader to conduct the prosecution of the said case

The charge against the accused is that, etc. (state the offence as in the charge).

Dated this day of 19 .
(Signature)

XXVIII—CHARGES.

(See Sets 221, 222, 223)

(1) CHARGES WITH ONE HEAD

(a) I [name and office of Magistrate, etc] hereby charge you [name of accused person] as follows —

(b) That you, on or about the _____ day of _____, waged war against Her Majesty the Queen, Empress of India, and thereby committed an offence punishable under S 121 of the Indian Penal Code, and within the cognizance of the Court of Session [when the charge is framed by a Presidency Magistrate, for Court of Session substitute High Court]

(c) And I hereby direct that you be tried by the said Court on the said charge.

[Signature and seal of the Magistrate.]

[To be substituted for (b)] —

(2) That you, on or about the _____ day of _____ at _____ with the intention of inducing the Hon'ble A. B. Member of the Council of the Governor General of India to refrain from exercising a lawful power as such Member, assaulted such Member, and thereby committed an offence punishable under S 124 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court]

(3) That you, being a public servant in the Department, directly accepted from [state the name], for another party [state the name] a gratification other than legal remuneration, as a motive for forbearing to do an official act, and thereby committed an offence punishable under S 161 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(4) That you, on or about the _____ day of _____, at _____, did [or omitted to do] as the case may be such conduct being contrary to the provisions of the Act _____, section _____ and known by you to be prejudicial to _____, and thereby committed an offence punishable under S 166 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(5) That you, on or about the _____ day of _____ at _____ in the course of the trial of _____ before _____, stated in evidence that " _____ " which statement you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under S 193 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(6) That you, on or about the _____ day of _____, committed _____ homicide not amounting to murder, causing the death of _____, and thereby committed an offence punishable under S 304 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court]

(7) That you, on or about the _____ day of _____, at _____, abetted the commission of suicide by *A B*, a person in a state of intoxication, and thereby committed an offence punishable under S 306 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(8) That you, on or about the _____ day of _____, at _____, voluntarily caused grievous hurt to _____, and thereby committed an offence punishable under S 325 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(9) That you, on or about the _____ day of _____, at _____, robbed [*state the name*], and thereby committed an offence punishable under S 397 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(10) That you, on or about the _____ day of _____, at _____, committed dacoity, an offence punishable under S 395 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

[*In cases tried by Magistrates, substitute "within my cognizance" for "within the cognizance of the Court of Session", and in (c) omit "by the said Court"*]

(II) CHARGES WITH TWO OR MORE HEADS

(a) I [*name and office of Magistrate, etc*] hereby charge you [*name of accused person*] as follows:—

(b) *First*—That you, on or about the _____ day of _____, at _____, knowing a coin to be counterfeit, delivered the same to another person, by name *A B*, as genuine, and thereby committed an offence punishable under S 241 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

Secondly—That you, on or about the _____ day of _____, at _____, knowing a coin to be counterfeit attempted to induce another person, by name *A B*, to receive it as genuine, and thereby committed an offence punishable under S 241 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court.]

(c) And I hereby direct that you be tried by the said Court on the said charge

[*To be substituted for (b)*] — [Signature and seal of the Magistrate]

(2) *First*—That you, on or about the _____ day of _____, at _____, committed murder by causing the death of _____, and thereby committed an offence punishable under S 302 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

Secondly — That you, on or about the _____ day of _____, at _____, causing the death of _____, committed homicide not amounting to _____ punishable under S 304 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(3) *First* — That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed an offence punishable under S. 379 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

Secondly — That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing death to a person in order to the committing of such theft, and thereby committed an offence punishable under S 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

Thirdly — That you, on or about the _____ day of _____, at _____, committed theft having made preparation for causing restraint to a person in order to the effecting of your escape after the committing of such theft, and thereby committed an offence punishable under S 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

Fourthly — That you, on or about the _____ day of _____, at _____, committed theft having made preparation for causing fear of hurt to a person in order to the retaining of property taken by such theft, and thereby committed an offence punishable under S 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

(4) That you, on or about the _____ day of _____, Alternative charges on section 193, _____, in the course of the inquiry into _____ before _____, stated in evidence that "_____ and that you, on or about the _____ day of _____, at _____, in the course of the trial of _____, before _____, stated in the evidence that "_____ one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under S 193 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]

[In cases tried by Magistrates, substitute "within my cognizance" for "within the cognizance of the Court of Session" and in (c) omit "by the said Court"]

(III) CHARGE FOR THEFT AFTER PREVIOUS CONVICTION.

I (name and office of Magistrate etc), hereby charge you (name of accused person) as follows —

That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed an offence punishable under S 379 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court or Magistrate as the case may be].

And you, the said (*name of accused*), stand further charged that you, before the committing of the said offence, that is to say, on the day of _____, had been convicted by the (*state Court by which conviction was had*) at _____ of an offence punishable under Chapter XVII of the Indian Penal Code with imprisonment for a term of three years, that is to say, the offence of house breaking by night (*describe the offence in the words used in the section under which the accused was convicted*), which conviction is still in full force and effect and that you are thereby liable to enhanced punishment under S 75 of the Indian Penal Code

And I hereby direct that you be tried, etc

XXIX.—WARRANT OF COMMITMENT ON A SENTENCE OF IMPRISONMENT OR FINE IF PASSED BY A MAGISTRATE

(See sections 245 and 258)

To the Superintendent (*or Keeper*) of the Jail at _____
 WHEREAS on the _____ day of _____ 19____, (*name of prisoner*), the (1st, 2nd or 3rd, *as the case may be*) _____ prisoner in case No _____ of the Calendar for 19____, was convicted before me (*name and official designation*) of the offence (*mention the offence or offences concisely*) under section (*or sections*) of the Indian Penal Code (*or of Act* _____), and was sentenced to (*state the punishment fully and distinctly*) _____

This is to authorize and require you, the said Superintendent (*or Keeper*), to receive the said (*prisoner's name*) into your custody in the said Jail, together with this warrant, and there carry the afore said sentence into execution according to law

Given under my hand and the seal of the Court, this day of _____ 19____.

(Seal)

(Signature)

XXX.—WARRANT OF IMPRISONMENT ON FAILURE TO RECOVER AMENDS BY Attachment and sale

(See section 250)

To the Superintendent (*or Keeper*) of the Jail at _____
 WHEREAS (*name and description*) has brought against (*name and description of the accused person*) the complaint that (*mention it concisely*) and the same has been dismissed as *false and frivolous* (*or vexatious*), and the order of dismissal awards payment by the said (*name of complainant*) of the sum of rupees _____ as amends, and whereas the said sum has not been paid [* * *] and an order has been made for his simple imprisonment in Jail for the period of _____ days, unless the aforesaid sum be sooner paid,

This is to authorize and require you, the said Superintendent (*or Keeper*), to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (*term of imprisonment*), subject to the provisions of S 69 of the Indian Penal Code, unless the said sum be sooner paid, and on the receipt thereof, forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this
day of _____ 19____
(Seal)

(Signature)

XXXI — SUMMONS TO WITNESS

(See sections 68 and 252)

To _____ of _____
WHEREAS complaint has been made before me that
has (or is suspected to have) committed the offence of (*state the offence
concisely with time and place*), and it appears to me that you are likely
to give material evidence for the prosecution,

You are hereby summoned to appear before this Court on the
day of _____ next at ten o'clock in the
forenoon, to testify what you know concerning the matter of the said
complaint, and not to depart thence without leave of the Court, and you
are hereby warned that, if you shall without just excuse neglect or refuse
to appear on the said date, a warrant will be issued to compel your
attendance

Given under my hand and the seal of the Court, this
day of _____ 19____

(Seal)

(Signature)

XXXII — PRECEPT TO DISTRICT MAGISTRATE TO SUMMON JURORS AND ASSESSORS

(See section 326)

To the District Magistrate of _____
WHEREAS a Criminal Session is appointed to be held in the Court
house at _____ on the _____ day of _____ next,
and the names of the persons herein stated have been duly drawn by lot
from among those named in the revised list of Jurors and Assessors
furnished to this Court you are hereby required to summon the said
persons to attend at the said Court of Session at 10 A.M. on the said date,
and, within such date, to certify that you have done so in pursuance of
this precept

(Here enter the names of Jurors and Assessors)

Given under my hand and the seal of the Court, this
day of _____ 19____

(Seal)

(Signature)

XXXIII — SUMMONS TO ASSESSOR OR JUROR

(See section 328)

To (name) of (place)

PURSUANT to a precept directed to me by the Court of Session
of _____ requiring your attendance as an Assessor (or a Juror) at
next Criminal Session, you are hereby summoned to attend
said Court of Session at (place), at ten o'clock in the foren
the _____ day of _____ next

And you, the said (*name of accused*), stand further charged that you, before the committing of the said offence, that is to say, on the day of _____, had been convicted by the (*state Court by which conviction was had*) at _____ of an offence punishable under Chapter XVII of the Indian Penal Code with imprisonment for a term of three years, that is to say, the offence of house breaking by night (*describe the offence in the words used in the section under which the accused was convicted*), which conviction is still in full force and effect and that you are thereby liable to enhanced punishment under S 75 of the Indian Penal Code

And I hereby direct that you be tried, etc

XXIX.—WARRANT OF COMMITMENT ON A SENTENCE OF IMPRISONMENT OR FINE IF PASSED BY A MAGISTRATE

(See sections 245 and 258)

To the Superintendent (*or Keeper*) of the Jail at _____
 WHEREAS on the _____ day of _____ 19____, (*name of prisoner*), the (1st, 2nd or 3rd as the case may be) prisoner in case No _____ of the Calendar for 19____, was convicted before me (*name and official designation*) of the offence (*mention the offence or offences concisely*) under section (*or sections*) of the Indian Penal Code (*or of Act* _____), and was sentenced to (*state the punishment fully and distinctly*) _____

This is to authorize and require you, the said Superintendent (*or Keeper*), to receive the said (*prisoner's name*) into your custody in the said Jail, together with this warrant, and there carry the afore said sentence into execution according to law

Given under my hand and the seal of the Court, this _____ day of _____ 19____.

(Seal)

(Signature)

XXX.—WARRANT OF IMPRISONMENT ON FAILURE TO RECOVER AMENDS BY Attachment and sale

(See section 250)

To the Superintendent (*or Keeper*) of the Jail at _____
 WHEREAS (*name and description*) has brought against (*name and description of the accused person*) the complaint that (*mention it concisely*) and the same has been dismissed as false and frivolous (*or vexatious*), and the order of dismissal awards payment by the said (*name of complainant*) of the sum of rupees _____ as amends, and whereas the said sum has not been paid { * * * } and an order has been made for his simple imprisonment in Jail for the period of _____ days unless the aforesaid sum be sooner paid,

This is to authorize and require you the said Superintendent (*or Keeper*), to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (*term of imprisonment*), subject to the provisions of S 69 of the Indian Penal Code, unless the said sum be sooner paid, and on the receipt thereof, forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this
day of 19
(Seal)

(Signature)

XXXI —SUMMONS TO WITNESS

(See sections 68 and 252)

To _____ of _____
WHEREAS complaint has been made before me that
has (or is suspected to have) committed the offence of (*state the offence
concisely with time and place*), and it appears to me that you are likely
to give material evidence for the prosecution,

You are hereby summoned to appear before this Court on the
day of _____ next at ten o'clock in the
forenoon, to testify what you know concerning the matter of the said
complaint, and not to depart thence without leave of the Court, and you
are hereby warned that, if you shall without just excuse neglect or refuse
to appear on the said date, a warrant will be issued to compel your
attendance

Given under my hand and the seal of the Court, this
day of 19
(Seal)

(Signature)

XXXII —PRECEPT TO DISTRICT MAGISTRATE TO SUMMON JURORS AND ASSESSORS

(See section 326)

To the District Magistrate of _____
WHEREAS a Criminal Session is appointed to be held in the Court
house at _____ on the _____ day of _____ next,
and the names of the persons herein stated have been duly drawn by lot
from among those named in the revised list of Jurors and Assessors
furnished to this Court you are hereby required to summon the said
persons to attend at the said Court of Session at 10 A.M. on the said date,
and, within such date, to certify that you have done so in pursuance of
this precept

(Here enter the names of Jurors and Assessors)

Given under my hand and the seal of the Court, this
day of 19
(Seal)

(Signature)

XXXIII —SUMMONS TO ASSESSOR OR JUROR

(See section 328)

To (name) of (place)

PURSUANT to a precept directed to me by the Court of Session
of _____ requiring your attendance as an Assessor (or a Juror) at the
next Criminal Session, you are hereby summoned to attend at
said Court of Session at (place), at ten o'clock in the forenoon
the _____ day of _____ next

Given under my hand and the seal of office, this
day of 19 .

(Seal)

(Signature)

XXXIV—WARRANT OF COMMITMENT UNDER SENTENCE OF DEATH

(See section 37A)

To the Superintendent (or Keeper) of the Jail at _____ day
 WHEREAS at the Session held before me on the _____ of
 19____, (name of prisoner), the (1st, 2nd, 3rd as the case may
 be) prisoner in case No _____ of the Calendar at the said Session, was
 duly convicted of the offence of culpable homicide amounting to murder
 under section _____ of the Indian Penal Code, and sentenced to
 suffer death, subject to the confirmation of the said sentence by the
 Court of _____

This is to authorize and require you, the said Superintendent (or your custody in the safely to keep until hurt, carrying into

day of _____ 19____
(Seal)

(Signature)

XXXV—WARRANT OF EXECUTION ON A SENTENCE OF DEATH

(See section 381)

To the Superintendent (or Keeper) of the Jail at
 WHEREAS (name of prisoner) the (1st, 2nd, 3rd, as the case may be)
 prisoner in case No _____ of the Calendar at the Session held
 before me on the _____ day of _____ 19____ has been by
 warrant of this Court, dated the _____ day of _____, com-
 mitted to your custody under sentence of death, and whereas the order
 of the _____ Court of _____ confirming the said sentence has been
 received by this Court.

This is to authorise and require you, the said Superintendent (or Keeper) to carry the said sentence into execution by causing the said to be hanged by the neck until he be dead at (time and place of execution), and to return this warrant to the Court with an endorsement certifying that the sentence has been executed

Given under my hand and the seal of the Court, this
day of 19
(Seal)

(Signature)

XXXVI - WARRANT AFTER A COMMUTATION OF A SENTENCE.

(See sections 381 and 382)

To the Superintendent (or Keeper) of the jail at _____
 WHEREAS at a Session held on the _____ day of _____ 19____,
 (name of prisoner), the (1st, 2nd, 3rd as the case may be) prisoner in case
 No _____ of the Calendar at the said Session, was convicted of the
 offence of _____ punishable under section _____

of the Indian Penal Code, and sentenced to and was thereupon committed to your custody, and whereas by the order of the Court of (a duplicate of which is herewith annexed) the punishment adjudged by the said sentence has been commuted to the punishment of transportation for life (or as the case may be),

This is to authorize and require you, the said Superintendent (or by you to going the

or
if the mitigated sentence is one of imprisonment, say, after the words "custody in the jail," "and there to carry into execution the punishment of imprisonment under the said order according to law"

Given under my hand and the seal of the Court, this day of 19

(Seal)

(Signature)

XXVII — WARRANT TO LEVY A FINE BY Attachment AND SALE

[See section 386 (1) (a)]

To (name and designation of the Police officer or other person or persons who is or are to execute the warrant)

of offence of of rupees required to pay the said fine, has not paid the same or any part thereof,

This is to authorize and re-
belonging to the said (name) of
of and if within (sta
next after such attachment the
to sell the moveable property as
sufficient to satisfy the said fine
ment certifying what you have
execution

Given under my hand and the seal of the Court, this day of 19

(Seal)

(Signature)

XXXVII A — BOND FOR APPEARANCE OF OFFENDER RELEASED PENDING REALISATION OF FINE.

(See section 383)

Whereas I, (name), inhabitant of (place), have been sentenced to pay a fine of rupees and in default of payment thereof to undergo imprisonment for the Court has been pleased to order my release on condition of executing a bond for my appearance on the following date or namely:—

I hereby bind myself to appear before the Court of
at
to His Majesty
Dated this
Where a bond with sureties is to be executed, add—we do hereby
declare ourselves sureties for the above-named *that*
he will appear before the Court of
or dates, namely —
therein we bind ourselves jointly and
the King Emperor of India the sum of Rupees
(Signature)

XXXVIII — WARRANT OF COMMITMENT IN CERTAIN CASES OF CONTEMPT WHEN A FINE IS IMPOSED

(See section 480)

To the Superintendent (or Keeper) of the Jail at
 WHEREAS at a Court holden before me on this day (*name and description of the offender*) in the presence (or view) of the Court committed wilful contempt;
 And whereas for such contempt the said (*name of offender*) has been adjudged by the Court to pay a fine of rupees, or in default to suffer simple imprisonment for the space of (*state the number of months or days*),
 This is to authorize and require you, the Superintendent (or Keeper) of the said Jail to receive the said (*name of offender*) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (*term of imprisonment*) unless the fine be sooner paid, and on the receipt thereof, forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution
 Given under my hand and the seal of the Court, this
 day of 19
(Seal) (Signature)

XXXIX — MAGISTRATE'S OR JUDGE'S WARRANT OF COMMITMENT OF WITNESS REFUSING TO ANSWER.

(See section 485)

I,
do hereby *brought*
the said *evidence*
to the Court *question*
and *nce, and*
and for
 his contempt has been adjudged detention in custody for (*term of detention adjudged*);
 This is to authorize and require you to take the said (*name*) into custody and him safely to keep in your custody for the space of days unless in the meantime he shall consent to be examined and to answer the question asked of him, and on the last

of the said days, or forthwith on such consent being known, to bring him before this Court to be dealt with according to law, returning this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this

day of

19

(Seal)

(Signature)

XL.—WARRANT OF IMPRISONMENT ON FAILURE TO PAY MAINTENANCE.

(See section 488)

To the Superintendent (or Keeper) of the Jail at

WHEREAS *(name, description and address)* has been proved before me to be possessed of sufficient means to maintain his wife *(name)* [or his child *(name)*, who is by reason of *(state the reason)* unable to maintain herself *(or himself)*] and to have neglected *(or refused)* to do so, and an order has been duly made requiring the said *(name)* to allow to his said wife *(or child)* for maintenance the monthly sum of rupees , and whereas it has been further proved that the said *(name)* in wilful disregard of the said order has failed to pay rupees , being the amount of the allowances for the month *(or months)* of . And thereupon an order was made adjudging him to undergo simple *(or rigorous)* imprisonment in the said Jail for the period of ;

This is to authorize and require you, the said Superintendent *(or Keeper)*, to receive the said *(name)* into your custody in the said Jail, together with this warrant, and there carry the said order into execution according to law, returning this warrant, with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this

day of

19

(Seal)

(Signature)

XLI.—WARRANT TO ENFORCE THE PAYMENT OF MAINTENANCE BY ATTACHMENT AND SALE

(See section 488)

To *(name and designation of the Police officer or other person to execute the warrant)*

WHEREAS an order has been duly made requiring *(name)* to allow to his said wife *(or child)* for maintenance the monthly sum of rupees , and whereas the said *(name)* in wilful disregard of the said order has failed to pay rupees , being the amount of the allowance for the month *(or months)* of

This is to authorize and require you to attach any moveable property belonging to the said *(name)* which may be found within district of and if within *(state the number of a., hours allowed)* next after such attachment the said sum be paid *(or forthwith)*, to sell the moveable property attached much thereof as shall be sufficient to satisfy the said sum,

this warrant with an endorsement certifying what you have done under it immediately upon its execution

Given under my hand and the seal of the Court, this

day of _____ 19

(Seal)

(Signature)

XLII —BOND AND BAIL BOND ON A PRELIMINARY INQUIRY BEFORE A MAGISTRATE

(See sections 496 and 499)

I (name) of (place), being brought before the Magistrate of (as the case may be) charged with the offence of _____, and required to give security for my attendance in his Court and at the Court of Session, if required, do bind myself to attend at the Court of the said Magistrate on every day of the preliminary inquiry into the said charge and, should the case be sent for trial by the Court of Session, to be, and appear, before the said Court when called upon to answer the charge against me, and, in case of my making default herein, I bind myself to forfeit to Her Majesty the Queen Empress of India, the sum of _____ rupees

Dated this

day of

19

(Signature)

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the said (name) that he shall attend at the Court of _____ on every day of the preliminary inquiry into the offence charged against him, and, should the case be sent for trial by the Court of Session, that he shall be, and appear, before the said Court to answer the charge against him, and in case of his making default therein, I bind myself (or we bind ourselves) to forfeit to Her Majesty the Queen Empress of India, the sum of _____ rupees

Dated this

day of

19

(Signature)

XLIII —WARRANT TO DISCHARGE A PERSON IMPRISONED ON FAILURE TO GIVE SECURITY

(See section 500)

To the Superintendent (or Keeper) of the Jail at

(or other officer in whose custody the person is)

WHEREAS (name and description of prisoner) was committed to your custody under warrant of this Court, dated the _____ day of _____ and has since with his surety (or sureties) duly executed a bond under Section 499 of the Code of Criminal Procedure

This is to authorise and require you forthwith to discharge the said (name) from your custody, unless he is liable to be detained for some other matter

Given under my hand and the seal of the Court, this

day of _____ 19

(Seal)

(Signature)

(See section 51.4)

(Signature)

(See section 514)

(Signature)

(See section 514)

You are hereby required to pay the said penalty of rupees _____
or to show cause within _____ days why it should not be paid.

this warrant with an endorsement certifying what you have done under it immediately upon its execution

Given under my hand and the seal of the Court, this
day of _____ 19____

(Seal)

(Signature)

XLII —BOND AND BAIL BOND ON A PRELIMINARY INQUIRY BEFORE A MAGISTRATE

(See sections 496 and 499)

I (name) of (place), being brought before the Magistrate of (as the case may be) charged with the offence of _____, and required to give security for my attendance in his Court and at the Court of Session, if required, do bind myself to attend at the Court of the said Magistrate on every day of the preliminary inquiry into the said charge and, should the case be sent for trial by the Court of Session, to be, and appear, before the said Court when called upon to answer the charge against me, and, in case of my making default herein, I bind myself to forfeit to Her Majesty the Queen Empress of India, the sum of rupees _____

Dated this _____

day of _____

19____

(Signature)

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the said (name) that he shall attend at the Court of _____ on every day of the preliminary inquiry into the offence charged against him, and, should the case be sent for trial by the Court of Session, that he shall be, and appear, before the said Court to answer the charge against him, and in case of his making default therein, I bind myself (or we bind ourselves) to forfeit to Her Majesty the Queen Empress of India, the sum of rupees _____

Dated this _____

day of _____

19____

(Signature)

XLIII —WARRANT TO DISCHARGE A PERSON IMPRISONED ON FAILURE TO GIVE SECURITY

(See section 500)

To the Superintendent (or Keeper) of the Jail at _____
(or other officer in whose custody the person is)

WHEREAS (name and description of prisoner) was committed to your custody under warrant of this Court, dated the _____ day of _____ and has since with his surety (or sureties) duly executed a bond under Section 499 of the Code of Criminal Procedure

This is to authorise and require you forthwith to discharge the said (name) from your custody, unless he is liable to be detained for some other matter

Given under my hand and the seal of the Court, this
day of _____ 19____

(Seal)

(Signature)

XLIV — WARRANT OF ATTACHMENT TO ENFORCE A BOND

(See section 514)

To the Police officer in charge of the Police station at

WHEREAS (*name, description and address of person*) has failed to appear on (*mention the occasion*) pursuant to his recognizance, and has by such default forfeited to Her Majesty the Queen, Empress of India, the sum of rupees (*the penalty in the bond*), and whereas the said (*name of person*) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him,

This is to authorize and require you to attach any moveable property of the said (*name*) that you may find within the district of , by seizure and detention, and if the said amount be not paid within three days, to sell the property so attached or so much of it as may be sufficient to realise the amount aforesaid, and to make return of what you have done under this warrant immediately upon its execution

Given under my hand and the seal of the Court, the

day of 19

(Seal)

(Signature)

XLV — NOTICE TO SURETY ON BREACH OF A BOND

(See section 514)

To of 19 ,
 WHEREAS on the day of ,
 you became surety for (*name*) of (*place*) that he should appear before this Court on the day of and bound yourself in default thereof to forfeit the sum of rupees to Her Majesty the Queen, Empress of India, and whereas the said (*name*) has failed to appear before this Court and by reason of such default you have forfeited the aforesaid sum of rupees ,

You are hereby required to pay the said penalty or show cause, within days from this date, why payment of the said sum should not be enforced against you

Given under my hand and the seal of the Court, this

day of 19

(Seal)

(Signature)

XLVI — NOTICE TO SURETY OF FORFEITURE OF BOND FOR GOOD BEHAVIOUR

(See section 514)

To of 19 ,
 WHEREAS on the day of , you became surety by a bond for (*name*) of (*place*) that he would be of good behaviour for the period of and bound yourself in default thereof to forfeit the sum of rupees to Her Majesty the Queen, Empress of India, and whereas the said (*name*) has been convicted of the offence of (*mention the offence concisely*) committed since you became such surety whereby your security bond has become forfeited;

You are hereby required to pay the said penalty of rupees or to show cause within days why it should not be paid.

Given under my hand and the seal of the Court, this
day of 19
(Seal)

(Signature)

XLVII—WARRANT OF ATTACHMENT AGAINST A SURETY

(See Section 514)

To _____ of
WHEREAS (*name, description and address*) has bound himself as surety for the appearance of (*mention the condition of the bond*), and the said (*name*) has made default, and thereby forfeited to Her Majesty the Queen, Empress of India, the sum of rupees (*the penalty in the bond*);

This is to authorize and require you to attach any moveable property of the said (*name*) which you may find within the district of _____, by seizure and detention, and, if the said amount be not paid within three days, to sell the property so attached, or so much of it as may be sufficient to realise the amount aforesaid, and make return of what you have done under this warrant immediately upon its execution

Given under my hand and the seal of the Court, this
day of 19
(Seal)

(Signature)

XLVIII—WARRANT OF COMMITMENT OF THE SURETY OF AN ACCUSED PERSON ADMITTED TO BAIL

(See Section 514)

To the Superintendent (or Keeper) of the Civil Jail at _____

WHEREAS (*name and description of surety*) has bound himself as a surety for the appearance of (*state the condition of the bond*) and the said (*name*) has therein made default, whereby the penalty mentioned in the said bond has been forfeited to Her Majesty the Queen Empress of India, and whereas the said (*name of surety*) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him, and the same cannot be recovered by attachment and sale of moveable property of his and an order has been made for his imprisonment in the Civil Jail for (*specify the period*),

This is to authorize and require you, the said Superintendent (or Keeper), to receive the said (*name*) into your custody with this warrant and him safely to keep in the said jail for the said (*term of imprisonment*) and to return this warrant with an endorsement certifying the manner of its execution

Given under my hand and the seal of the Court, this
day of 19
(Seal)

(Signature)

XLIX—NOTICE TO THE PRINCIPAL OF FORFEITURE OF A BOND TO KEEP THE PEACE.

(See section 514)

To (*name, description and address*)

WHEREAS on the _____ day of _____ 19____, you entered into a bond not to commit, etc., (*as in the bond*), and proof of the forfeiture of the same has been given before me and duly recorded,

You are hereby called upon to pay the said penalty of rupees
 or to show cause before me within days why payment
 of the same should not be enforced against you
 Dated this day of 19
 (Seal) (Signature)

**L—WARRANT TO ATTACH THE PROPERTY OF THE PRINCIPAL
 ON BREACH OF A BOND TO KEEP THE PEACE**

(See section 514)

To (name and designation of Police officer) at the Police station of
 WHEREAS (name and description) did on the day of
 19, enter into a bond for the sum of rupees binding himself
 not to commit a breach of the peace, etc, (as in the bond) and proof
 of the forfeiture of the said bond has been given before me and duly
 recorded, and whereas notice has been given to the said (name) calling
 upon him to show cause why the said sum should not be paid, and he
 has failed to do so or to pay the said sum.

This is to authorize and require you to attach by seizure moveable
 property belonging to the said (name) to the value of rupees
 which you may find within the district of and, if the said
 sum be not paid within, to sell the property so attached or
 so much of it as may be sufficient to realise the same, and to make
 return of what you have done under this warrant immediately upon
 its execution

Given under my hand and the seal of the Court, this
 day of 19
 (Seal) (Signature)

**L.I—WARRANT OF IMPRISONMENT ON BREACH OF A BOND TO KEEP
 THE PEACE.**

(See section 514)

To the Superintendent (or Keeper) of the Civil Jail at

WHEREAS proof has been given before me and duly recorded that
 (name and description) has committed a breach of the bond entered into
 by him to keep the peace, whereby he has forfeited to Her Majesty the
 Queen, Empress of India, the sum of rupees, and
 whereas the said (name) has failed to pay the said sum or to show
 cause why the said sum should not be paid although duly called upon to
 do so, and payment thereof cannot be enforced by attachment of his

day of 19
 (Seal) (Signature)

**LII—WARRANT OF ATTACHMENT AND SALE ON FORFEITURE OF
BOND FOR GOOD BEHAVIOUR**

(See section 514)

To the effect that the said sum of money has been
day of the month of _____, 19____
proof has been given by _____
by the said (name) of the _____
has been forfeited, and _____
calling upon him to show _____
and he has failed to do so or to pay the said sum.

This is to authorize and require you to attach by seizure moveable property belonging to the said (name) to the value of rupees _____ which you may find within the district of _____ and, if the said sum be not paid within _____, to sell the property so attached or so much of it as may be sufficient to realise the same and to make return of what you have done under this warrant immediately upon its execution

Given under my hand and the seal of the Court, this
day of 19
(Stat)

(Signature)

LIII—WARRANT OF IMPRISONMENT ON FORFEITURE OF BOND FOR
GOOD BEHAVIOUR

(See section 91.1)

To the Superintendent (or Keeper) of the Civil Jail at

WHEREAS (name, description and address) did, on the _____ day of _____ 19____, give security by bond in the sum of rupees _____ for the good behavior of (name etc., of the principal) and proof of the breach of the said bond has been given before me and duly recorded, whereby the said (name) has forfeited to Her Majesty the Queen, Empress of India, the sum of rupees _____, and whereas he has failed to pay the said sum or to show cause why the said sum should not be paid although duly called upon to do so, and payment thereof cannot be enforced by attachment of his moveable property, and an order has been made for the imprisonment of the said (name) in the Civil Jail for the period of (term of imprisonment),

This is to authorize and require to receive the said (name) into your cu and him safely to keep in the said imprisonment) returning this warrant the manner of its execution

Given under my hand and the seal of the Court, this
day of 19
(Seal) (S)

(Signature)

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